IN THE FIRST-TIER TRIBUNAL **Case No. EA/2018/0179**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50722446
Dated: 31 July 2018

Appellant:	**Jason Blake**
Respondent:	**The Information Commissioner**
Date & venue of hearing:	**9 January 2019** **Fleetbank House, London**
Date of decision:	**19 February 2019**

Before

Anisa Dhanji

Judge

and

Rosalind Tatam
David Wilkinson

Panel Members

Subject matter

Freedom of Information Act 2000, section 14(1) - whether request was vexatious.

IN THE FIRST-TIER TRIBUNAL **EA/2018/0179**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

DECISION

Dated:	**19 February 2019**
Name of Complainant:	**Jason Blake**
Public Authority:	**Leicester City Council**
Address of Public Authority:	**City Hall** **115 Charles Street** **Leicester** **LE1 1FZ**

The appeal is dismissed.

Signed

Anisa Dhanji
Judge

IN THE FIRST-TIER TRIBUNAL **EA/2018/0179**
GENERAL REGULATORY CHAMBER
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REASONS FOR DECISION

Introduction

1. This is an appeal by Mr Jason Blake (the "Appellant"), against a Decision Notice issued by the Information Commissioner (the "Commissioner"), on 31 July 2018.

2. It concerns a request for information made by the Appellant on 20 November 2017 (the "Request"), under the Freedom of Information Act 2000 ("FOIA"), to Leicester City Council (the "Council"), in relation to male only swimming sessions at leisure centres run by the Council.

3. The Council refused the Request made on the basis of section 14 of FOIA (vexatious requests).

The Request and its Context

4. Before making the Request, the Appellant made two requests for information to the Council on the same general subject matter.

5. The first request was for the following information:

    1) *A list of each council / public pool facility with address and contact details; phone & email address for either a pool only facility or a pool within a Sports/Leisure, or other, facility.*

    2) *Details of who manages the pools or sports / leisure, or other, facility; either council directly, a trust, management company or combination.*

    3) *Which centres have public single sex swimming sessions as part of the timetable (inclusive of normal and summer time table changes).*

    4) *How many hours of single sex swimming sessions per week are provided per gender (female/male).*

    5) *If only <u>one</u> gender, either female or male, is provided for please supply the data (supportive evidence) that shows need and the demand over and above a provision for the opposite gender.*

6. The Council responded and provided the requested information.

7. Quoting from the Council's response, the Appellant then submitted a second request, as follows:

    The programming of female only sessions is in response to evidence that female participation is lower than male participation.

    I request under the Freedom of Information Act the name of the third party who do hold this information, or indeed citations of reports with which this statement/ decision is based upon.

8. The Council responded that the information was not held. In addition, the Council said:

The statement in our original response is based on the local observations in our locations of attendance at swimming sessions. In addition it is also in response to verbal requests from female local community members at Cossington Street, Spence Street and Evington. It has been observed that these female only sessions, put on due to these local community requests are particularly well attended. We would also like to confirm that there were also requests for male only sessions at these locations which were held for some time. We cannot be specific as to the dates as this data is not held.
These sessions were replaced due to the local observation that they were not well attended.

These decisions are not based on data held in any particular system or within any report. They are based on local verbal requests and observations of staff, which are not recorded or held in any system. Therefore this is information not held under the Freedom of Information Act 2000. This letter acts as a refusal notice under section 17.1 of the Freedom of Information Act 2000 because, in accordance with section 1.1 of the Act, this information is not held by Leicester City Council.

9. About a month later, in November 2017, the Appellant made the Request which is the subject of this appeal. It was made on the following terms:

I refer to the letter you sent and in particular the reference in regards male only sessions having been previously be supplied but removed due to low attendance. You also advise that you are not able to offer the exact dates [of the male-only sessions]. However I would like to request not the exact dates [but] the approximation of the time period for these sessions and which centres held them.

10. The Council refused the Request on 13 December 2017, citing section 14(1) of FOIA (vexatious request). It undertook an internal review, but maintained its refusal.

11. In addition to the Appellant's complaint to the Commissioner (see below), he also made a complaint against the Council to the Local Government Ombudsman ("LGO"). He maintained that the Council had failed to supply evidence to justify the gender imbalance in its single sex swimming provision, and had refused to engage further with him on the issue. In a decision dated 7 November 2017, the LGO decided that there were no grounds to investigate the complaint because there was no sign that fault by the Council had caused the Appellant an injustice. Amongst other things, the LGO noted that the Council had a considerable amount of correspondence with the Appellant on this matter, and that it was evident that the Council considered it had no more information to give. In the LGO's view, the Council could not be faulted for deciding not to commit any further resources to debating these issues with the Appellant.

Complaint to the Commissioner

12. The Appellant complained to the Commissioner about the Council's refusal.

13. The Commissioner investigated the complaint. For the reasons set out in her Decision Notice, she agreed that the Request was vexatious, and upheld the Council's refusal under section 14.

Appeal to the Tribunal

14. The Appellant has appealed against the Commissioner's Decision Notice under section 50 of FOIA. The Council has not been joined as a party to the appeal.

15. The scope of the Tribunal's jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the Decision Notice is not in accordance with the law, or to the extent that it involved an exercise of discretion by the Commissioner, she ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.

16. The parties have lodged an open bundle comprising some 200 pages, and certain additional material. There has been no closed material. The Council, not having been joined, has not made any submissions in this appeal, but we have considered its responses to the Commissioner's investigations.

17. The Appellant has requested that this appeal be determined on the papers without an oral hearing. The Commissioner has agreed. Having regard to the nature of the issues raised, and the nature of the evidence, we are satisfied that the appeal can properly be determined without an oral hearing.

The Statutory Framework

18. Under section 1 of FOIA, any person who makes a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with that information.

19. The duty on a public authority to provide the information requested does not arise if the information sought is exempt under Part II of FOIA or if certain other provisions apply. In the present case, the Council has invoked section 14.

20. Section 14 of FOIA sets out two grounds on which a public authority may refuse a request. The first is where the request is vexatious. The second is where the request is identical or substantially similar to a previous request that the public authority has already complied with. The Council has relied on the first ground.

21. Where section 14 applies, the public authority does not have to provide the information requested, nor indeed is it required to inform the requester if it holds the information.

Finding and Reasons

22. The only issue before us is whether the Request was vexatious. The burden of showing that a request is vexatious lies with the public authority asserting it, to the civil standard.

23. FOIA does not define "vexatious". However, there are a number of decisions of the Upper Tribunal ("UT") and the Court of Appeal ("CA"), which have offered guidance as to what the term means in the context of information requests. The principles are perhaps most comprehensively set out by the UT in Information Commissioner v Devon County Council and Dransfield; Craven v Information Commissioner and Department of Energy and Climate Change; and Ainslie v Information Commissioner and Dorset County Council [2012] UKUT 440 AAC.

24. These cases concerned section 14(1) of FOIA and/or the corresponding provision under the Environmental Information Regulations 2004. They were heard by Judge Wikeley, who treated Dransfield as the 'lead case' and set out guidance on the meaning of "vexatious", which we have summarised below:

- In the context of section 14, "vexatious" carries its ordinary and natural meaning, within the particular statutory context of FOIA. The dictionary definition of "vexatious" as *"causing, tending or disposing to cause … annoyance, irritation, dissatisfaction or disappointment"* can only take us so far. As a starting point, a request which is annoying or irritating to the recipient may well be vexatious, but it depends on the circumstances.
- "Vexatious" connotes *"manifestly unjustified, inappropriate or improper use of a formal procedure"*. Such misuse may be evidenced in different ways.
- The Commissioner's guidance that *"the key question is whether the request is likely to cause distress, disruption or irritation without any proper or justified cause",* provides a useful starting point, so long as the emphasis is on the issue of justification (or not).
- The purpose of section 14 is to protect public authorities and their employees in their everyday business. Thus, consideration of the effect of a request on them is entirely justified. A single abusive and offensive request may well cause distress, and so be vexatious. A torrent of individually benign requests may well cause disruption. However, it may be more difficult to construe a request which merely causes irritation, without more, as vexatious.
- An important aspect of the balancing exercise may involve consideration of whether there is an adequate or proper justification for the request.
- A common theme underpinning section 14(1) as it applies on the basis of a past course of dealings between a public authority and a particular requester, is a lack of proportionality.

25. Judge Wikeley stressed that this guidance is not intended to be prescriptive, and went on to say that the question of whether a request is truly vexatious may be determined by considering four broad issues or themes:

- The burden on the public authority and its staff;
- The motive of the requester;
- The value or serious purpose of the request; and
- Any harassment or distress caused to the staff.

In paragraphs 29 to 45, he set out further guidance about each of these four themes.

26. The UT decisions in Craven and Dransfield were upheld by the CA ([2015] EWCA Civ 454). The CA added that the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, the public, or to any section of the public. It went on to say (at para 68), that:

> *Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one, and that is consistent with the constitutional nature of the right. The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious.*

27. The CA also considered that where a motive can be established, that may be evidence of vexatiousness, although if a request is aimed at disclosure of important

information which ought to be publicly available, then even a "vengeful" request may not meet the test.

28. The UT has revisited vexatious requests in a number of further cases, including CP v Information Commissioner [2016] KUT 427 (AAC). This case considered whether the First-tier Tribunal ("FTT"), had correctly given weight to the nature of the requests made, and had conducted an appropriately rounded assessment in light of the high hurdle required to satisfy section 14(1), and also whether the evidential basis for the FTT's decision was sufficiently clear. The UT stressed that the satisfaction of the section 14(1) test requires an appropriately detailed evidential foundation of the course of dealings between the requestor and the public authority. While a compendious and exhaustive chronology exhibiting numerous items of correspondence is not required, there must be some evidence, particularly from the Commissioner, about the past course of dealings between the requestor and the public authority, which explains and contextualises them. The UT went on to say that a proper scrutiny of the number of previous FOIA requests requires more than a superficial count, and that section 14 should not be invoked without objective and careful justification.

Findings

29. For convenience, we will set out our findings by reference to Judge Wikeley's 4 themes, as set out above. We cannot, however, make findings on the underlying substantive issue raised by the Appellant. It is not for us to express a view about whether there is a case for more male only swimming sessions, nor even whether the Council made its decisions in this regard on proper and evidence-based considerations.

Burden

30. As to burden, clearly the Request was capable of being answered briefly (whether by providing the information or saying it was not held, if that was the case). Either way, doing so would not have been burdensome to the Council.

31. However, the Request must be seen in the context of the Appellant's previous and likely future requests. This is in line with Judge Wikeley's guidance in Dransfield (at paragraph 29):

> *First the present or future burden on the public authority may be inextricably linked with the previous course of dealings. Thus the context and history of the particular request, in terms of the previous course of dealings between the individual requester and the public authority in question, must be considered in assessing whether it is properly to be characterised as vexatious. In particular, the number, breadth, pattern and duration of previous requests may be a telling factor.*

32. The evidence before us is that the Appellant has previously engaged extensively with the Council, over a 5 year period, with information requests on various subjects, including in particular, sexual entertainment, car parking charges, and breaches of one way street restrictions by motorists. The Appellant's dealings with the Council were by phone, as well as by written communications. The evidence of these previous dealings has not been presented along the lines envisaged by CP (see paragraph 28 above). There is also no evidence from the Council as to the amount of time involved in corresponding with the Appellant, nor is there a witness statement from the Council that the number, breadth, pattern or duration of the previous requests, have been particularly burdensome.

33. Nevertheless, it is clear from the evidence that not only have there been a number of issues in respect of which the Appellant has sought to engage the Council through information requests, but also, there has been a tendency to draw in a range of other individuals and bodies, including various sections of the Council. We find this likely to have resulted in complexity in coordination and responsibility, and created an unreasonable burden for the Council.

34. As to future burden, while we do not consider that the Appellant is on a fishing expedition, the evidence indicates that he tends to follow up on an answer to one request by making another request, sometimes within an hour or two (examples are set out at para 41 of the Decision Notice), pursuing a matter beyond what can be regarded as reasonable. The evidence indicates that this is partly, at least, because he is reluctant or unwilling to properly consider or accept the answers he is given. We consider that to have been the case with the Request, and with previous requests on other subjects.

35. In relation to the Request, in particular, we note that in addition to the previous correspondence on the same subject matter, the Appellant sent 11 e mails to the Council, which we have listed below by date:

5th August 2017
23rd August 2017
3rd September 2017 (16:40, 17:06 and 17:52)
18th September 2017
18th October 2017
13th November 2017
20th November 2017
23rd November 2017
11th December 2017

36. We consider that such extensive communications on a single information request, and the overlapping nature of the communications, would inevitably have placed a burden on the Council's staff, and had an impact on their ability to deal with other tasks.

Motive, Value and Purpose

37. As regards motive, value and purpose**,** for convenience, we have considered these two themes together because on the facts of the present case, as indeed in Dransfield, the issues are closely intertwined.

38. The motive of the requester may well be a relevant and indeed a significant factor in assessing whether a request is vexatious. Judge Wikeley noted in Dransfield, at paragraph 34, that *"the proper application of section 14 cannot side-step the question of the underlying rationale or justification for the request"*.

39. The Appellant says that the Request raises a matter of public interest. In particular, he says that:

- Male participation rates in swimming sessions are almost 50% lower than female rates in every age category;
- Joint swimming sessions dissuade more men from swimming because men are also concerned about issues to do with body image;
- It is unfair that the Council operates considerably more female-only swimming sessions than male-only - this may be depressing male participation;

- He has evidence of support (which he has provided), for his work from Sport England and the Council's own public health team; and

- Statistics from Public Health England (which he has also provided), support his position.

40. The Council, on the other hand, considers that there is no wider public interest in the Request. It cites the lack of demand/take-up of male-only swimming sessions.

41. The Commissioner considered that there was, at the outset, a serious purpose and value to the Request, and that the Appellant was motivated by a genuine desire to increase male participation in swimming. She acknowledged that encouraging exercise and public participation in sport are increasingly issues of public concern. Understanding how public authorities are making decisions which affect policy in this area is therefore of legitimate public interest.

42. We agree that the issues raised by the Appellant are of public interest. While there is no direct evidence about this from any section of the public, we have taken into account the support the Appellant has had from Sport England, as well as what is generally known from press reports on the problems of obesity, and the concern that has been expressed by various professional and public bodies, as well as relevant Government departments, on the issue generally. The Commissioner's position (paragraph 26 of the Decision Notice), to the effect that the support the Appellant received from Sports England and the Council's own public health team is not directly relevant because these post-date the Request by a few months, is not one we agree with. What is relevant is whether there was a public interest as at the date of the Request, and there is no suggestion that the public interest evidenced by that support was not equally in existence as at date of the Request.

43. In our view, it is clear that the Appellant is not pursuing a narrow private issue. We find that the information sought is of public interest. We also note that for the most part, the Council has not sought to challenge the factual aspects of the Appellant's position, and has relied instead, on a broad characterisation of his requests and previous history.

44. However, having a justification does not mean that a request cannot be vexatious. As Judge Wikeley noted, in some cases, the value or purpose may dim over time, and subsequent requests may not have a continuing justification. He described this as *"vexatiousness by drift".*

45. On the evidence before us, we consider that the Appellant's quest has become disproportionate to its original proper purpose. We consider that he has used the Request, and his previous requests on the same broad subject matter, as a basis to pursue his contention that the policy the Council adopted was misguided and disadvantaged male swimmers, and that the factual basis of the Council's policy was lacking or incorrect. As with previous requests, what began as a reasonable information request, quickly escalated to challenge and argument.

46. We have referred, at paragraph 11 above, to the complaint the Appellant made to the LGO. Although our findings are independent of the LGO's findings, the Appellant's pursuit of that complaint is a further indication of what might fairly be described as an obsessive approach, using multiple channels to pursue the same issues.

47. The Appellant says, in his grounds of appeal, that the Council showed no readiness to debate or discuss. He also complains that the Council would not "accept a

meeting to discuss". However, that is not the purpose of FOIA. Information requests under FOIA place a statutory duty on public authorities to provide information to members of the public. It is not a channel for members of the public to challenge or argue about policy, nor for public authorities to have to defend or justify such policy. While information requested and obtained under FOIA may reveal issues or provide evidence which the requester or other members of the public may legitimately wish to pursue, the channel to do so is not through FOIA. Although the Appellant is an experienced user of FOIA, the line between an information request and other forms of engagement with a public authority has not been understood, or at least has not informed his interactions with the Council.

48. While we consider that the Request, as well as the Appellant's previous requests, have been an inappropriate attempt to use FOIA to challenge policy concerns, we also consider that the Council could and should have drawn a distinction more clearly between information requests and complaints/concerns about policy.

Harassment or Distress Caused to the Staff

49. Finally, although a finding of vexatiousness does not depend on there being harassment or distress caused to the public authority's staff, it may be evidenced:

> *…by obsessive conduct that harasses or distresses staff, uses intemperate language, makes wide-ranging and unsubstantiated allegations of criminal behaviour or is in any other respects extremely offensive…* (Dransfield, at paragraph 39).

50. Apart from one instance of frustration (paragraph 34 of the Decision Notice), the Request, and ensuing communications, have not been made in offensive or intemperate terms. We do not have any evidence before us from any members of staff at the Council, to suggest that the Appellant's conduct, language or assertions in connection with the Request or at any other time, have been inappropriate or given rise to distress or concern for the Council's staff.

Our Findings

51. Taking all the foregoing factors and findings into account, was the Request vexatious?

52. The Commissioner has characterised this matter as being finely balanced and we agree. However, after careful consideration, we find that on balance, the Request has crossed the line, and that it was vexatious.

53. It follows that we uphold the Commissioner's decision.

Decision

54. We dismiss the appeal.

55. Our decision is unanimous.

Signed

Anisa Dhanji
Judge

Date: 19 February 2019
Promulgation Date: 22 February 2019