

Freedom of Information Act 2000

Decision notice

Date: 8 October 2014

Public Authority: Stockton-on-Tees Borough Council
Address: Municipal Buildings
Church Road
Stockton-on-Tees
TS18 1LD

Decision (including any steps ordered)

1. The complainant requested information relating to proposals by Stockton-on-Tees Borough Council (the Council) to build a children's home within the complainant's village. The requests were handled under both the Freedom of Information Act 2000 (the Act) and the Environmental Information Regulations (EIR). The Council refused certain requests made in relation to this under the following:
 - Section 12 of the Act (where requests exceed appropriate cost limit)
 - Section 14 of the Act (vexatious or repeated requested requests)
 - Regulation 12(4)(b) of the EIR (manifestly unreasonable requests)
2. The Commissioner decision is that the Council has not demonstrated that section 12 applies to the requests, and that the requests cannot be refused as vexatious.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a new response to the three requests submitted on 3 and 6 November 2013 (as set out at items 5 to 7 in annex 1 of this notice) without relying upon sections 12 or 14 of the Act or regulation 12(4)(b) of the EIR.

4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. The Commissioner has included copies of the complainant's requests in annex 1 at the end of his decision notice. The complainant submitted seven requests across a 30 day period. The first four requests were complied with under the terms of the relevant legislation. The last three were refused and are those on which the Commissioner has made his decision.
6. The Council issued a combined response to all three requests on 25 November 2013. This response refused the requests as vexatious under section 14 of the Act and regulation 12(4)(b) of the EIR. It also aggregated the requests with others that were submitted about the children's home and refused them under section 12 of the Act.
7. Following an internal review request by the complainant, the Council responded on 30 January 2014. The internal review upheld the previous decision.

Scope of the case

8. The complainant contacted the Commissioner on 18 December 2013 to complain about the way his request for information had been handled. The Commissioner accepted the case on 11 March 2014 after the complainant provided a copy of the Council's internal review.
9. The Commissioner considers the scope of the case to be whether the Council was correct to refuse the requests using sections 12 and 14 of the Act, and regulation 12(4)(b) of the EIR.

Reasons for decision

Section 12 – cost of compliance for requests

10. Section 12 of the Act states that a public authority may refuse a request if it considers that complying with the request would exceed the appropriate cost limit. This limit is defined in the Freedom of Information

and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regs) as 18 hours of work for a local government organisation.

11. In order to demonstrate whether section 12 applied the Council needs to provide a clear estimate based on reasonable evidence that shows complying with the requests would exceed the appropriate limit. The Fees Regs explicitly state that this estimate can only take into account the following activities:
 - determining whether the information is held
 - locating the information, or a document which may contain the information
 - retrieving the information, or a document which may contain the information, and
 - extracting the information from a document containing it
12. Public authorities are also permitted to aggregate requests for similar information made by one or more persons that are received within a 60 working day period if they appear to be acting in concert or in pursuance of a campaign. The Council aggregated the complainant's requests with others it had received concerning the proposed children's care home which came to a total of 31 requests.
13. In its refusal notice to the complainants the Council stated:

"The Council estimates that each separate piece of correspondence will take on average about 40 minutes to 1½ hours to process with each individual request within the correspondence taking at least 25 minutes but the majority significantly longer. On this basis we estimate that the cost to determine the appropriate material and locate, retrieve and extract the information in reference to the aggregated requests would be a minimum of £525.00 (based on at least 21 hours at £25 per hour)."
14. This calculation was reiterated in the Council's first submissions to the Commissioner. It stated that 21 hours was the best case scenario *"where all the requested information would be readily available in a retrievable format, with no internal management time included"*.
15. The Commissioner wrote to the Council and stated that he could not accept this estimate as it did not conform to the activities outlined in the Fees Regs. Whilst it was possible that 31 separate requests could well exceed the appropriate cost limit the Commissioner could not accept an estimate for how long it would take to "process" a request, and the Council needed to describe what this meant in the terms of the Fees Regs.

16. The Council provided its second set of submissions to the Commissioner in response to this. In these submissions, the Council stressed that the potential establishment of the children's home was a hugely significant project that encompasses approximately 30 officers from a variety of departments at any one time. All of these officers would have to be asked to search for the requested information, and whilst much was held electronically it was also the case that a significant amount of information was held in hard copy.
17. The Council also stressed that the requests asked for information across an "extensive range" of issues relating to the project such as: *"the acquisition of properties, the legal structure of the venture, consultation with police, the planning merits, highways issues, commercial due diligence, the procurement process, cost of care for looked after children, project governance, numbers of delivery vehicles and down to the size of the dustbins"*.
18. Whilst the Council was able to give an indication of the scale of the work involved in responding to the requests, it did not provide much in the way of an estimate that would demonstrate that the appropriate limit would be exceeded by complying with the requests. It stated that a typical request would involve the following:
 - Outlook e-mails (5 officers @ 3 minutes): 15 minutes
 - Database/system (e.g. procurement system): 15 minutes
 - Council/officer decision reports: 10 minutes

The Council did not explain what these activities entailed, nor how they related to the permitted activities outlined in the Fees Regs.

19. The Council did provide an example of a previous request from the complainants that it had complied with, and stated that using the permitted activities it took an hour to obtain the information for the three items within the request. However, there is no argument to extrapolate this information and apply it to the refused requests. The Commissioner notes that the Council identified 52 separate questions within the 31 requests. If the Council can comply with three within an hour then it would suggest that 52 could be complied with in 17 hours and 20 minutes, which is within the appropriate limit.
20. The Commissioner wishes to stress again that due to the number of requests involved he still considers there might be a case that compliance with the 31 requests would exceed the appropriate limit. However, the fact remains that it is the Council's responsibility to demonstrate that the exemption has been applied correctly by providing a clear estimate based upon reasonable evidence. The Council should have been able to provide this to the complainants in the initial refusal notice, and if not then it should have been provided in its internal

review. In addition to this, the Council has been given two chances to provide submissions to the Commissioner with a coherent justification for the use of the exemption. In the absence of an estimate based on cogent evidence the Commissioner's decision is that the council has not demonstrated that section 12 applies to the complainants' requests. He has now gone on to consider whether the requests can be refused under section 14 of the Act and regulation 12(4)(b) of the EIR.

Section 14 – vexatious requests

21. The Commissioner has reviewed the seven requests made by the complainant and does not consider that any of them ask for environmental information, so instead he will only consider the requests under section 14 of the Act. For the purposes of this section, the Commissioner will determine whether the requests submitted by the complainant on 3 and 6 November 2013 (items 5 – 7 in annex 1) can be refused as vexatious.
22. Whilst the term vexatious is not defined in either the Act or the EIR, a working definition was used in the Upper Tribunal (Information Rights) case of Information Commissioner v Devon CC and Dransfield [2012] UKUT 440 (AAC). This stated that the in the context the term would be seen as a "...*manifestly unjustified, inappropriate or improper use of a formal procedure.*"¹ For this decision, the Commissioner will use this definition.
23. The Council's submissions state that the reason the complainant's requests were refused was due to the burden imposed. To support its argument the Council aggregated the requests submitted by the complainant with those made by others about the proposed children's home. This is because it believed the complainant was acting in concert with other requesters who had submitted requests for information about the proposed children's home.
24. This is an important distinction, as the complainant submitted seven requests whereas the aggregated total amounts to 31. Clearly the difference between the two totals is sizeable, and the Commissioner considers that it would be significant enough to determine whether the request represented an unjustified burden or not.

¹ <http://www.osscsc.gov.uk/judgmentfiles/j3680/GIA%203037%202011-01.doc> (see para 27 pg7)

25. The Commissioner's guidance on the subject² states that the context and history in which an individual request was made can be taken into account when determining if a request is vexatious. It is well established that a public authority can include requests made previously by an individual when determining whether a current request is vexatious. However, this does not necessarily apply to requests made by other individuals on the same subject. Unlike section 12 there is nothing in the legislation to state that a public authority can aggregate requests made by other individuals.
26. Instead, the Commissioner referred to the First-Tier Tribunal case of Dr Gary Duke v ICO and Salford University. In this judgment a request was determined to be vexatious due to the complainant's activities in encouraging other individuals to submit requests to the University, with the intention of increasing the burden placed upon the University and causing disruption to its normal functions. In effect, the Tribunal decided the University was entitled to include the requests made by other individuals when making its decision on whether a request was vexatious, much as the Council has done in this case. To make the determination that the requests of the other individuals could be aggregated with those of Dr Duke, the Tribunal considered whether it was more likely than not that he was party to the requests submission "whether by direction, incitement or mild encouragement" for the purpose of causing a burden to the Council.³ The Commissioner will adopt this test for the purposes of this decision.
27. As evidence for its position, the Council referred to a blog and a Twitter account – both of which are run by the complainant – which it believes shows a "clear concerted campaign mounted by a number of individuals...against the Council's proposals for a residential children's home in the village of Wolviston."
28. That there is a campaign is not in dispute, there is evidence both in social media accounts and in local news outlets that there is resistance to the Council placing the children's home in the village. However, the

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/dealing-with-vexatious-requests.ashx#page=15

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[http://www.informationtribunal.gov.uk/DBFiles/Decision/i1288/Duke,%20Gary%20Remitted%20EA.2011.0060%20\(21.05.14\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i1288/Duke,%20Gary%20Remitted%20EA.2011.0060%20(21.05.14).pdf) (see para 32 pg13)

Commissioner does not agree that the presence of a blog and a Twitter account designed to raise attention about the proposal automatically implies that the complainant is responsible for requests from other applicants about the same subject. Whilst the term "mild encouragement" does imply a low amount of involvement in engaging with other requesters, the Commissioner does not consider that providing information about a subject in a blog is sufficient to be interpreted as mild encouragement for others to submit requests to the Council in order to create a burden on its resources.

29. The Commissioner has viewed the blog, the Twitter account, and also the complainant's comments on the 'whatdotheyknow' website (which is popular for making requests in the public domain). None of the information seen by the Commissioner suggests that the complainant is openly directing, inciting, or encouraging other people to send requests for information to the Council, let alone to do so with the purpose of creating a burden upon the Council's resources. The blog and Twitter account draw attention to developments of the proposed children's home, but nothing about a campaign to disrupt the Council's resources by submitting requests. The only comment from the complainant on whatdotheyknow is to inform an individual that a late response from the Council could be reported to the Commissioner. Whilst this might have the effect of leading to an investigation from the Commissioner it is not seen as incitement, rather informing an individual of the appropriate regulator to handle a breach of statutory regulations.
30. The Commissioner also notes that the other requests referred to by the Council in its submissions all come from one couple. Whilst the Commissioner would consider that the complainant may be familiar with the other requesters due to the small number of residents in the village, no evidence has been presented to show that the complainant has encouraged the couple to submit numerous requests to the Council. In its submissions to the Commissioner the Council acknowledged that the proposals had proven to be controversial and a subject of consternation for the local residents. The Commissioner would consider it feasible that this level of interest in the proposals would mean that individuals might seek to obtain information independently.
31. Therefore the Commissioner considers that the complainant is less likely than not to have directed, incited or encouraged other individuals to cause a burden to the Council's resources by submitting requests for information. This means that the burden to the Council will be viewed as seven requests rather than 31.
32. The Commissioner does not consider that the seven requests represent a burden to the Council to the extent that the requests could be described as a manifestly unjustified, inappropriate or improper use of a formal procedure. Whilst it is a significant number of requests and close

to representing a significant burden, in this instance the Commissioner does not view the burden as being enough to view the requests as vexatious.

33. The Commissioner decision is that the requests are not vexatious. This being the case the Commissioner does not need to consider the public interest test required under regulation 12(4)(b).
34. In order for the Council to meet its statutory obligations it needs to issue a new response to the three refused requests which comply with the Act and the EIR.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

36. 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.
37. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Alexander Ganotis
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex 1

The Commissioner has included the seven requests that were cited by the Council as evidence. Only requests 5 – 7 were refused under section 12 and 14 of the Act and regulation 12(4)(b) of the EIR.

1. Sent to the Council on 7 October 2013:

I am writing to formally request the full and transparent details of the following:-

- The name and the position of Stockton Borough Councils designated LLP member, noted as the Managing Director of Spark of Genius North East LLP.*
- Any Committees that this person is a member or lay member of and whether this is a voting membership or non voting, or chair position.*
- The agendas, minutes and supporting papers for any meetings attended by this individual in the period September 2012 to date.*

2. Sent to the Council on 10 October 2013:

I am formally writing to request the full and transparent details of the following:-

- The selection process followed by Stockton on Tees Borough Council in engaging with your LLP partner, 'Spark of Genius' including any advertising with OJEU, the relevant dates and specification details for this contract.*
- The number of, unsuccessful tenderers, and the company name and address of any unsuccessful tenderers for the contract,*

3. Sent to the Council on 12 October 2013:

I am formally writing to request the full and transparent details of the following:-

- The name of the organisation or individual who made the payment and the value of this payment for the application fee for the change of use from dwelling house (Use Class C3) to a children's home (Use Class C2) ref. 13/2480/COU.*
- The date this payment was made and received by Stockton Borough Council.*

4. Sent to the Council on 3 November 2013:

Under the FOI act 2000, I would like to request agendas, minutes and supporting papers for the board meeting of Spark of Genius LLP, for the period March 2013 to date.

5. Sent to the Council on 3 November 2013:

Under the Freedom of Information Act 2000, I would like to request the documented justification for the selection of 'Spark of Genius' as the successful supplier for the Tender for the education & 52week residential provision for children and young people with behaviour, social and emotional difficulties. ref. SBC 1023.

6. Sent to the Council on 6 November 2013:

Under the Freedom of Information Act 2000, I would be grateful if you could provide to me the partnership agreement document, for Spark of Genius North East LLP.

I would also be grateful if you could include with this any financial contributions relating to this LLP and who these came from, the value and the date of the payment(s). Finally I would like an indication of which of the 12 members of this board have a majority interest (or vote) in the LLP or if the weighting is distributed equally between all twelve members.

7. Sent to the Council on 6 November 2013:

I would like to request, under the Freedom of Information act 2000, the details of the formal valuation of the property known as 'Fairview' located in the village of Thorpe Thewles.

I would like the details to consist of:

- Date of valuation;*
- Valuation in GBP £s;*
- The name of the organisation or individual who undertook the valuation;*