

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 December 2019

Public Authority: London Borough of Brent
Address: Brent Town Hall
Forty Lane
Middlesex
HA9 9HD

Decision (including any steps ordered)

1. The complainant has requested copies of internal correspondence exchanged with the Audit and Investigations Team in respect of his ongoing grievance. The London Borough of Brent ("the London Borough") refused to comply with the request because it considered the request to be vexatious.
2. The Commissioner's decision is that the request was not vexatious and therefore the London Borough was not entitled to rely on section 14(1) of the FOIA to refuse it.
3. The Commissioner requires the London Borough to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response, to the request, under the FOIA, which does not rely on section 14(1).
4. The London Borough must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. On 29 January 2019, the complainant's brother was parking his car in an on-street parking bay. The precise sequence of events which then followed is disputed. The London Borough claims that one of its officers

witnessed the complainant's brother drop a small bottle out of the car, whilst it was stationary, before pulling his car out of the bay. The complainant's brother claims that, as he opened the door to ascertain whether or not he was lawfully and safely parked, the bottle fell out. He argued that he fully intended to pick it up, once he had completed his parking manoeuvre, but that he was not given the opportunity to do so.

6. What is not in dispute is that the officer proceeded to issue the complainant's brother with a Fixed Penalty Notice (FPN), pursuant to Section 87 of the Environmental Protection Act 1990, for littering. The complainant's brother had the option to pay an £80 fine or leave himself liable to being prosecuted for a criminal offence of littering.
7. The complainant's brother made representations to the London Borough as to why he believed the FPN had been issued unfairly. When these initial representations were unsuccessful, the complainant himself began acting on his brother's behalf.
8. As well as making representations, the complainant also attempted to bring judicial review proceedings against the London Borough and referred a complaint to the Local Government and Social Care Ombudsman (LGSCO), which was refused.
9. On 20 June 2019, four weeks before a magistrate's hearing was due to take place, a senior legal assistant at the London Borough wrote to the complainant's brother stating that she had considered whether or not to proceed with a prosecution and that:

"Having considered the paperwork and analysed the case I am satisfied that both the Evidential [sic] and the Public interest tests have been met. However; as a gesture of good will the council has exercised its discretion and made a decision not to proceed with this matter."
10. In September 2019, the complainant wrote to the London Borough again and posed a series of questions relating to the decision to bring criminal proceedings against his brother. He also complained about the decision to bring a criminal prosecution which, he argued, was unfair and unjust.
11. The London Borough provided some information in response to the request and withheld some. This request forms the basis of a separate complaint which the Commissioner is currently considering.
12. The complainant sought an internal review of the London Borough's response, disputed its version of events and expressed dissatisfaction at the processes which officers had followed. The London Borough's internal review also addressed the underlying complaint as well as the request and noted that a referral had been made to its internal Audit

and Investigations team who had been satisfied with the conduct of the officers involved.

Request and response

13. On 19 March 2019, the complainant wrote to the London Borough and, as well as challenging some of its previous responses, also made a fresh request for information in the following terms:

"Also, as a separate Freedom of Information Request, please supply us with a copy of the following:

- 1) Your formal written referral to Brent Council's Audit and Investigation Team including the evidence presented to them.*
- 2) The Audit and Investigation Team formal written response to you."*

14. The London Borough responded on 10 April 2019. It refused the request as vexatious, relying on section 14(1) of the FOIA to do so.
15. Following an internal review the London Borough wrote to the complainant on 12 June 2019. It upheld its original response.

Scope of the case

16. The complainant first contacted the Commissioner on 23 April 2019 to complain about the way both this and his other request for information had been handled. At that point the Council had yet to complete its internal review. Once the review was complete, the Commissioner separated the complaint into two parts to deal with the separate (although related) information requests.
17. The Commissioner considers that the scope of this investigation is to determine whether the request of 19 March 2019 was vexatious.

Reasons for decision

Section 14 - Vexatious

18. Section 1(1) of the FOIA states that:

Any person making a request for information to a public authority is entitled –

- (a) *to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) *if that is the case, to have that information communicated to him.*

19. Section 14 of the FOIA states that:

Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

20. The term “vexatious” is not defined within the FOIA. The Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). It commented that “vexatious” could be defined as the “manifestly unjustified, inappropriate or improper use of a formal procedure”. The Upper Tribunal’s approach in this case was subsequently upheld in the Court of Appeal.
21. The *Dransfield* definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
22. *Dransfield* also considered four broad issues: (1) the burden imposed by the request (on the public authority and its staff), (2) the motive of the requester, (3) the value or serious purpose of the request and (4) harassment or distress of and to staff. It explained that these considerations were not meant to be exhaustive and also explained the importance of: “...adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests.” (paragraph 45).
23. The Commissioner has published guidance on dealing with vexatious requests¹, which includes a number of indicators that may apply in the case of a vexatious request. However, even if a request contains one or more of these indicators it will not necessarily mean that it must be vexatious.
24. When considering the application of section 14(1), a public authority can consider the context of the request and the history of its relationship

¹ <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

with the requester, as the guidance explains: "*The context and history in which a request is made will often be a major factor in determining whether the request is vexatious, and the public authority will need to consider the wider circumstances surrounding the request before making a decision as to whether section 14(1) applies*".

25. However, the Commissioner is also keen to stress that in every case, it is the request itself that is vexatious and not the person making it.
26. In some cases it will be obvious when a request is vexatious but in others it may not. The Commissioner's guidance states: "In cases where the issue is not clear-cut, the key question to ask is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress."

The London Borough's position

27. The London Borough argued that the original FPN had been correctly issued and that the complainant's pursuance of the matter had, at the point he made his request, become a burden beyond that which a public authority should be expected to bear.
28. Noting the Commissioner's guidance on common characteristics of a vexatious request, the London Borough noted four traits of the complainant's correspondence which, it argued, showed the vexatious character of the request:
 - Aggressive language
 - Unfounded accusations
 - Unreasonable persistence
 - Futile request
29. The London Borough argued that the complainant's emails, in the course of making his representations, "*became aggressive and were harassing various council staff members*." Although the London Borough provided a great deal of correspondence, it did not identify any specific examples of correspondence which it considered to be "aggressive" or "harassing."
30. As well as being aggressive, the London Borough also noted that the complainant's correspondence had latterly begun making accusations that council officers were "corrupt" without offering any evidence. It noted that the complainant had started an email chain whose lengthy title included "Potential Corrupt/Suspicious Behaviour of Brent Council Officers." The Commissioner also notes that, in one of the emails in that chain, the complainant states :

"Overall nothing has been said or provided by you to satisfy us that there has not been corrupt/suspicious or bullying behaviour by Brent Council officers."

31. The London Borough argued that the underlying matter had been *"comprehensively addressed by the public authority, or otherwise subjected to some form of independent scrutiny"* and that the complainant had therefore demonstrated an unreasonable persistence in using FOIA requests to re-open matters which had already been dealt with. It further argued that the request was futile because the matter was of interest only to the complainant and his brother.
32. In summary, the London Borough argued that it had spent a considerable amount of time attempting, in good faith, to deal with the complainant's queries and that answering this request would be likely to lead to further rounds of correspondence.

The complainant's position

33. In his original correspondence with the Commissioner of 23 April 2019, the complainant set out what he considered to be the public interest in publication of the information he had requested. Whilst the Commissioner notes that there is no explicit public interest test in respect of section 14(1), she considers that the points made are relevant in assessing the motive and value of the present request:

"We seriously believe there has been maladministration. I would refer you to my pre-action Judicial review letter in this matter where the reasons for maladministration are outlined and all the supporting correspondence submitted to you in this matter."

"The council have show nothing but bad faith in this matter for the following reasons: [sic]"

- *Repeatedly refusing reasonable and substantiated representations*
- *Refusing to enter into mediation*
- *Giving two entirely different reasons as to why they finally dropped the case and thereby damaging its credibility in this matter. Consequently, in this matter, they cannot be trusted.*
- *The council have not evidenced objectivity and independence in decision making at any level*
- *The council sought to bring a prosecution in a case which never had any supporting evidence"*

34. The complainant was particular keen to draw attention to the London Borough's contradictory explanations as to why it dropped the prosecution of his brother. In its original letter of 20 June 2018, the London Borough claimed that all the requisite tests for a prosecution had been met, but that it had decided not to prosecute "as a gesture of good will." However, the London Borough subsequently informed the complainant, in an email dated 23 January 2019, that the key witness involved had taken up employment overseas and would thus have been unable to present his evidence.
35. The complainant argued that the original FPN had been issued unfairly and, rather than admit it had been wrong or accept what he considered to be reasonable attempts to resolve the matter informally, the London Borough had proceeded with a prosecution. The complainant argued that this had caused him and his brother a great deal of stress.
36. The complainant also challenged the London Borough's assertion that the matter had been subject to independent review. He noted that the LGSCO had *not* found that the London Borough had no case to answer, rather, the LGSCO ruled that his grounds of complaint related to the underlying reasons for issuing the PCN and could thus be challenged via the court process – which was ongoing at the time of the complaint.
37. In summary, the complainant argued that disclosure of the withheld information would (in his opinion) "prove" that the FPN had been issued unfairly and that the London Borough would have not succeeded had the case gone to court.

The Commissioner's view

38. Section 14(1) is a powerful exemption as it relieves a public authority of any further work in relation to a request. The public authority is not required to consider any additional exemptions or even to identify what relevant information it might hold. As such, the Commissioner necessarily considers that the threshold for considering a request to be vexatious should be set high and the burden of proof falls on the public authority to demonstrate why that threshold has been reached.
39. In reaching her view that the request in question was not vexatious, the Commissioner has had regard to a number of factors which weigh either in favour of or against the London Borough's position.
40. On the one hand, the Commissioner has reminded herself that this matter began with an £80 fine. The complainant's brother had the option to pay the fine and make the problem go away. It was, of course, his right to challenge the FPN but, in choosing to do so, he was required to accept a certain degree of burden in defending himself. The

complainant, in pursuing this matter, has again chosen to impose a certain, avoidable, burden upon himself.

41. The Commissioner can also see, from the substantial volume of correspondence that both parties have furnished her with, that a disproportionate amount of resources has been spent on debating this matter. The complainant has, at times, seemed unwilling to accept reasonable explanations (such as why the exact amount of officer time spent on the prosecution was unquantifiable) and each response from the London Borough seems to provoke further rounds of correspondence which frequently revisit the same ground.
42. The Commissioner also accepts that the complainant's tone has occasionally strayed beyond what might be considered reasonable – particularly in relation to his allegations of "corruption" for which he has provided no evidence or rationale. Nevertheless, the Commissioner does note that the London Borough had accused the complainant's brother of committing a criminal offence and threatened him with the prospect of a £2,500 fine and a criminal record. In such circumstances, it is not unreasonable to expect that the complainant and his brother might be extremely frustrated and the tone of the correspondence, whilst probably at the upper limit of acceptability, has largely stayed within those boundaries.
43. That said, the Commissioner has also had regard to the fact that, when the London Borough withdrew its prosecution of the complainant's brother, it also simultaneously withdrew his right to present his case as to why the FPN had been issued unfairly. Thus the underlying decision (to issue an FPN) has gone unscrutinised.
44. In the Commissioner's view, the London Borough's suggestion that the matter had been subject to review by the LGSCO is, whilst factually true, also misleading as to what it was the LGSCO actually decided.
45. The Commissioner has been provided with a copy of the LGSCO's decision which states that:

"The Ombudsman will not normally investigate a complaint where the main issue in dispute, here the fixed penalty notice, is not being considered. There is no compelling reason to do so. The injustice mentioned by [the complainant's brother] is not separable from the notice and largely results from the decision not to pay the fine."
46. The thrust of the complaint which the Ombudsman was required to consider was that the London Borough had "unjustly" issued an FPN to the complainant's brother, that the proper procedure had not been followed in deciding to issue an FPN and that he had therefore been

subjected to “unnecessary” distress and inconvenience in his attempts to have the FPN overturned – which should constitute an injustice.

47. The LGSCO’s decision, as the Commissioner interprets it, is that the issue of “injustice” would turn on whether or not the FPN had been correctly issued. If the London Borough *had* issued the FPN correctly, any distress and inconvenience caused to the complainant’s brother would have arisen as a direct consequence of him choosing to break the law. By definition, that would not be *in*justice.
48. As the correct method of challenging the validity of the FPN was through criminal proceedings, the LGSCO decided not to consider a complaint.
49. The London Borough is arguing that the LGSCO has subjected its actions to independent review, when in fact the LGSCO felt that the matter ought more appropriately to be dealt with via the magistrate’s court. Because the prosecution did not proceed, the complainant’s brother was denied the opportunity to challenge the original FPN decision.
50. Of course, it is entirely possible that, had the matter gone to court and had the key witness been able to give evidence, the complainant’s brother might have been found guilty – but the more fundamental point at issue here is that the London Borough’s decision-making has *not* been subject to external scrutiny.
51. Of particular concern to the Commissioner are the conflicting explanations offered by the London Borough to explain why it was dropping its prosecution. The letter of 20 June 2019 gave the very clear implication that the prosecution had *only* been dropped due to the good will of the London Borough. Subsequent responses, however, have given clear grounds for believing that, however strong the evidence might have been at the point proceedings commenced, the absence of the key witness had substantially reduced the London Borough’s chances of a successful prosecution.
52. In the Commissioner’s view, such a discrepancy strengthens the arguments in favour of transparency considerably.
53. Whilst the information in question is being sought in a private dispute between the complainant, his brother and the London Borough, the Commissioner does consider that there is a broader value in understanding the process by which local authorities treat such offences.
54. When an FPN is issued, the recipient is faced with the prospect of paying the fine or going through a lengthy and risky process of proving their innocence. Whilst acknowledging that FPNs are a lawful and, often, efficient method of dealing with minor offences, given the potential for

injustices to arise, the Commissioner considers that there is a considerable value in understanding the processes involved.

55. The Commissioner has not seen the withheld information, but it seems reasonable to assume that information of this type would, in this case, be likely to shed some light on the cause of the underlying dispute. The complainant may or may not find himself vindicated but, in the circumstances the Commissioner does consider that responding to the request may assist in bringing this long-running saga to a conclusion.
56. The Commissioner is therefore satisfied that there is a serious purpose behind the request and that the requested information would be of value.
57. Having considered all the arguments, the Commissioner concludes that the request was not vexatious and therefore the London Borough was not entitled to rely on section 14(1) of the FOIA to refuse it.

Other matters

58. Having reached her decision, the Commissioner is conscious that, because of the nature of the information involved, it is highly likely that a significant proportion of the information within the scope of the request will be the personal data of either the complainant, his brother, or both. Therefore, whilst she is ordering the London Borough to issue a fresh response under the FOIA, it must be conscious of its responsibilities to protect personal data (particularly that covering proceedings to dispose of a criminal offence). The London Borough should therefore consider using sections 40(1) and 40(2) of the FOIA as it considers appropriate.
59. Whilst she has no power to compel it to do so as part of a decision notice under the FOIA, the Commissioner would recommend that the London Borough consider issuing a separate response to the request under Subject Access legislation.

Right of appeal

60. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

61. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
62. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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