

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 2 December 2010

Public Authority: Leeds City Council
Address: Legal, Licensing and Registration
Civic Hall
Leeds
LS1 1UR

Summary

The complainant requested the 'Working file' that contained the original records of the Leeds City Council AGM held on 19 May 2003. The public authority responded that it would provide the public records of the meeting to the complainant, but would not provide the remainder of the 'Working file' because it believed that:

- (1) The request for information was not valid; and
- (2) If it was, it was vexatious. It could therefore rely on the exclusion found in section 14(1) of the Act.

The complainant referred this case to the Commissioner, who found:

- (1) That the requests for information dated 22 October 2009 and 26 October 2009 were valid as they complied with the requirements of section 8(1); and
- (2) That on the facts of the case a reasonable public authority could not find the requests vexatious by virtue of section 14(1).

He requires that the public authority processes the requests again under the Act, without relying on the above arguments. He has also found procedural breaches of section 1(1)(a), 10(1) and section 17(5).

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.
2. The Commissioner has carefully considered all of the withheld information and considers that it does not constitute environmental information. He has considered this issue because it may have been that the information related to a planning matter. However, he has determined that he is not required to consider the Environmental Information Regulations in this particular case.

Background

3. It has been alleged that the public authority have had previous difficulties in keeping the necessary records for its historical AGMs and the 2003 AGM in particular. It has explained that it mislaid the original records and was required to recreate them in order for it to comply with its records management obligations. It did this using the information that was held within the public authority. The information that was required to be kept was called the 'public file' and this has been disclosed to the complainant. The public authority has also kept all the other information that it held about the 2003 AGM in a 'Working file'. It is this 'Working file' that has been sought by the complainant in this case.
4. There has been a court case about what was agreed in the 2003 AGM. This was heard on 28 October 2009. In particular how authority was delegated to officers in that meeting and what effect this had on a planning decision.

The Request

5. On 22 October 2009 the complainant requested the following information by email and explained that he would visit the public authority to see it later that day:

'Can I urgently see the 'working file' containing the papers for the Annual Council Meeting held on 19 May 2003?'

6. Later that day, the complainant emailed the public authority and explained that he was not granted access to the information.
7. On 23 October 2009 the public authority explained that it was wary of the context that the request was being made in and was seeking legal advice about it. It explained that it would tell the complainant once it had received appropriate advice.
8. Later that day, the complainant requested an update. He explained that the documents were public documents and were required to ensure scrutiny of the public authority.
9. The public authority also issued a second email, it explained that having sought preliminary legal advice, it believed that its lawyers needed to consider carefully whether the information was embraced by the 'Right to Know'¹ and this would require further analysis. It explained that there was pressure of work and asked whether the complainant was prepared to be liberal with the timescales in this case.
10. The complainant then wrote a further email to the public authority. He explained that in his view he had a 'very real and immediate need' to see the files. He said he wanted to see the original documents because he was worried about the accuracy of the photocopying. He explained that the records ought to be public and, if there was a difficulty identifying them, then he was happy to inspect all the available documents.
11. On 25 October 2009 the complainant also explained that in his view the documents were required to enable there to be accountability in respect of the public authority's procedures.
12. On 26 October 2009 the public authority provided a partial response. It explained that in its view it did not have legal requirements to provide the information to the complainant in his personal capacity. This was because of the time that had passed since the 2003 meeting and the fact that in their view 'background papers' has a specific definition that does not embrace the 'Working file'. It also questioned the complainant's 'need to know' of the same documents.
13. On the same day the complainant then complained about the partial response. He specifically requested access to the same file under the

¹ The 'Right to Know' is the right a member of the Council has to access records that are relevant to conduct his duties. This is a distinct information access regime and is not within the remit of the Information Commissioner.

- Act. He also appealed the decision under the 'Right to Know'. From the context, it was clear that the complainant wanted to inspect the file.
14. The public authority then provided a second email explaining that it was prepared to release some of the file on a discretionary basis, but the remainder would not be disclosed.
 15. On 6 November 2009 the complainant appealed the decision not to provide the information under his 'Right to Know'.
 16. On 18 December 2009 the complainant made a further request for the 'Working File' under the Act.
 17. On 24 December 2009 the public authority issued its response specifically under the Act. It explained that in its view the request for the 'working file' was not a valid request, as the Act provides an obligation to provide information rather than specific documents. It then went on to explain that even if a request was framed in a valid way there would be a more 'fundamental issue' here. It explained that in its view the request would be vexatious under section 14(1) of the Act. It explained that the request had no serious purpose or value and was obsessive. It believed that this was the case because there was no issue that the public authority failed to make appropriate disclosures and by questioning the High Court decision in this way it would be contrary to the rule of law and therefore vexatious. In addition it explained that the request for the information under the Act after the 'Right to Know' process prevented him receiving the information would undermine the necessary process to appeal the right to know rights. It explained that it saw no value in a further internal review and advised the complainant to approach the Commissioner.
 18. On 12 January 2010 the complainant requested an internal review. He explained that the motives that have been implied are the reason why the information remains withheld. He explained that it was important that there was transparency so that there was no possibility that the public authority had perjured itself.
 19. On 14 January 2010 the public authority explained that it was not minded to conduct an internal review. It explained that this was so because in its view the request was not valid under the Act and even if they could be reframed as a valid request under the Act, it would be vexatious.
 20. There have been a number of further requests for information from the complainant that post date the 14 January 2010. The Commissioner is

not considering these in this investigation and has not included them in this Notice.

The Investigation

Scope of the case

21. On 26 February 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
- That he should be entitled to see the 'Working file' which contains the only surviving records of the Leeds City Council AGM held on 19 May 2003;
 - He believed that he should be entitled to see the originals rather than the photocopies because he was worried about the documents being altered;
 - That he is concerned about whether the public authority has made a full disclosure to the Court in a relevant case;
 - The public authority has refused to process the request through the internal review process as required by the law; and
 - That it is generally agreed that the documents are not confidential and it is difficult to see any logical reason why they cannot be disclosed².
22. On 6 May 2010 the Commissioner agreed the scope of his investigation with the complainant. It was:
- *To determine whether the remainder of the 'Working file' can be disclosed to the public (including the complainant), or whether the public authority can rely on an appropriate exemption/exclusion under the Act.*
23. It follows that the Commissioner is considering the two original requests on the 22 and 26 October 2010 to see the 'Working file.' He is not considering the 18 December 2010 request because had the

² The Commissioner has not considered in this case whether the minutes were or were not confidential. The focus of this case was to consider whether the request was vexatious.

original requests been considered under the Act then it would not have been necessary. He has also not considered the information that has already been disclosed. This is because he considers that this part of the case has been informally resolved. He also wishes to address the complainant's point about there being no internal review in this case. In the Commissioner's view, in the particular circumstances of this case, it was not necessary for the public authority to conduct an internal review where it believed the request was vexatious, had explained that it was not providing such a procedure and had provided the Commissioner's details.

24. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. For clarity, the Commissioner is not able to consider an individual Councillor's 'Right to Know' rights as he does not regulate the right of access under Regulation 17 of the Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2000, as amended. The Commissioner can also not comment on the complainant's application for a judicial review into the handling of the request or any potential appeal about the verdict.
25. The Commissioner is also not making any decision about the validity or otherwise of the complainant's accusations against the public authority. His role is only to consider the application of the Freedom of Information Act on the evidence that have been presented to him by both sides. He will, however, judge the strength of the evidence when coming to a decision.

Chronology

26. 25 March 2010: The Commissioner wrote to the public authority to explain that in his view the requests dated 22 October 2009 and 26 October 2009 constituted a valid request under the Act and should be processed accordingly. He asked that the public authority considered whether it had relevant recorded information and either provided the information to the complainant or issued an appropriate refusal notice in ten working days.
27. 26 March 2010: The public authority responded to the Commissioner and said that the letter issued the previous day did not take into account all the material facts. It explained that it continued to maintain its view that it was reasonable to:
 1. Take from the correspondence that the principal issue in the material time related to the refusal to provide the information under the Councillor's 'Right to Know';

2. Understand that despite the Freedom of Information Act being cited, that the behaviour of the complainant led it to the reasonable expectation that it was pursuing the other access regimes at the time instead of his rights under the Act;
 3. Say that in any event the refusal notice dated 24 December 2009 was valid; and
 4. Not conduct a further internal review given that its position remained the same.
28. 30 March 2010: The complainant contacted the Commissioner explaining that he remained dissatisfied and that the case had become time critical as he was concerned about the potential to conceal or destroy the withheld information.
29. 9 April 2010: The Commissioner wrote to the complainant about his concerns around retention. He also wrote to the public authority to confirm that this complaint was eligible and would be progressed.
30. 28 April 2010: The complainant telephoned the Commissioner for an update and was provided with one.
31. 5 May 2010: The Commissioner telephoned the complainant to discuss the case. He discussed the scope and the background. The Commissioner then emailed the complainant in order to confirm the scope of the investigation.
32. 6 May 2010: The Commissioner received an email from the complainant. It confirmed the scope and provided further information about the background of this case. The Commissioner acknowledged its receipt.
33. The Commissioner also telephoned the public authority. He explained how the investigation was to proceed. He also explained that the evidence he had was inadequate for him to find in the public authority's favour. He explained that he was going to make a number of further enquiries in order to obtain relevant evidence. He sent those enquiries by email the same day and used the opportunity to ask for a copy of both the public file and the 'Working file' to be held for the purposes of his investigation.
34. 27 May 2010: The public authority presented its arguments to the Commissioner. It explained that the Commissioner should

reconsider his view that the request was valid, that the Commissioner should take into accounts events that happened after the request and presented its submissions about why it believed that the request was vexatious.

35. It also provided the Commissioner with a copy of both the public file (that had been disclosed) and the 'Working file' (that was the disputed information in this case). The public authority then presented further arguments on a number of other occasions including 5 August 2010, 23 September 2010 and 1 December 2010. These provided further detail about its position and have been considered where relevant.

Analysis

Substantive Procedural Matters

Is the request for information valid under the Act?

36. Section 1(1)(a) of the Act applies when the applicant makes an appropriate 'request for information'. Section 8 of the Act defines what constitutes a valid 'request for information'. The Commissioner has considered whether the complainant's requests dated 22 October 2009 and 26 October 2009 constitute valid requests for the purposes of section 8 of the Act.

37. Section 8(1) provides that –

"In this Act any reference to a "request for information" is a reference to such a request which –

- (a) is in writing,*
- (b) states the name of the applicant and an address for correspondence, and*
- (c) describes the information requested."*

38. The Commissioner considers that the requests for information on 22 October 2009 and 26 October 2009 satisfy these three requirements.

39. The first requirement is that the request is in writing. Section 8(2) confirms that text, received in a legible form, that is transmitted by electronic means which is capable of enabling subsequent reference should be regarded as being in writing. The Commissioner therefore finds that the two requests are in writing for the purposes of the Act.

40. The second requirement is the need for a name and an address. The emails contained the complainant's name and the Commissioner considers that, for the purposes of section 8(1)(b), the email address that was used for sending the request constitutes 'an address for correspondence'. The two requests therefore satisfy section 8(1)(b).
41. The last requirement is contentious. The public authority has maintained that the request for the 'Working File' fails to adequately describe the information that is requested. It suggested that the request did not constitute a description of the information, but instead is a request for the medium in which that information was held. It explained in its view that the request was invalid because it fails to recognise the distinction between being able to request information and documents.
42. It explained that this distinction was in its view important because of the way both section 11 of the Act and the Freedom of Information and Data Protection (Appropriate Limits and Fees) Regulations 2004 ('the Regulations') are worded. Section 11 is a provision that enables the means of communication to be specified by a complainant where reasonably practicable. It specifically mentions that one can request a copy of the information in permanent form. The Regulations refer to 'a document that may contain information' (Regulations 4(3), 6(3) and 7(4)). The public authority maintained that the variation in wording meant that the Commissioner should accept that it is important for the complainant to specify exactly what information was being sought rather than being able to specify the folder. It explained in its view the wording of section 11 would become irrelevant if the Commissioner interpreted a request for information in this way.
43. It also commented that this outcome would correspond with the way the Regulations operate. As the public authority correctly pointed out the public authority is only able to charge for the time spent doing activities in Regulation 4(3) – so activities to locate, retrieve and extract information. It cannot therefore charge for time spent considering exemptions. The public authority explained that it was worried about the consequences of it being compelled to consider potentially thousands of items in the event that this was held in the specified file and the complainant requested the information held in that file. It explained that this could not possibly be the intention of Parliament when passing the legislation.
44. The Commissioner has carefully considered the public authority's arguments in this case and notes that they have been strongly argued. However, the Commissioner does not accept that the Act can be read

in the way that the public authority argues. The Commissioner considers that the purpose of section 8(1)(c) is to provide sufficient detail to allow the public authority to identify relevant recorded information that the complainant is interested in. In this case the complainant is interested in the 'Working file' about an AGM meeting. Section 1(3) does allow the public authority to require further information from an applicant where it cannot identify and locate the information and this provision is consistent with the Commissioner's reading.

45. The Commissioner considers that the requests do provide sufficient detail to describe the information requested and therefore comply with section 8(1)(c). He is satisfied that in cases such as this one it is reasonable for the complainant to request a relevant file, when it is the contents of the file that are of interest. It follows that in the Commissioner's view the requests are valid requests for recorded information and should be considered under the Act.
46. However, while the request is valid, this does not automatically mean that a complainant's preference for receiving the information is absolute. Indeed the public authority is required to consider whether it would be reasonably practicable to provide it in the requested format in line with section 11 and this issue is separate from the validity of the request. Whilst not forming part of his decision the Commissioner has chosen to make further comments about the operation of section 11(1) in the Other Matters section at the end of this Notice.

Exclusion

Is the request for information vexatious?

47. The principal issue that the Commissioner has been asked to determine is whether the requests for information dated 22 October 2009 and 26 October 2009 are vexatious.
48. The public authority contends that the requests correctly considered in their context are vexatious and that it should be entitled to rely on section 14(1). The Commissioner will consider its detailed arguments below.
49. The complainant argues that there is no doubt that his requests are not vexatious and that a reasonable public authority could not rely on section 14(1) in this case. The Commissioner will also consider his detailed arguments.
50. Section 14(1) is an exclusion that provides that –

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

51. The Commissioner's view is that the time he can consider whether the requests are vexatious is the date that the requests were received by the public authority. If the request was not vexatious when it was received, then the public authority would have had an obligation in line with section 1(1)(a) to answer it.
52. The Commissioner has consistently indicated to the public authority that the time he must consider the request from was the 26 October 2009 (the date of the request). The public authority argued that in its view this would be inequitable as it would fail to take into account the events that occurred from the date of the original request to the date the Commissioner began his consideration of the case. The Commissioner has noted these comments but does not generally accept them. It follows that his starting position is that he is unable to take into account any of the events that occurred after this date that were not present at the date of the request. However, he is prepared to consider the events that occurred after the request to determine whether the request would have the effect of harassing the members of the public authority's staff at the date of the request.
53. When assessing vexatiousness the Commissioner adopts the view of the Information Tribunal (the 'Tribunal') decision in *Ahilathirunayagam v Information Commissioner's Office* (EA/2006/0070) (paragraph 32); that it must be given its ordinary meaning so would be likely to cause distress or irritation. Whether the request has this effect is to be judged on objective standards. This has been reaffirmed by the Tribunal in *Gowers v Information Tribunal and London Camden Borough Council* (EA/2007/0114) (paragraph 27). The Commissioner has developed a more detailed test in accordance with his guidance but it is important to understand that it has developed from these general principles and these guide him in applying his test.
54. The Commissioner also endorses the Tribunal's consideration of this point in *Mr J Welsh v the Information Commissioner* (EA/ 2007/0088) (paragraph 21) where it stated:

'In most cases, the vexatious nature of a request will only emerge after considering the request in its context and background. As part of that context, the identity of the requester and past dealings with the public authority can be taken into account. When considering section 14, the general principles of FOIA that the identity of the requester is irrelevant, and that

FOIA is purpose blind, cannot apply. Identity and purpose can be very relevant in determining whether a request is vexatious. It follows that it is possible for a request to be valid if made by one person, but vexatious if made by another; valid if made to one person, vexatious if made to another.'

55. The Commissioner has taken into account the complainant's previous interaction with the public authority when determining whether the request can be correctly characterised as vexatious. This means that even if the request appears reasonable in isolation, it may be vexatious when considered in context. The public authority has acknowledged that in this case the request by itself would be unlikely to be vexatious, but argues that it is vexatious within its context.
56. The Commissioner has issued guidance as a tool to assist in the consideration of what constitutes a vexatious request³. This guidance explains that for a request to be deemed vexatious the Commissioner will consider the context and history of the request as well as the strengths and weaknesses of both parties' arguments in relation to some or all of the following five factors to reach a reasoned conclusion as to whether a reasonable public authority could refuse to comply with the request on the grounds that it is vexatious:
- (1) whether compliance would create a significant burden in terms of expense and distraction;
 - (2) whether the request has any serious purpose or value;
 - (3) whether the request has the effect of harassing the public authority or its staff;
 - (4) whether the request is designed to cause disruption or annoyance; and
 - (5) whether the request can otherwise fairly be characterised as obsessive.
57. When considering the public authority's reliance upon section 14(1), the Commissioner has had regard to the Information Tribunal's decision in *Mr J Welsh v the Information Commissioner* (EA/2007/0088) at paragraph 26. In that case, the Tribunal spoke of the consequences of determining a request vexatious. It pointed out that these are not as serious as those of finding vexatious conduct in other contexts and therefore the threshold for vexatious requests need not be set too high.

³ This guidance is called 'When can a request be considered vexatious or requested?'

58. The public authority has indicated in its arguments to the Commissioner that it believes that factors (1), (2), (3) and (5) apply in this case. The Commissioner has looked at each of these factors in turn.

Does the request constitute a significant burden in terms of expense and distraction?

59. When considering this element of his test the Commissioner endorses the Tribunal's approach in *Welsh* (in paragraph 27). It stated that whether a request constitutes a significant burden is

"...not just a question of financial resources but also includes issues of diversion and distraction from other work..."

60. The Commissioner therefore expects a public authority to show that complying with the request would cause a significant burden both in terms of costs and also diverting staff away from their core functions.

61. The Tribunal in the case of *Gowers v the Information & London Borough of Camden* (EA/2007/0114) emphasised that previous requests received may be a relevant factor:

'...that in considering whether a request is vexatious, the number of previous requests and the demands they place on the public authority's time and resources may be a relevant factor' (paragraph 70 of its decision).

62. The public authority asked for the Commissioner to take into account the following arguments about the request's context, which the public authority considers to be relevant to the burden of the request:

- It had received a very large volume of requests over the last four years. It explained that one of its departments (City Development) had exchanged around 400 items with the complainant, while one employee had exchanged around 640 items. It provided the Commissioner with a schedule of the 400 items;
- It explained that from the schedule it can be seen that the requests are often for more than one item and can ask for large quantities of information; and
- It explained that when considering the expense, if one placed a notional thirty minutes (which was in its view conservative) for

each item (also allowing for some savings from duplication) charging at the rate of £25 per hour, then it had done over £10,000 worth of work in response to the complainant's requests over the four years. It explained that it was likely that the actual costs to the rate payer could amount to many times its conservative estimate.

63. The complainant argued that the burden in this case is negligible. The information is held in one place and the public authority has already agreed that there is nothing confidential within the 'Working file'. The Commissioner also notes that the complainant is a Councillor and should be able to legitimately request information from the public authority to enable him to conduct his functions and therefore the burden outlined above has to be considered in its context too. The Commissioner does not consider that the argument that there was nothing confidential in the file is relevant to the burden experienced in this case.
64. The Commissioner has come to the conclusion that it is only legitimate to consider the requests for the 'Working file' and those requests about the connected court case when considering whether the request in its context constituted a significant burden to the public authority. He has come to this view because the relationship between the parties would make it inequitable to take unconnected requests into account when considering the burden of these particular requests. The public authority has acknowledged that the complainant did try and inspect the 'Working file' on one previous occasion (on 17 June 2009) and also exchanged emails to try and obtain it on a second occasion before making these requests. However, he had not made any requests about the connected court case prior to the date of these requests as the court case had not yet taken place. Therefore, the Commissioner considers that the relevant burden was not a great one in this case (amounting to only four emails asking for the 'Working file').
65. When considering the facts the Commissioner is satisfied that a great deal of the public authority's time has been spent dealing with the complainant in the past. However, he is of the view that the request itself considered at the date of its receipt would not have imposed a significant burden in terms of either expense or distraction. He considers that the information requested was readily identifiable and that the history of previous requests about other matters should not be taken into account in this particular case.
66. The Commissioner has considered the reasoning in the Tribunal decision of *Coggins v Information Commissioner* [EA/2007/0130] about what constitutes 'a significant administrative burden' and is not

satisfied that the requests in this case would have contributed to a 'significant distraction from its core functions' (paragraph 27 of its decision).

67. The Commissioner has also considered in this determination the approach of the Information Tribunal in *Betts v The Information Commissioner* [EA/2007/0109], where the Tribunal indicated that it would be reasonable for the public authority to consider its past dealings with the complainant, particularly in relation to its experience of answering one request which would likely lead to still further requests. This had the effect of perpetuating the requests and adding to the burden placed on the authority's resources. The Tribunal said:

'...it may have been a simple matter to send the information requested in January 2007, experience showed that this was extremely likely to lead to further correspondence, further requests and in all likelihood complaints against individual officers. It was a reasonable conclusion for the Council to reach that compliance with this request would most likely entail a significant burden in terms of resources.'

68. The Commissioner has examined the pattern of the requests and has not been satisfied that the provision of the 'Working file' would have led to further requests on the facts of this case. He considers this is so because the provision of the file would enable the complainant to come to whatever verdict he chooses and further information would not be needed about the issue of the 'Working file'.
69. Assessing all the circumstances of the case the Commissioner has found that the particular requests in their context would not have imposed a significant burden in terms of expense and distraction for the reasons outlined above. He therefore finds in favour of the complainant on this factor.

Did the request have value and/or a serious purpose?

70. The complainant argued his request has value and a serious purpose since the information will enable him to scrutinise the public authority's conduct in respect of 2003 AGM minutes. He explained that in his view there were serious questions about the chronology of the events and the documents are necessary to consider whether the public authority had been truthful in its evidence in the connected court case. The provision of the information would also address his concerns that the minutes have been manipulated to support the public authority's position. The value of the information that has been withheld is that it will allow interested parties to check carefully the contents of the files

against the events that are believed to have taken place and therefore provide accountability of the public authority's actions. He explained that in his view this would be the only way of being certain that the public authority's actions in the litigation were honest.

71. The public authority's view is that the request had neither a serious legitimate purpose nor any value when considering it in context. It explained that in its view there was no legitimate issue concerning disclosure in the connected court case. To evidence this fact it provided the Commissioner with considerable contemporary evidence about how the connected court case was undertaken and the concerns of the lawyers after it.
72. However, the Commissioner cannot consider evidence that has been generated after the date of the request. He must consider the situation on 26 October 2009, which was prior to the court hearing which occurred on 28 October 2009. At the time of the request, the complainant was preparing to be a witness to the hearing and all the events outlined in the public authority's submissions had not occurred. The complainant therefore had a serious purpose in ensuring that the evidence that he provided to the hearing was fully comprehensive and could contribute to ensuring that the court case was decided with all the facts being apparent.
73. The Commissioner does consider that there was a serious purpose to this particular request to information at the time of the request. He is satisfied that there is an important purpose in ensuring that the public authority is both accountable and transparent in respect of its decisions. It is also important in the Commissioner's view that it is accountable for how it recreated the records for 2003 and what it included within the public records.
74. The Commissioner has therefore found that this factor favours the complainant.

Did the request have the effect of harassing the public authority or its staff?

75. The complainant contends that there is no evidence of this request harassing the public authority or its staff, other than correctly holding it accountable for its actions. Instead he believed it was important that the information held was out in the open so that the public authority's actions were open to scrutiny.
76. The Commissioner appreciates that to harass is a strong verb and emphasises that it is the effect of the request and not the requester that must be considered. He has considered the definition in the

Shorter Oxford English Dictionary and considers that the following alternative reflects what his guidance means:

'To tire out, exhaust.'

77. The Commissioner accepts it was not the intention of the complainant to cause distress in this case.
78. The public authority has argued that the effect of this request should be carefully judged in light of both the complainant's previous behaviour and the subject matter of the request.
79. In respect of the complainant's previous behaviour this is not the first time that the complainant has made serious accusations about members of its staff. Indeed the public authority provided a catalogue of such incidents. It explained that while some of these comments can be regarded as robust political comment, the sheer number of them and their nature make them representative of the complainant's manner and show that the behaviour exhibited by the particular request was far from unusual. Indeed the public authority presented the Commissioner with over a hundred examples from 2004 that it wished him to consider.
80. The Commissioner accepts that a number of these comments were robust political comments and cannot be said to harass the public authority in any substantial way. However, he considers that there are enough examples that stray into the territory of having the effect of harassing the public authority and its staff. He has decided to provide six examples and he has also ensured that the examples are diverse in time and subject matter. It is also noted that the emails to the relevant staff are often copied to all other councillors to increase their effect:
 - 16/04/2004 'The evidence that might reveal this folly is being massaged or suppressed by your staff. Elected members and the general public are being fed an edited stream of information...'
 - 06/07/2005 'This disease [tardiness, creating needless restrictions] infects every corner of the planning process'.
 - 14/07/2005 '...The most plausible explanation was that a group of officers was trying to mislead elected Members and the public about their actions and intentions. Some of the people involved achieved rapid promotion within the authority.'

- 8/06/2008 'In the present case I have reason to believe that part of the information supplied to the Ombudsman might be incomplete, misleading or incorrect.'
- 29/08/2008 'It would also appear that much of the information previously considered by the Executive board was seriously misleading, incomplete or factually wrong.'
- 26/11/2008 'The council's response is obfuscation and waffle. I do not believe that the A65 scheme does work properly, and I suspect that the Council knows this and is trying to cover it up.'

81. The public authority explained that it believed that this case was factually analogous to the First Tier Tribunal (Information Rights)⁴ decision of *Tony Wise v The Information Commissioner* [EA/2009/0080] in respect of this point. It explained that the Tribunal found that the complainant repeatedly called the public authority '*corrupt, dishonest, unethical liars*', that the requests '*cannot be divorced from the correspondence upon the same topic being sent to those at the Council tasked with answering the information requests*' and that the comments above meant that it had the same problem. The Commissioner having considered both cases is not convinced that the intemperate comments are connected in the same way to the request as they were in the *Wise* case. However, he is satisfied that the comments in the round did have the overall effect of harassing the public authority. In respect to this factor, he considers it is equitable to consider all the requests that have been submitted by the complainant. This is because the effect that the requests have cannot be divorced from this evidence.

82. In respect of the subject matter of this complaint the public authority provided the Commissioner with witness statements of 9 December 2009 and 30 December 2009 which show that the accusations in this case have caused serious distress to members of the public authority's staff. The Commissioner view is that it is right to consider these statements as an exception to the rule that the situation must be considered at 26 October 2009 because the circumstances to which they relate are material to the effect the request had at the date of the request. The Commissioner does not doubt that the complainant generally believes in the veracity of his allegations. In relation to the question of harassment, the Commissioner has considered the withheld information, the evidence presented by the complainant, the evidence

⁴ The First Tier Tribunal (Information Rights) is the body that has replaced the Information Tribunal.

presented by the public authority and all the evidence mentioned above about the events that occurred after the request (including the court judgment and the connected judicial review hearing). The Commissioner considers that the allegations are serious and in the circumstances can be legitimately regarded as having the effect of harassing the public authority's staff who dealt with the court case. He considers that even the allegations alone could cast unwarranted doubt on an individual's professional conduct and that this harassed the public authority's staff.

83. The Commissioner's view is that the Information Tribunal decision in *Coggins v Information Commissioner* [EA/2007/0130] also provides support to his consideration of the case. The Information Tribunal considered whether the requests amounted to having the effect of harassing the public authority and found that it did because:

"...what we do find is that the Appellant often expressed his dissatisfaction with the CCU in a way that would likely have been seen by any reasonable recipient as hostile, provocative and often personal...and amounting to a determined and relentless campaign to obtain any information which he could then use to discredit them....we find that taken in their context, the requests are likely to have been very upsetting to the CCU's staff and that they...are likely to have felt deliberately targeted and victimised...." (paras 53 & 54).

84. The Commissioner is satisfied that the request in its context did have the effect of harassing the public authority. The Commissioner therefore considers that this factor strongly supports the application of section 14(1) in this case. He has decided this factor deserves real weight on the facts of this case.

Can the request be characterised as obsessive?

85. The complainant contends that his request for information is not obsessive. He has explained that he is doing his job as a Councillor in holding the public authority to account and he cannot do his job without having access to all of the appropriate information.
86. The public authority indicated that it viewed the request as obsessive. It explained that the interrelation between the complainant's conduct under his 'Right to Know' rights and the request itself shows its obsessive nature. It explained that it received daily email exchanges around the date of the request (that have been noted above), that he frequently copies his email exchanges to large audiences and made frequent attempts to visit numerous Council officers about this matter.

It also cited a number of events after the date of the request, which the Commissioner is not prepared to take into account when considering whether the request is obsessive because they postdate the requests.

87. The Commissioner has carefully considered where the balance lies in this case. He notes that the time of the requests is crucial and the principal issue is connected to the public authority's conduct of the court case. The Commissioner accepts that at times there is a thin line between obsession and persistence and each case should be determined on its own facts. In this case, the Commissioner considers that at the time of the requests (22 October 2009 and 26 October 2009) the nature of the requests did not fall within the definition of obsession, as at that time the information may have been illuminative to the central issue and in the public interest.
88. He therefore considers the public authority was incorrect in characterising this request as obsessive and finds in favour of the complainant on this factor.

Could a reasonable public authority refuse to comply with the request on the grounds that it is vexatious?

89. The Commissioner recognises that there is a fine balancing act between protecting a public authority from meritless applications and the promotion of the transparency in the workings of an authority.
90. The Commissioner has considered all the evidence presented, including the history and context of the request. The Commissioner accepts that the public authority had genuine concerns about the effect of this request. However, on the basis of the circumstances of this case, the Commissioner finds that a reasonable public authority could not have found the complainant's requests of 22 October 2009 and 26 October 2009 vexatious.
91. In arriving at this decision, the Commissioner has had regard to the Information Tribunal's decision in *Mr J Welsh v the Information Commissioner* [EA/ 2007/0088], where the Tribunal commented that the threshold for vexatious requests need not be set too high. He notes that it is not necessary for every factor to be made out from his guidance. However, in this case he has found that only one factor was satisfied in this case and the Commissioner's decision in this case therefore rests on the complainant's request having a serious purpose, not being obsessive and not causing a significant burden. While he has found that the request had the effect of harassing the public authority,

he does not regard this factor as having sufficient weight to cause the request overall to be characterised as vexatious.

92. In reaching this decision the Commissioner notes that the findings are made on the circumstances at the time of these particular requests and that this finding does not preclude the public authority from relying on section 14(1) of the Act in response to future requests for information, where it believes that a reasonable public authority could find those requests vexatious.

Procedural Requirements

93. Due to the decision that has been arrived at, there are also a number of procedural breaches in this case. The Commissioner will list them in turn:

Section 1(1)(a)

94. The public authority is required to confirm or deny whether relevant recorded information is held. In this case the public authority believed either the requests was not valid or that it was vexatious. It never specifically confirmed that it held the relevant recorded information that related to the requests. The failure to do this was a breach of section 1(1)(a), although no remedial steps are required as this notice confirms that the relevant recorded information is held.

Section 10(1)

95. Section 10(1) requires that a public authority complies with section 1(1)(a) in 20 working days. The public authority failed to do this and therefore breached section 10(1).

Section 17(5)

96. Section 17(5) required that the public authority when relying on section 14(1) should issue a notice within 20 working days explaining that this was so. The public authority in this case took more than 20 working days and so breached section 17(5) too.

The Decision

97. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act. The particular elements that were of concern were:

- The public authority wrongly decided that the request was not a valid request under the Act;
- The public authority could not evidence that a reasonable public authority, at the time of the request, could characterise the request as vexatious and cannot rely on section 14(1);
- The public authority breached section 1(1)(a) as it failed to specifically confirm that it held relevant recorded information in this case (because of its wrongful belief in the above two things);
- The public authority breached section 10(1) because it failed to comply with section 1(1)(a) in 20 working days; and
- The public authority breached section 17(5) as the notice that applied section 14(1) in the alternative was late.

Steps Required

98. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- *It must reconsider the two valid requests under the Act and determine the case on the basis of the circumstances that existed on 26 October 2009. It must not decide that the request is invalid or apply section 14(1) to this request.*

- *It must either:*

(1) Consider whether allowing inspection of the original 'Working file' was reasonably practicable and if so, to allow the complainant to inspect the file. If it believes it is not, then it should provide a complete copy of the 'Working file' to the complainant.

Or:

(2) Disclose the parts of the 'Working file' that are not exempt and issue a valid refusal notice under section 17(1) in respect to those parts that it believes are exempt. This notice must specify the relevant exemption, explain why it applies and

provide a public interest consideration where specified in any exemption.

99. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

100. Failure to comply with the steps described above 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.

Other matters

Section 11(1)

101. Whilst not forming part of this notice the Commissioner considered it may be helpful to outline his view about 'appropriate means of communication' in this case should the public authority decide to disclose the information.

102. Section 11(1) provides that –

'Where, on making his request for information, the applicant expresses a preference for communication by any one or more of the following means, namely -

(a) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant..

The public authority shall so far as reasonably practicable give effect to that preference

103. The complainant has asked to inspect the original 'Working file'. The Commissioner notes that all information released under the Act is to be available to the public.
104. The Commissioner's view is that an analysis of this section is not about whether other means of communication are sufficient, but should be focussed on whether the means requested was reasonably practicable.

The Commissioner's view is that a requester should be permitted to inspect original copies where that is reasonably practicable. He has been provided with no arguments from the public authority about why access to the original file would not be reasonably practicable in this case.

105. It follows that the Commissioner is of the view that in the event that the public authority decide to disclose the information the provision of supervised access should be considered as being reasonably practicable in this case.

Right of Appeal

106. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 2nd day of December 2010

Signed

**Gerrard Tracey
Principal Policy Advisor
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1 - General Right of Access

Section 1(1) provides 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.”

Section 1(2) provides that –

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 1(3) provides that –

“Where a public authority –

- (a) reasonably requires further information in order to identify and locate the information requested, and
- (b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
- (b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or

deletion that would have been made regardless of the receipt of the request."

Section 1(5) provides that –

"A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b)."

Section 1(6) provides that –

"In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as "the duty to confirm or deny"."

Request for Information

Section 8(1) provides that –

"In this Act any reference to a "request for information" is a reference to such a request which –

- (a) is in writing,
- (b) states the name of the applicant and an address for correspondence, and
- (c) describes the information requested."

Section 8(2) provides that –

"For the purposes of subsection (1)(a), a request is to be treated as made in writing where the text of the request –

- (a) is transmitted by electronic means,
- (b) is received in legible form, and
- (c) is capable of being used for subsequent reference."

Section 10 - Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Section 10(2) provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

Section 10(3) provides that –

“If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

Section 10(4) provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

Section 10(5) provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

Section 10(6) provides that –

“In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

Section 11 - Means of communication

Section 11(1) provides that –

“Where, on making his request for information, the applicant expresses a preference for communication by one or more of the following means, namely –

- (a) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,
- (b) the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and
- (c) the provision to the applicant of a digest or summary of the information in permanent form or in another form acceptable to the applicant.

The public authority shall so far as is reasonably practicable give effect to that preference.”

Section 14 – Vexatious or repeated requests

Section 14 of the Act provides that:

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

(2) Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

Section 17 - Refusal of request

(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

(2) Where—

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—

(i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

(ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

(6) Subsection (5) does not apply where—

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

(7) A notice under subsection (1), (3) or (5) must—

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.