

Decision Notice

Decision 001/2019: Mr M and City of Edinburgh Council

Whether request was vexatious

Reference No: 201801044

Decision Date: 8 January 2019



Scottish Information
Commissioner

Summary

The Council refused to respond to a request on the basis that it was vexatious.

The Commissioner investigated, but was not satisfied that the Council had demonstrated that the request was vexatious. He required the Council to respond otherwise than in terms of section 14(1) of FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 14(1) (Vexatious or repeated requests)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 15 November 2017, Mr M made a request for information to City of Edinburgh Council (the Council). With reference to the content of a letter sent by the Council to the Scottish Public Services Ombudsman (SPSO), Mr M requested information relating to records, reports and details of an investigation into specified allegations about a specific individual.
2. The Council responded on 14 December 2017. The Council refused the request on the basis that it was vexatious, in terms of section 14(1) of FOISA.
3. On 20 December 2017, Mr M wrote to the Council, requesting a review of its decision as he did not accept that his request was vexatious. In seeking a review, Mr M asked the Council to address the following points:
 - (i) He refuted a statement that he had already been provided with the information.
 - (ii) He believed it was in the public interest to request copies of the reports, or at least know if they existed or not.
 - (iii) He argued that the Council's reference to the outcome of an SPSO investigation did not have a role in determining whether reports existed or not.
 - (iv) He did not accept the Council's timeline of events in relation to the investigation of allegations made.
4. The Council notified Mr M of the outcome of its review on 23 January 2018. The Council maintained its position that his request was vexatious and upheld its application of section 14(1).
5. On 20 June 2018, Mr M wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr M stated he was dissatisfied with the outcome of the Council's review because he did not accept that his request was vexatious.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr M made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 31 July 2018, the Council was notified in writing that Mr M had made a valid application.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and to answer specific questions, focusing on its application of section 14(1) of FOISA.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both Mr M and the Council. He is satisfied that no matter of relevance has been overlooked.

Section 14(1) – Vexatious or repeated requests

10. Under section 14(1) of FOISA, a Scottish public authority is not obliged to comply with a request for information if the request is vexatious.
11. FOISA does not define the word “vexatious”. The Commissioner’s general approach, as set out in his guidance on section 14(1)¹, is that the following factors are relevant when considering whether a request is vexatious. These are that the request:
 - (i) would impose a significant burden on the public body
 - (ii) does not have a serious purpose or value
 - (iii) is designed to cause disruption or annoyance to the public authority
 - (iv) has the effect of harassing the public authority
 - (v) would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.
12. This is not an exhaustive list. Depending on the circumstances, other factors may be relevant, provided the impact on the authority can be supported by evidence. The Commissioner recognises that each case must be considered on its merits, taking all circumstances into account. The term “vexatious” must be applied to the request and not the requester, but an applicant’s identity, and the history of their dealings with a public authority, may be relevant in considering the nature and effect of the request and surrounding circumstances.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Briefings.aspx>

The Council's submissions

13. In its initial response to Mr M, the Council informed him that it considered his request to be vexatious, stating that, while it appreciated it may not have been his intention, the effect of his use of FOI legislation in this case was to harass the Council.
14. The Council argued that it was important to reflect the context of the request. The Council believed Mr M wished the Council to revisit historic matters that it believed it answered and which, in addition, had been examined by external regulators.
15. The Council stated that Mr M's request was framed in such a way as to ignore the Council's previous correspondence and the information that had been provided previously. The Council considered the most appropriate mechanism to pursue his complaints was through the SPSO (which it noted he had already done) and not through a request for information he had already received.
16. In its review outcome, the Council reiterated its view that Mr M's request had the effect of harassing the authority, set in the context it had described earlier. It believed the handling of his complaints had already been thoroughly reviewed by an independent solicitor, by way of a report by the Monitoring Officer. The findings were reported to full Council, at which he received a full public apology. The Council's actions had additionally been examined by the SPSO, following a number of referrals made by Mr M.
17. The Council stated that his apparent wish to continue to pursue the matter through freedom of information legislation only served to demonstrate the persistent and ongoing correspondence with the Council in relation to these matters, the effect of which is to harass the authority.

Harassing the public authority

18. The Council explained that it had been responding to a long-standing and complex complaint situation, stemming from concerns raised in relation to an incident in 2010 and the Council's subsequent failure to handle their complaints appropriately. The Council stated that, over the years, these matters had received extensive scrutiny, internally and externally. Its actions had also been scrutinised by external regulators. The Council submits that over this period the related complaints were broad-ranging and the correspondence voluminous.
19. The Council submitted that this request focused on the Council's investigation into the actions of a named individual and their involvement in handling the complaints. The Council states that, in 2015, in an effort to bring resolution to the situation, the Council commissioned an external solicitor to look into the outstanding issues causing Mr M concern. The Council noted that the scope of this investigation was agreed at the time, although it acknowledged that this was now disputed. (The resultant reports are referred to as the Monitoring Officer's reports.)
20. The Council stated that the focus of the investigation was an examination of the Council's overall response to matters raised, in which the actions of individuals (including the named individual) played a part. The Council stated a full public apology had been given in relation to the findings of maladministration identified.
21. The Council submitted that it had been unable to reach a position of closure and Mr M continued to correspond with the Council in relation to these matters (which it considered historical).

22. In the Council's view, Mr M's complaints had been extensively scrutinised through the Monitoring Officer's reports. The Council also highlighted that its actions in relation to the management of these complaints had been assessed by the SPSO. In relation to this request, the Council submitted that the information sought by Mr M was contained in the Monitoring Officer's reports (as he had been advised) and stated that he had received extracts of the reports and the SPSO case records in accordance with his subject access rights.
23. The Council argued that the timing of Mr M's request was significant. In summary, the Council highlighted that the General Teaching Council for Scotland (GTCS) concluded not to proceed with their case regarding the named individual in July 2017. Mr M then asked the Council to re-examine the named individual's actions in relation to his complaints.
24. In requesting this re-examination, Mr M highlighted a commitment made by the Council in January 2015 to revisit his concerns regarding the actions of the named individual if the GTCS proceedings did not provide satisfactory resolution. The Council submitted that this commitment predated the Monitoring Officer's investigations.
25. The Council made reference to the outcome of the SPSO's investigation (on 7 and 20 December 2017), which it argued upheld the Council's position that it was reasonable not to conduct further complaint investigations.
26. The Council highlighted that Mr M submitted his review request on 20 December 2017 and that the terms of his review request were clearly rooted in his complaint and his view that the Council's investigations had not been sufficient.
27. The Council submitted that Mr M's request has the effect of harassing the authority, by requiring it to revisit and repeat information which it believed had already been conveyed to Mr M.
28. In the Council's view, the nature and context of this request was vexatious as it ignored the explanations previously provided, and the findings of the regulator. It argued that Mr M's persistence, copied to multiple recipients within the Council and elected members, was symptomatic of his determination to continue to re-examine historical matters and had the effect of harassing the authority.
29. The Council submitted that Mr M has purposely phrased his questions with the intention of eliciting an "information not held" response, in order to continue his endeavour to re-open investigations. The Council stated that it had (albeit under his subject access rights) indicated to him where the information meeting the terms of his request was held. In the circumstances, the Council argued that his use of FOSA legislation was vexatious and intended to agitate and question matters which had already been determined by the regulator.

Mr M's submissions

30. Mr M did not accept the Council's position that he had already been provided with the information. He argued that his request did not require the Council to revisit matters but simply to provide him with information. He stated that he has not received any evidence that the specific matters raised had been investigated, or that learning had resulted from them.
31. With reference to the SPSO's investigation, Mr M highlighted that the SPSO's decision had not been released when he made the request and was under appeal when he submitted his review request. He argued that the SPSO did not conclude that the investigations had taken

place or that he had received the information. He submitted that the SPSO concluded it was reasonable in the circumstances not to investigate. Mr M considered FOI an appropriate route to obtain information, which was a different matter from complaints handling.

32. Mr M submitted that the Council had presented no evidence that his request had the effect of harassing the Council. He explained that his correspondence had been extended due to the approach taken by the Council, which he described as persistently defensive. He argued that the judgements of the regulators supported this position.
33. Mr M submitted that he was not requiring the Council to look into historic matters but to provide him with information about past consideration of specific issues (or accept that it did not exist). He also submitted that he was not seeking to pursue his complaint through FOI legislation, but wished to receive information about the investigation, outcomes and learning, if the investigation had taken place, or be told that the information did not exist if the investigation had not taken place.
34. He explained that his correspondence was ongoing because of a changing situation and what he described as the Council's defensive rather than open approach. He highlighted that in his opinion he had not been provided with the information requested and no other regulator had come to a conclusion which would affect his right to request the information.

The Commissioner's view

35. The Commissioner has carefully considered the submissions made by the Council, intended to demonstrate that Mr M's request had the effect of harassing the authority.
36. In this case, the Commissioner is limited to considering whether the Council has provided sufficient evidence and submissions to support its claim that the application of section 14(1) was appropriate in the circumstances.
37. Even if a requester does not intend to cause inconvenience or create a significant burden, if a request has the effect of harassing a public authority and/or its staff, it may be deemed vexatious when considered from the perspective of a reasonable person.
38. The Commissioner has some sympathy for the Council and the persistent nature of Mr M's correspondence, but that does not in itself make a request for information vexatious. The Commissioner accepts that an unreasonable pursuit of a complaint, for which all appropriate remedies had been exhausted, might be vexatious. However, in this instance, he is not satisfied that he has been presented with sufficient evidence to support that conclusion.
39. It is clear from the submissions made by both parties that there is a fundamental difference of opinion between the Council and Mr M as to whether information provided already is capable of answering his request. With regard to the consideration of Mr M's complaints by other regulators, the Commissioner must make a distinction between the outcome of the SPSO being satisfied that matters had been investigated adequately, in general terms, and providing specific information sought by Mr M. Whether any more specific investigation was necessary is not for the Commissioner to say, but the applicant was still entitled – at least up to a point – to ask about such investigation, with a view to understanding the processes followed and the reasons for following them. There is also nothing in the authority's submissions evidencing that the content of Mr M's communications, in the opinion of a reasonable person, would have the effect of harassing anyone.
40. Where a requester has an ongoing grievance against a public authority or could reasonably be described as conducting an extended campaign, to the point that their behaviour can be

described as unreasonable, then it may be appropriate to apply section 14(1) of FOISA. However, such behaviour in furtherance of legitimate concerns can still be appropriate activity in a democratic society.

41. There may be cases where it is reasonable, on the basis of requester's previous dealings with the authority, to conclude that the requester's purpose is to pursue an argument and not actually to obtain the information. This may, depending on the circumstances, amount to harassment.
42. In this case, the Commissioner does not believe he has been presented with sufficient evidence to conclude that the request was vexatious. He is not satisfied that it would be reasonable to view this request as harassment, even viewed in a context of persistent correspondence. It would not be unreasonable, in itself, for Mr M to wish to satisfy himself that the specific grounds of complaint had, or had not, been investigated individually – even if knowing that could lead nowhere in terms of further complaints resolution.
43. In all the circumstances, therefore, the Commissioner finds that the Council was not entitled to refuse to comply with the request on the basis that section 14(1) of FOISA applied. He therefore requires the Council to carry out a new review in respect of Mr M's request, and to respond to him otherwise than in terms of section 14(1) of FOISA.

Decision

The Commissioner finds that City of Edinburgh Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr M. He finds that the Council was not entitled to refuse to comply with Mr M's request on the basis it was vexatious. In doing so, it failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires the Council to carry out a new review, in terms of section 21(4)(b) of FOISA, by 22 February 2019.

Appeal

Should either Mr M or the Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Daren Fitzhenry
Scottish Information Commissioner

8 January 2019

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

14 Vexatious or repeated requests

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

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