

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 July 2016

Public Authority: City of Wolverhampton Council
Address: Civic Centre
St. Peters Square
Wolverhampton
West Midlands
WV1 1SH

Decision (including any steps ordered)

1. The complainant made requests for information relating to private equity funds. The City of Wolverhampton Council (the Council) refused to comply with the request as vexatious under section 14(1) of the FOIA. The Commissioner's decision is that the request was not vexatious and so the Council has incorrectly relied on the vexatious provision at section 14(1) of the FOIA. The Commissioner requires the Council to provide to the complainant a fresh response to his request that does not rely on section 14(1).

Request and response

2. On 7 December 2015 the complainant made a request under the FOIA about the West Midlands Pension Fund (WMPF) for:

*'Please provide the information as requested in the table below (Appendix B) for all of the private equity funds listed in Appendix A **on a quarterly basis** from inception to the most recently available quarter.*

Please provide this information to me in the form of an excel table. Template listed below (Appendix B).

Appendix A

*Carlyle Europe Partners IV
Corpfin Capital Fund III, L.P.
ECI 8, L.P.*

ECI 9
Exponent PEP II
Graphite Capital Partners VII
IK VII
Astorg IV

Appendix B

All in original currency of each respective fund

<i>Fund name</i>	<i>Commitment</i>	<i>Contributed since inception</i>	<i>Unfunded (remaining commitment)</i>	<i>Distributed since inception</i>	<i>NAV</i>	<i>Reference Quarter (date)</i>

- The Council responded on 6 January 2016 stating that it considered the request to be vexatious and therefore covered by section 14(1) of the FOIA. It also explained that to perform its public task, the information was created annually not quarterly as requested. The Council also advised that in the future the WMPF Fund will publish information quarterly on its website. (This would not include historical material)
- The complainant requested an internal review on 6 January 2016. He argued that it was nearly one year since the Council had been trying to deny disclosure:

'Over the course of this time these are snippets from the responses you have provided:

10th February 2015:

"Section 43"

22nd April 2015

Therefore we are applying Section 12 ...

26th May 2015

These Fees Regulations... it allows all citizens a minimum free level of £450, equating to roughly 16 hours of time in the present case...

My request has moved a great deal during the year, progressively becoming more and more narrow and focused. ..., my request has been carefully narrowed precisely to ensure that you are not expending more effort on this than that stipulated by the Fees Regulations.

- The Council provided the outcome of its review on 25 February 2016 and refused to provide the requested information:

'The Council has considered your various requests made during 2015 and has provided certain information, while also applying certain reasons to refuse, namely the provisions of Section 12 of the Act relating to cost of compliance, Section 14 (1) Vexatious requests and the exemption contained at Section 43 (2) relating to Commercial Interests

On review, I set aside the use of the provisions of Sections 12 and 43.

I am of the opinion that the provisions of Section 14 (1) are correct in that Section 14 (1) of the Act allows a public authority to refuse a request that it considers to be vexatious.'

6. The complainant wrote to the Commissioner on 26 February 2016 with 7 pages of background and arguments to support his complaint. In addition to the arguments above, the complainant provided:

'On 10th February 2015, WMPF agreed to provide all of the information on all of its 187 private equity funds subject to me paying them a considerable fee... £925.

This is a considerable amount of money which I was not willing to pay. Instead, given my legal background, I decided to utilise Regulation 3(3) of The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 which provides that a request that would incur costs of up to £450 is within the "appropriate limit" in the case of the WMPF and that cost shall be borne by the public body. I therefore significantly narrowed and split my request into smaller batches spread over time to make use of this.

I pause now to consider the economics. The WMPF, as at 10th February 2015, quoted me a price of £925 for 187 funds. That works out at approximately £5 per fund. However, when I declined to pay this amount and requested the fulfilment of my request up to the appropriate limit of £450, the WMPF then changed their estimate. They would provide information on just six funds. (Approximately £30 worth of work versus the £450 appropriate limit). Though this was grossly over their own initial estimates, I accepted this and decided to break down my request even further into batches of six funds and spread them over time. This would effectively work out at £30 of work every two months....

Quite simply, the request cannot be vexatious given that the same information would have been provided had a fee been paid....

I believe it is useful for the ICO to consider the £450 appropriate limit within each 60 day period something of a "Safe Harbour"....

all requests cause some degree of disruption and nuisance to public bodies.... Crucially, this splits the reasons for keeping data undisclosed from the costs of disclosing it. Thus, for data that ought to be disclosed and publicly available it is either the public body that pays (if the request is within the appropriate limit) or the requestor themselves....

In the present case, I am simply attempting to get the information by splitting my initial request into smaller batches and spreading them over time, and at all times staying within the Safe Harbour of the Fees Regulation. It cannot be the case that someone who is simply seeking to cost effectively manage his request is denied disclosure for this reason....

At that rate, it would have taken me over five years to gather all of the information for free...

In the present case, it is submitted that the request is not "disproportionate or unjustified" for the following reasons:

1. The WMPF previously agreed to fulfil the whole request on condition of payment of £925. This makes clear that the position of the WMPF is that this is about costs rather than whether the disclosure of the information is actually "unjustified".

2. I carefully narrowed my request to be within the Safe Harbour limit. Thus the implication is not that the legislature thought such requests were not disruptive but rather that the legislature has decided that small requests falling within the Safe Harbour are not a "disproportionate or unjustified" level of disruption.

Moreover, it is noted that the WMPF's position that this request is "vexatious" is inconsistent with the Fees Regulations. This is because this position renders me unable to rely upon my statutory right to narrow my request to fall within the appropriate limit and within the appropriate periods without fear of my requests being characterised as "vexatious"... requests within the Safe Harbour are typically an acceptable level of disruption and, indeed, ought not to incur any fees at all to the requestor.

... We regard it as beyond dispute that the information is "held".'

7. In conclusion, the complainant asked the Commissioner to order:

'1. The WMPF shall comply with the request of 7th December 2015 providing raw data if necessary; and

2. The WMPF shall re-estimate its costs on a per fund basis and set out a quote for the actual costs of the 7th December 2015 request to guide any future requests.'

Scope of the case

8. The Commissioner has examined the request and related correspondence from both the complainant and the Council. The Commissioner has considered the scope of the case to be whether the Council is entitled to rely on the vexatious provision at section 14(1) of the FOIA.

Reasons for decision

Section 14 – Vexatious requests

9. Section 14(1) of FOIA states that section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious. There is no public interest test.
10. The term “vexatious” is not defined in the FOIA. The Upper Tribunal considered the issue of vexatious requests in the case of the *Information Commissioner v Devon CC & Dransfield*¹. The Tribunal commented that vexatious could be defined as the “*manifestly unjustified, inappropriate or improper use of a formal procedure.*” The Tribunal’s definition clearly establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
11. The Upper Tribunal also found it instructive to assess the question of whether a request is truly vexatious by considering four broad issues: (1) the burden imposed by the request (on the public and its staff); (2) the motive of the requester; (3) the value or serious purpose of the request; and (4) any harassment or distress of and to staff. The Upper Tribunal did, however, also caution that these considerations were not meant to be exhaustive. Rather, it stressed the

“importance of adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests” (paragraph 45).

¹ GIA/3037/2011

12. In the Commissioner's view, the key question for public authorities to consider when determining if a request is vexatious is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
13. The Commissioner has identified a number of "indicators" which may be useful in identifying vexatious requests. These are set out in his published guidance on vexatious requests. (<https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>) The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of a case will need to be considered in reaching a judgement as to whether a request is vexatious.

Is the request a disproportionate burden on the public authority?

14. In this case, the complainant made a request on 13 January 2015 for detailed information on the WMPF's investments in 187 private equity funds. He explained that the purpose of this data:

'is to provide analysis for limited partners in private equity so that they can make informed decisions about how they manage their private equity portfolio. In short, the work we are doing is aimed at helping limited partners such as yourselves to better manage private equity investments. In due course, we would be happy to share back with you our research and analysis based on this data on an entirely complimentary basis.'

15. Since then, the Council received a number of similar requests on 17 March 2015, 22 April 2015, 26 May 2015, 29 June 2015, 27 July 2015, 6 October 2015 and the subject of this decision notice 7 December 2015.
16. The Council has confirmed to the complainant that WMPF only holds the historical information regarding Private Equity Funds in annual format. The Fund did not create such information on a quarterly basis as part of its public task:

'Any relevant historic information is therefore held at a granular level and requires significant input to prepare it.'

17. The Commissioner has considered his guidance on this matter (https://ico.org.uk/media/for-organisations/documents/1159/information_from_original_sources.pdf):

'Where it is possible to extract the information requested and present it in the form of a list or schedule, this does not amount to the creation of new information.'

'The complexity of the query made of an electronic database is not a factor to take into account in deciding whether or not information is held. All information held in electronic databases is held for the purposes of the FOIA. Any query that can be made of a database amounts to retrieval and extraction of information and not the creation of new information.'

18. Therefore, the Commissioner considers that the information is held. The WMPF may not have the historic quarterly information but does hold the raw data or 'building blocks' of the information.
19. Since the original requests for the quarterly historical information for all of the 187 funds were refused by the Council for cost reasons, the complainant refined his request into a number of smaller requests.
20. On 27 July 2015 he asked for the quarterly historical information for 6 funds. This was provided by the Council on 19 August 2015.
21. On 6 October 2015 he asked for the quarterly historical information for another 6 funds. This was provided by the Council on 1 December 2015.
22. The Commissioner notes that these requests were submitted to the Council 71 days apart and are therefore outside the 60 day limit provided by the Fees regulations.
23. On 7 December the complainant asked for the quarterly historical information for another 8 funds. This was refused by the Council as vexatious on 6 January 2016.
24. In his letters to the Council and the Commissioner (see paragraphs 4 and 6 above), the complainant has made it clear that he wishes to receive all the historical information on the 187 private equity funds but is not willing to pay the suggested fee of £925 in February 2015. He has therefore refined his original request into a number of smaller requests.
25. The Council also confirmed that, in terms of time and cost estimates, the costs previously cited to the complainant remain the same.
26. The Commissioner considers that the request of 7 December 2015 represents a continuation of the complainant's previous correspondence with, and requests to, the Council about similar matters.
27. The Commissioner estimates that, at 6 funds every 60 days, it will take 5 years to request the quarterly information for all of the 187 funds and if the cost of each request is just below the maximum of £450 (cost fee limit) then the estimated cost will be £14,000.

28. The Commissioner refers to his guidance on the costs involved in vexatious requests: <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

'It may apply section 14(1) where it can make a case that the amount of time required to review and prepare the information for disclosure would impose a grossly oppressive burden on the organisation.

However, we consider there to be a high threshold for refusing a request on such grounds. This means that an authority is most likely to have a viable case where:

- *The requester has asked for a substantial volume of information **AND***
 - *The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the ICO **AND***
 - *Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.'*
29. Therefore, although the Commissioner is sympathetic to the inevitable ongoing cost, the Commissioner is not convinced that the public authority has demonstrated that it meets this higher threshold and the Council does not fulfil all three requirements for a viable case that disclosure would impose a grossly oppressive burden.
30. This is consistent with the findings of the Upper Tribunal in *Craven vs The Information Commissioner and The Department of Energy and Climate Change* [2012] UKUT 442 (AAC), (28 January 2013):

'...if the public authority's principal reason (and especially where it is the sole reason) for wishing to reject the request concerns the projected costs of compliance, then as a matter of good practice serious consideration should be given to applying section 12 rather than section 14 in the FOIA context.' (paragraph 31)

**Is the request designed to cause disruption or annoyance?
Does it have the effect of harassing the public authority?**

31. The Commissioner considers that a requester is likely to be abusing the section 1 rights of the FOIA if he uses FOIA requests as a means to vent anger at a particular decision, or to harass and annoy the authority, for example by submitting a request for information which he knows to be futile. When assessing whether a request or the impact of dealing with it is justified and proportionate, it is helpful to assess the purpose and value of the request.

32. The FOIA is generally considered applicant blind, but this does not mean that a public authority may not take into account the wider context in which the request is made and any evidence the applicant has imparted about the purpose behind their request.
33. The Council judges that this request for historical quarterly figures is *'intended to cause a disruption to the West Midlands Pension Fund'*.

'Producing raw data for quarterly reports as the complainant requires would require interrogation of various third party software programs and resources that WMPF download relevant information from and its conversion into spreadsheet data.

To pull it off in its raw form would create a huge data set and would contain transactional and information not included in the request.'
34. The Commissioner accepts that transparency about the private equity funds for the West Midlands Pension Fund is of value to the general public and notes that the Council produced annual figures as part of its public task.
35. The complainant has stated that his purpose for the quarterly data is to provide *'analysis for limited partners'*.
36. The Council stated that these requests for historical quarterly data do not appear to serve a serious purpose in the interests of the wider public, but rather benefit a narrow private interest.
37. The Commissioner has considered the purpose and value of the request. He accepts that the request for historical quarterly information on the funds, where the annual figures have already been published for many years, will be of lesser interest to the wider public.
38. The Commissioner also notes that the Council, in response to this request, has advised that in the future the WMPF Fund will publish information quarterly on its website.
39. However, the Commissioner has considered all the evidence presented to him and is not convinced by the poor arguments of the public authority that the effect is to cause disruption or annoyance or intended to harass the staff at the Council.

The Commissioner's decision

40. Taking into consideration the findings of the Upper Tribunal that a holistic and broad approach should be taken in respect of section 14(1), the Commissioner has concluded that the Council was incorrect to find the request vexatious. He has balanced the purpose and value of the

request against the detrimental effect on the public authority and is satisfied that the request is not obsessive and does not have the effect of harassing the public authority.

Right of appeal

41. 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>

42. 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.
43. 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

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