

Decision Notice

Decision 113/2018: Mr Brian Gourlay and West Dunbartonshire Council

Whether request was vexatious

Reference No: 201800459

Decision Date: 18 July 2018



Scottish Information
Commissioner

Summary

The Council was asked for information which would corroborate its stance that it considered the requester's behaviour to be abusive. The Council found the request to be vexatious under section 14(1) of FOISA.

Taking into account the history of the requester's dealings with the Council, the Commissioner agreed that the request was vexatious. However, he also found that the Council had failed to respond to the initial request within the required timescale.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 10(1) (Time for compliance); 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 Appendices form part of this decision.

Background

1. On 23 October 2017, Mr Gourlay made a request for information to West Dunbartonshire Council (the Council). The information request contained 12 separate points, all of which related to a letter sent by the Council to Mr Gourlay dated 4 August 2017 (advising that abusive correspondence received from him would not be responded to). The request is reproduced at Appendix 2.
2. The Council did not respond to Mr Gourlay's request within 20 working days, so he wrote to the Council again on 11 December 2017. He asked the Council for a review of its failure to respond to his request.
3. The Council provided Mr Gourlay with a response to his request on 11 January 2018, stating that it considered his request to be vexatious in terms of section 14(1) of FOISA.
4. Mr Gourlay made a second review requirement on 28 January 2018, on the grounds that he was unhappy that the Council was refusing to provide him with a substantive response to his request and he considered the matter was in the public interest.
5. On 23 February 2018, the Council responded to Mr Gourlay's second review request and upheld its decision not to provide a substantive response him in terms of section 14(1) of FOISA. By way of advice and assistance, the Council advised Mr Gourlay to pursue complaints about the Council through its complaints procedures rather than through FOISA.
6. On 11 March 2018, Mr Gourlay wrote to the Commissioner's office and applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He stated he was dissatisfied with the outcome of the Council's review because:
 - his request was not acknowledged
 - he had not received a prompt response to his request
 - he did not consider the Council had carried out a proper review

- he disagreed with the Council's application of section 14(1) and
- he believed it was in the public interest for the his request for be answered.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr Gourlay 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.
8. On 1 May 2018, the Council was notified in writing that Mr Gourlay had made a valid application. The case was then allocated to an investigating officer.
9. 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 answer specific questions, focusing on its reliance on section 14(1) of FOISA.
10. Mr Gourlay was also invited to provide any comments he wished to make in support of his position.
11. Both Mr Gourlay and the Council provided submissions to the investigating officer.

Commissioner's analysis and findings

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

Timescales for responding and other technical requirements

13. Mr Gourlay was dissatisfied that his request was not acknowledged and that he did not receive a prompt response to his initial request of 23 October 2017.
14. Although the Scottish Ministers' Code of Practice on the discharge of function by Scottish public authorities under FOISA and the Environmental Information (Scotland) Regulations states, at paragraph 4.8.1, that it is good practice to acknowledge receipt of the request, explaining who will be handling it and when a response will be provided, acknowledging a request is not a statutory requirement.
15. Consequently, the Commissioner finds no breach of Part 1 of FOISA in this regard.
16. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case.
17. It is a matter of fact that the Council did not provide a response to Mr Gourlay's request for information of 23 October 2017 within 20 working days, so the Commissioner finds that it failed to comply with section 10(1) of FOISA.
18. The Commissioner notes that the Council acknowledged Mr Gourlay's requirement for review as if it was a new request for information, and then proceeded to respond to the request of 23 October 2017 as if no review had been sought. The response provided on 11 January 2018 made no reference to any delay in responding to the request and, in the circumstances, the Commissioner has no option but to make the finding set out in the previous paragraph.

19. It is unfortunate that the response of 11 January was framed as an initial response to the request, rather than as a review outcome. There was no justification for this: Mr Gourlay's communication of 11 December 2017 was clearly a review requirement for the purposes of section 20 of FOISA and the Council therefore had to respond in accordance with section 21, by giving notice under either section 21(5) or section 21(9). Treating the response as an initial response to the request and inviting Mr Gourlay to submit a further requirement for review prolonged the handling of the request unnecessarily.
20. Given that a response was issued, enabling Mr Gourlay (eventually) to apply to the Commissioner under section 47(1) of FOISA, the Commissioner does not require the Council to take any action in relation to this breach.

Section 14(1) – vexatious requests

21. In terms of section 14(1) of FOISA, a Scottish public authority is not obliged to comply with a request for information made under section 1(1) if the request is vexatious.
22. FOISA does not define the word "vexatious". The Commissioner's general interpretation, as set out in his guidance¹ on section 14(1), is that the following factors are relevant when considering whether a request is vexatious:
 - (i) it would impose a significant burden on the public body;
 - (ii) it does not have a serious purpose or value;
 - (iii) it is designed to cause disruption or annoyance to the public authority;
 - (iv) it has the effect of harassing the public authority;
 - (v) it would otherwise, in the opinion of a reasonable person, be considered manifestly unreasonable or disproportionate.
23. It is important to remember that 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 the circumstances into account.
24. While the Commissioner's view is that "vexatious" must be applied to the request and not the requester, he acknowledges that the applicant's identity, and the history of their dealings with a public authority, may be relevant in considering the nature and effect of a request and its surrounding circumstances. It may be reasonable, for example, for the authority to conclude that a request represents a continuation of a pattern of behaviour it has deemed vexatious in another context.

Background

25. The Council referred the Commissioner to previous correspondence it had provided to him in relation to *Decision 094/2018 Brian Gourlay and West Dunbartonshire Council*². This correspondence (as can be seen at paragraphs 24 to 31 of Decision 094/2018 and which the Commissioner will not repeat at length here) explained (with evidence) that the Council had received voluminous correspondence from Mr Gourlay in relation to his past employment with the Council and related Employment Tribunal claims and that he

¹ http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Vexatious_or_repeated_requests.aspx

² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2018/201800068.aspx>

had written numerous times to express his feelings about various members of Council staff, in a manner which it considered defamatory, threatening and accusatory.

26. As will be noted from the paragraphs referred to above, the Council's submissions in that previous case also set out its position on the following points:
- that Mr Gourlay's requests were not serious attempts to seek information, but rather were primarily designed as a weapon to campaign against the authority (in other words, they did not have serious purpose or value)
 - that the requests were regularly of such an insulting, defamatory and derogatory nature, and so repetitive, complex and voluminous, as to give the impression there were designed primarily to cause the Council disruption and annoyance
 - that the effect of Mr Gourlay's approach, exemplified by the tone and content of his correspondence, was to cause harassment to the Council and its staff
 - that the volume and tone of the requests had reached the point where they should be considered part of a repeated pattern of behaviour which was abusing the right to information.
27. For the purposes of this case, the Council made the following additional submissions.

Submissions from the Council

28. The Council expressed the view that Mr Gourlay's requests formed an orchestrated campaign by him, which it believed to be made with malicious intent and to be a misuse of the FOISA regime. The Council drew the Commissioner's attention to an email sent to it by Mr Gourlay on 28 January 2018, sent as a follow-up to Mr Gourlay's (second) review requirement of 28 January 2018. This email contained multiple attachments.
29. The Council referred to one particular attachment which, in its view, contributed to making the current request unacceptable. It noted that this appeared to be part of a submission to the Commissioner in a previous (unrelated) case and that it contained accusations in relation to a Council officer which it considered unsupported and unwarranted. In the context of the present case, it appeared to the Council that the sole purpose of including the document was to damage the reputation of the individual concerned, as a continuation of an ongoing campaign of harassment against the Council and individual officers.
30. The Council stated that it had provided extensive guidance to Mr Gourlay on avoiding abusive content (examples of which were provided to the Commissioner in the context of Decision 094/2018) but that his abusive correspondence with the Council continued unabated. The Council submitted that it considered the information request made on 23 October 2017, under consideration here, taken in the context of Mr Gourlay's numerous previous requests to the Council, to be vexatious for all the reasons stated above.

Submissions from Mr Gourlay

31. Mr Gourlay stated that he did not consider his requests to be vexatious, but rather persistent in the face of what he termed the Council's non-compliance with FOISA. He stated that he himself had been vexed by the manner in which the Council fulfilled its statutory duties under FOISA, by failing to respond to him without the intervention of the Commissioner.
32. Mr Gourlay maintained that he had been persistent, resolute and focussed with his information requests. He did not accept that this request, nor any of his requests were vexatious.

The Commissioner's findings

33. The Commissioner has considered the content of Mr Gourlay's request of 23 October 2017 and accepts that, in isolation, it does not appear to be specifically abusive or accusatory.
34. However, while the Commissioner cannot simply rely on the reasoning upheld in Decision 094/2018, he considers it appropriate in this case to look at the context of Mr Gourlay's previous dealings with the Council, as considered in that recent decision. He is considering a request in similar form and style to that considered in Decision 094/2018, within the same relatively narrow subject area. (Any similarity of subject matter does not, however, justify the gratuitous inclusion of abusive material from previous cases.)
35. In this case, the point of Mr Gourlay's request is no more apparent than in Decision 094/2018. Viewed objectively, it would appear to have no purpose, beyond adding to the considerable volume of correspondence submitted to the Council on these matters already and prolonging an already protracted campaign of harassment against the Council and its staff.
36. As in the case which led to Decision 094/2018, Mr Gourlay appears to be suggesting that the Council has contributed to the situation where the current request has been necessary. The Commissioner does not seek to excuse the Council's (very largely procedural) failures in handling previous requests, where he has found it necessary to identify such failures. However, it is not apparent – and Mr Gourlay has not really explained – why any of these should have led to Mr Gourlay making a further request adding nothing evident to the many he has made before.
37. The Council must make every effort to comply with its statutory obligations, but the Commissioner must also recognise that it is being required to do so in a context (in relation to Mr Gourlay's requests) which is subjecting it – and its staff – to considerable pressures, including (on a number of occasions) modes of expression which staff undoubtedly find abusive. The Council's handling of requests – including, potentially, a context of handling previous requests – may be relevant in considering whether any given request is vexatious (see paragraph 33 of the guidance on section 14), but the Commissioner must still reach a decision on the question of vexatiousness “in the round”, taking account of all relevant factors. The contribution made by the authority would have to be substantial (certainly considerably more so than would appear to be the case here) before it could prevail over a context very largely of the applicant's making.
38. On balance, the Commissioner accepts that Mr Gourlay's request of 23 October 2017, viewed in the context of his previous correspondence with the Council, should be considered vexatious, with the result that the Council was correct in responding under section 14(1) of FOISA.
39. As noted above, Mr Gourlay argued that it was in the public interest for his request to be answered. The Commissioner notes that the provision in section 14(1) is not, unlike some of the exemptions in Part 2 of FOISA, subject to the public interest in section 2(1)(b).
40. In any event, the Commissioner is satisfied, considering the question of vexatiousness in the round, that there is no public interest in his request being answered.

Decision

The Commissioner finds that West Dunbartonshire Council partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Gourlay. While it was entitled to refuse to comply with the request under section 14(1) of FOISA, it failed to meet the requirements of section 10(1) of FOISA fully in respect of complying with the required timescale.

Appeal

Should either Mr Gourlay 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.

Margaret Keyse
Head of Enforcement

18 July 2018

Appendix 1: Relevant statutory provisions

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.

10 Time for compliance

(1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

(a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or

(b) in a case where section 1(3) applies, the receipt by it of the further information.

...

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.

...

Appendix 2: Information Request

“Subject: FOISA request re Employee X letter 04/08/17 - please see:

- Appendix 01: Employee X states 'Abusive Correspondence' dated 04/08/17

Under FOISA in regard your letter date 04/08/17:

1. Please confirm, detail and provide copies of the abusive and threatening correspondence as referred to in Employee X's letter of 04/08/17.
2. Please confirm whom the variety of council officers and members are i.e. as referred to in Employee X's letter of 04/08/17.
3. Please confirm, detail and provide copies of the numerous incidences of further abusive correspondence submitted to council officers by Brian Gourlay i.e. as referred to in Employee X's letter of 04/08/17.
4. Please confirm and detail what has been recorded as 'arrangements that will remain in place' together with detailing when those recorded arrangements were put in place and by whom i.e. as referred to in Employee X's letter of 04/08/17.
5. Please confirm and detail what matters have been reviewed when and by whom as referred to in Employee X's letter of 04/08/17.
6. Please confirm and provide details and copies of the numerous incidences of further abusive correspondence submitted to council officers by Brian Gourlay i.e. as referred to in Employee X's letter of 04/08/17.
7. Please confirm and detail what has been recorded about Brian Gourlay whereby, accordingly, correspondence from Brian Gourlay is not being distributed to any council officer's mailbox as referred to in Employee X's letter of 04/08/17.
8. Please confirm and detail what has been recorded about Brian Gourlay's emails in regard what has been reviewed by whom and when reviewed - as referred to in Employee X's letter of 04/08/17.
9. Please confirm what has been recorded, when and by whom with the objective to determine if Brian Gourlay's correspondence is free of abuse. That is: as referred to in Employee X's letter of 04/08/17.
10. Please confirm and detail what has been recorded **and by WHOM**, at WDC, as a determination of **what has been** and **what has not been** threats, insults or derogatory views about council employees and whether or not it relates to either Freedom of Information or data protection matters whereby, according to Employee X's letter of 04/08/17 said correspondence will be forwarded to the officers dealing with same.
11. Please confirm and detail what has been recorded by whom and when in regard determination whether a response is appropriate or not appropriate.
12. Please confirm and detail what has been recorded at WDC as being currently inappropriate and has been ignored.”

(The name of the Council employee has been changed to read “Employee X”.)]

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