

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 02 May 2017

Public Authority: Merseytravel

Address: Mann Island
PO Box 1976
Liverpool
L69 3HN

Decision (including any steps ordered)

1. The complainant made requests for information relating to the funding of the Mersey tunnel. Merseytravel refused the request as vexatious under section 14(1) and during the Commissioner's investigation cited section 14(2) of the FOIA to the second part of the request. The Commissioner's decision is that Merseytravel has correctly applied the vexatious provision at section 14(1) of the FOIA to the whole of the request but has incorrectly applied 14(2) of the FOIA to the second part of the request. She does not require any steps to be taken.

Request and response

2. On 27 June 2016 the complainant made a request under the FOIA:

'MTUA2016B - Audit of LCRCA accounts for 2014-15

As the authority will be aware I made an objection to the authority's accounts for 2014-15.

In dealing with my objection the auditors at KPMG have said various things which I do not agree with or which I believe to be incorrect. I am now requesting information with regard to two points.

1. *The auditors have said (paragraph 2 on page 3 of KPMG letter of 22 December 2015) that the Tunnels losses of £28m "were financed by loans taken out by Merseyside Integrated Transport Authority from the Public Works Loan Board". I do not believe that there were any such*

loans but assuming that your auditor is correct and such loans do exist then can you supply us with whatever information you have on these loans.

2. The auditors in another letter say that it was arranged that the 'debt' be repaid in instalments with interest and that this "arrangement was agreed with the Treasurers of the five District Councils" (third paragraph on page 8 of KPMG letter of 3 May 2016), and also say (in the last paragraph on the same page) when referring to the change in the 'fixed' rate of interest, to "the amount of interest agreed with the District Councils". I do not believe that there were any arrangements agreed with the Treasurers of the five District Councils nor do I believe that the interest and the changes to it were agreed by the District Councils, but assuming that your auditor is correct then can you supply us with whatever information you have on the agreement of the five Treasurers to the arrangement and on the agreement of the District Councils to the interest and the changes to the 'fixed' interest rate.'

3. There followed some correspondence to clarify the breadth of the request.
4. On 18 August 2016 Merseytravel refused the request citing section 14(1) (vexatious request):

'Applying the tests in relation to these requests it is my conclusion that the requests are not valid requests under the Act, they are vexatious in nature. I come to this conclusion given that they seek to further /reopen issues that have recently (at your specific request) been comprehensively reviewed by external audit.

In your first email you clearly advise that you do not agree with the Auditors determinations. Therefore I reiterate as advised by the Auditors the remedy is to seek redress via the courts.'

5. The complainant requested an internal review on 1 September 2016 and made 8 points.
6. Merseytravel provided the outcome of its review on 27 September upholding its position and addressing the 8 points.

Scope of the case

7. The complainant contacted the Commissioner on 18 October 2016 to complain about the way his request for information had been handled and the case was accepted on 21 November 2016.

8. During the course of the Commissioner's investigation, Merseytravel also cited section 14(2), repeated request, to the second part of the requested information.
9. The Commissioner has examined the request and related correspondence from both the complainant and Merseytravel. The Commissioner has considered the scope of the case to be whether Merseytravel is entitled to rely on the vexatious provision at sections 14(2) to question 2 of the request and 14(1) of the FOIA to the whole of the request.

Background

10. Although the request refers to the accounts of the Liverpool City Region Combined Authority (LCRCA) the Commissioner has been advised that it is Merseytravel that operates the Mersey Tunnels on behalf of LCRCA; it is Merseytravel that conducts all finance-related operations and actions FOIA requests.
11. In a previous decision notice [FS50608471](#), the Commissioner accepted that Merseytravel was the appropriate authority to respond to the request. (see paragraphs 11-18)
12. The Mersey tunnels are not part of the national highways infrastructure and are funded independently. The complainant has requested information on the level and legality of tolls for tunnel users and the uses to which that toll income is used.
13. Question 1 of the FOIA request refers to page 3 of the provisional findings and views of the auditors dated 22 December 2015 in response to the complainant's objections to the statement of accounts for 2014/15:

'The Mersey Tunnels are now profitable but for a number of years in the 1980s and 1990s they were operating at a loss. These losses amounted to around £28m and were absorbed by the Authority's predecessor body, Merseyside Integrated Transport Authority. They were financed by loans taken out by Merseyside Integrated Transport Authority from the public Works loan Board.'
14. Question 2 of the request refers to page 8 of the auditors' updated provisional view dated 31 May 2016 in response to the complainant's objections to the statement of accounts for 2014/15. The updated

findings and decision were based on the complainant's written comments and representations:

'[complainant's name redacted] has queried the inclusion of interest in relation to the levy repayment. The Authority stated in 2003 that "Clearly it was not feasible to refund the debt in full immediately, so repayments were arranged in instalments with interest. The arrangement was agreed with the Treasurers of the five District Councils". The rate of interest and repayment period were subject to change between 1994/95 and 2001/02 but the period was set at 20 years in 2001/02 along with an interest rate of 9%.'

'[complainant's name redacted] also argues in his objection that it was unlawful for the rates of interest to change when they had previously been fixed.'

15. The auditors KPMG investigated both the matter and the accounts finding that the objection was without merit and that no application would be made to the court to declare that the payment was illegal. The statutory right to appeal against the auditors' decision was not taken by the complainant.

Reasons for decision

Section 14 – Vexatious requests

16. 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.

17. Section 14(2) of the Act states that

"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 for that person unless a reasonable interval has elapsed between compliance with a previous request and the making of the current request".

18. Merseytravel has cited section 14(2), repeated requests, for the second part of the request and this will be considered by the Commissioner first.

Section 14(2) – Repeated requests

19. Requests can be refused on the basis of section 14(2) if:

- It is made by the same person as a previous request;
- It is identical or substantially similar to the previous request; and
- No reasonable interval has elapsed since the previous request.

20. The Commissioner has therefore considered each of these aspects in turn.

Are the requests made by the same person?

21. The Commissioner notes that the request is made by the same person.

Is the request identical or substantially similar to the previous requests?

22. The Commissioner considers that a request will be substantially similar to a previous request if a public authority would need to disclose substantially similar information to respond to the request, even if the wording of the request is not identical.
23. Merseytravel have argued that question 2 of this request, *'whatever information you have on the agreement of the five Treasurers to the arrangement and on the agreement of the District Councils to the interest and the changes to the 'fixed' interest rate'* is similar to the request from 15 January 2005 *'to see all reports, agendas and minutes relating to the loan'*.
24. Although much information was provided at the time, the previous request concluded with the Information Tribunal appeal EA/2007/0052 on 15 February 2008. The Tribunal decision goes into considerable detail on the background to the funding of the tunnels including the legal advice in 1994 on the decision to consider the repayments as 'loans' from the district councils. It found that the legal advice (withheld by Merseytravel) should be released to the complainant.
25. The complainant argued that the previous request made no *'mention of "whatever information you have on the agreement of the five Treasurers to the arrangement and on the agreement of the District Councils to the interest and the changes to the 'fixed' interest rate."...the 2007 [tribunal] decision was that one document...should be released...and the document makes no mention of these arrangements with Treasurers or arrangements with District Councils'*.
26. The Commissioner has considered the previous request and the detail in the Tribunal decision and finds that although the wording of the previous request is different from this request the information requested can be considered to be substantially covering the same area as both seek the historic agreement on the loan repayment arrangements with the five

local authority district treasurers. The Tribunal noted that the legal opinion

'is still relied on as the justification for treating the original levy on the district councils as a loan, which must now be repaid: the opinion is still instrumental in the annual repayments of £3.6 million, continuing to 2014/15.'

Has a reasonable interval elapsed since the previous request?

27. What constitutes a reasonable interval will depend on the circumstances of the case including how likely the information is to change, how often records are updated and any advice previously given to the requester.
28. In this case, the interval between the requests is 11 years and the interval from the outcome of the first request (the tribunal decision in 2008) to the second request is 8 years.
29. Merseytravel consider that the length of the interval is immaterial as in both cases the complainant is seeking information relating to the decision on how to fund the losses of the tunnels from 1988-1992. The historic information from the early 1990s is not recent, but *'would not have been likely to change'*.
30. The complainant has argued that the current request is in the *'context of what the auditors had said in their letter of 31 May 2016. The auditors are relatively new and what they said could only have come from information that the Combined Authority had recently supplied to the auditors. We have not seen that information and that is why we made the June 2016 request.'*
31. The Commissioner understands that the complainant is seeking the information supplied to the auditors in 2015 and 2016. She is not convinced that this is necessarily new information as it appears to be substantially covering the historic agreement on the loan repayment arrangements from the 1990's which was provided to the complainant in 2005 and 2008. However, given the 11 year gap between the requests the Commissioner is not satisfied that whatever was eventually provided in response to the original request would have satisfied the terms of this fresh request.
32. Taking into consideration the above, the Commissioner's decision is that Merseytravel incorrectly applied the exemption for repeated requests at section 14(2) of the FOIA to the second part of the request.

Section 14(1) Vexatious requests

33. Merseytravel has cited section 14(1) to both parts of the request and this will be considered by the Commissioner here.
34. 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.
35. 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).
36. 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.
37. The Commissioner has identified a number of "indicators" which may be useful in identifying vexatious requests. These are set out in her published guidance on vexatious requests². 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

¹ GIA/3037/2011

² <https://ico.org.uk/media/1198/dealing-with-vexatious-requests.pdf>

considered in reaching a judgement as to whether a request is vexatious.

38. Merserytravel considered that the request, in isolation, is a fairly routine request but given the history of requests any response provided would lead to further requests and this impact would be unjustified or disproportionate in relation to its inherent value.

Is the request obsessive?

39. The Commissioner would characterise an obsessive request as one where the requester is attempting to reopen an issue which has already been comprehensively addressed by the public authority, or otherwise subjected to some form of independent scrutiny.
40. In the Commissioner's view, the test to apply here is reasonableness. Would a reasonable person describe the request as obsessive in the circumstances? For example, the Commissioner considers that although a request in isolation may not be vexatious, if it is the latest in a long series of overlapping requests or other correspondence then it may form part of a wider pattern of behaviour that makes it vexatious.
41. The Commissioner accepts that at times there is a fine line between obsession and persistence and although each case is determined on its own facts, the Commissioner considers that an obsessive request can be most easily identified where a complainant continues with the request(s) despite being in possession of other independent evidence on the same issue. However, the Commissioner also considers that a request may still be obsessive even without the presence of independent evidence.
42. The Commissioner considers that this particular request represents a continuation of the complainant's previous correspondence with the auditors about his objections to the statement of accounts for 2014/15.
43. The auditor provided a provisional view in December 2015 and after considering the complainant's written comments and representations published an updated findings and decision in May 2016. The complainant had a statutory opportunity to further appeal the findings of the auditor but did not do so.
44. Merseytravel has stated that
- what value there may have been to the public in the requested information has been more than adequately satisfied by the findings of KPMG. It would appear by making this enquiry that the requester is attempting to audit the work of the auditor despite

the fact that auditors are required by the National Fraud Office's Code of Audit Practice to 'carry out their work with integrity, objectivity and independence' (1.8). This displays an unreasonable level of intransigence and a disregard for the appropriate avenues for pursuing their concerns, which would have been through the court.

45. The complainant argues that he has

- ... certainly been persistent over the last thirteen years. If we had not then we, the public and even some authority members may not have know the real situation on various matters. It is for this reason that there is a Freedom of Information Act. ... Where we have been persistent we do not believe that it has at any time been unreasonable. This particular request does arise because of what the auditors told me, but it relates to information that if it exists we should probably have been given in answer to previous information requests about the "debt" and the £66 million of charges.

46. The Commissioner has taken into account the context and background to the request and considers that this particular request is an attempt to reopen an issue that has been the subject of independent scrutiny. The complainant's persistence has reached the stage where it could reasonably be described as obsessive. The request is pursuing a dispute which has already been resolved effectively by the auditor in an independent forum.

Does it have the effect of harassing the public authority?

47. 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.

48. 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.

49. The Commissioner notes that the complainant is part of a tunnel user group that has campaigned for many years to oppose the Mersey Tunnels tolls. The Commissioner notes that there is a history of requests

to the authority, complaints to the Commissioner and an appeal to the First-tier Tribunal (see paragraphs 24-26 above).

50. Merseytravel have stated that the complainant has submitted a total of 22 requests to Merseytravel on the subject of the Mersey Tunnels since January 2013 (the earliest electronic record still held): of these, 14 either resulted in one or more follow-up enquiries, while five resulted in a complaint to the Information Commissioner.

- It is, in our opinion, reasonable at this stage to expect that any response provided will simply lead to further requests.
- Despite all of the information that has been provided, either by Merseytravel over the years (including as part of ICO Decision Notice FS50549575 and Information Tribunal appeal EA/2007/0052) or by independent auditors in response to his objections, [name of complainant and campaign group redacted] remain entrenched in their view that the current tolling arrangements are illegal and that the tolls should be removed altogether. In this request [name of complainant redacted] even goes as far as to state 'I do not believe that there were any such loans [to subsidise losses in Tunnels income]' and 'I do not believe that there were any arrangements agreed [with the Treasurers of the District Councils]'. This level of intransigence is symptomatic of [name of complainant redacted]'s relationship with the authority.

51. The complainant has argued that

- Though we are usually critical of the authority in any public statements that we make, we dispute that this or any other information request is "tendentious" or in any way intended to abuse or harangue the authority. We make information requests so that we can understand what is going on and are in a position to counter or query the various statements that the Combined Authority make in public about the Tunnels.
- it was possible that our previous information and understanding was wrong and the authority could easily demonstrate that we were wrong by supplying us with the requested information.
- we do not believe that our request was "vexatious" and our request only arose because letters to us from the auditors indicated that there might be information that we were otherwise not aware of.

- this debt issue goes back to long before [name of campaign group redacted] was formed in 2003 but over the last 13 years we had gradually got what we thought was an almost complete understanding of what had happened; we need the requested information so that we can see if our understanding was wrong or whether what their auditor told us was not correct.
 - We believe that there is a public interest in this information and that what KPMG did or whether there is no "fault" is not relevant to the law on Freedom of Information. As we pointed out there have been £66 million worth of charges in respect of this "debt" that have come out of the tolls paid by our members and other users of the Tunnels.
52. The Commissioner has considered the purpose of this request in the context of the other correspondence and all of the evidence presented to her and finds that there is sufficient to suggest that the two parts of the request were vexatious in that they were designed to continue to dispute a particular historical decision with the effect of causing disruption and harassment to the authority.

The Commissioner's decision

53. The Commissioner has considered both Merseytravel's arguments and the complainant's position regarding the information request. Taking into consideration the findings of the Upper Tribunal in Dransfield that a holistic and broad approach should be taken in respect of section 14(1), the Commissioner has concluded that Merseytravel was correct to find the request vexatious. She has balanced the purpose and value of the request against the detrimental effect on the public authority and is satisfied that the request is obsessive and has the effect of harassing the public authority. Accordingly, the Commissioner finds that section 14(1) has been applied appropriately in this instance.

Right of appeal

54. 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>

55. 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.
56. 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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