

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 December 2020

Public Authority: Torbay Council

Address: Castle Circus

Torquay

Devon

TQ1 3DR

Decision (including any steps ordered)

1. The complainant submitted to Torbay Council (the Council) a request for information in four parts focused on the Council's decision to change its logo. The Council stated that:
 - it did not hold information in relation to two parts of the request; and
 - one part of the request was considered to be vexatious relying on section 14(1) of FOIA;
2. The Commissioner's decision is that, on the balance of probabilities, the Council was correct when it stated that it held no further information within the scope of the first and the third parts of the request. However, the Commissioner found that the Council failed to demonstrate that the third part of the request is vexatious. Therefore, the Council was not entitled to refuse this part of the request under section 14(1) of the FOIA.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation:
 - Issue a fresh response to the third part of the request that does not rely on section 14(1).

4. The Council 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. On 14 February 2020, the complainant wrote to the Council and requested information of the following description:

"Under the Freedom of information act I request a copy of the research that proves the current / previous Torbay Council Logo was not fit for purpose. I also request copies of all documents and emails with in the council that relate to or are about the logo change.

The document I was linked to does not include information on any research that went in to the decision to change the logo. Please provide evidence and research to show that the previous/ current logo is 'Dated' and please explain what you mean by dated?

Please also explain why the logo was used on the letter you sent me when the into service date is 1 March 2020 and why the new logo was set up on web pages prior to the decision at the council meeting?"

6. The Council provided the complainant with a response on 2 March 2020. It divided the complainant's request into 4 (four parts) and responded in that order:

- To the first part, about the research which proves that the Council's logo was not fit for purpose - it stated that it did not hold information in recorded form, but provided the complainant with a link to materials discussed in the Council's meeting of 4 February 2020, in which the issue of the Council's visual identity was raised.
- To the second part, about the copies of emails and documents relating to the change of the Council's logo - it refused to comply with the complainant's request because it considered that part of the request to be vexatious, citing section 14(1) of the FOIA as its basis for this refusal.
- To the third part, about the research that may have been conducted to proceed with the decision to change the logo - it provided the same response as in relation to the first part. That is, it did not hold information requested in recorded form as formulated in the complainant's request, indicating that any

information related to this matter would be found in the provided link.

- To the fourth part, it stated that it did not consider it to be a request for recorded information, nevertheless it provided the complainant with an explanation.
7. Remaining dissatisfied with the Council's response, on 7 April 2020 the complainant requested an internal review from the Council.
 8. The Council responded on 6 May 2020 and provided the complainant with the outcome of its internal review. It upheld the initial position, presented in its response of 2 March 2020.

Scope of the case

9. The complainant contacted the Commissioner on 14 May 2020 to complain about the way her request for information had been handled. She was dissatisfied with the amount of information provided and the Council's decision to consider one part of the request as vexatious.
10. During the course of her investigation, the Commissioner informed the complainant that this investigation would focus on three parts of the request, since she considered that the Council provided the explanation sought in the fourth part of the request. The complainant did not present any objection to the proposed scope of the investigation.
11. Therefore, the following analysis will determine whether the Council was correct:
 - when it stated that it did not hold further information in relation to the first and the third part of the request; and
 - when it applied section 14(1) of FOIA in relation to the second part of the request.

Reasons for decision

Section 1 – Determining whether further information is held in relation to part 1 and part 3 of the request

12. Section 1 of the FOIA states 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."*

13. The complainant disputes that the information that was disclosed is all the information that the Council held within the scope of the first part and the third part of the request.
14. In cases where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant's request.
15. The Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the Council to check whether the information is held and any other reasons offered by the Council to explain why the information is not held. In addition, she will consider any reason why it is inherently likely or unlikely that information is not held.
16. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.
17. As part of her investigation, the Commissioner wrote to the Council requesting a submission in respect of a number of questions relating to the allegations raised by the complainant. The Commissioner's questions were focused on the Council's endeavours in searching for the requested information, and whether any information falling within the scope of the requests was deleted or destroyed.
18. The Council stated that when the request was received, consultation was undertaken with the Head of Service for the Communications team who advised that there was no recorded information held as the Council had not undertaken any specific research in respect of the Council's visual identity.
19. The Council explained that the information in relation to part one and part three of the request was included in the link provided in the response to the complainant's request. The Council maintains that *"The documents available via the link set out that the Council's visual identity*

was 21 years old and no longer fit for purpose in the digital age and did not meet accessibility requirements."

20. The Council added that in a report made available through the link a supporting document stated *"under the question 'what evidence / data / research have you gathered in relation to this proposal?', 'not applicable'."*
21. The Council stated that as the complainant asked specifically for a copy of research and its Head of Service confirmed that no particular research was carried out, no further searches were undertaken in relation to these parts of the request.
22. Further, the Council stated that its *"retention schedule sets out that public consultation records should be destroyed 1 year from closure for minor policy matters, this closure being after a report has been published or a decision has been made."* However, according to the Council as it did not hold any information consisting of research for the necessity to change its logo, the relevant provisions of its retention period would not apply.
23. The Council stated that there is no statutory requirement to record information within the scope of these parts of the request.
24. The Commissioner has examined the submissions of both parties. She has considered the searches performed by the Council, the information it disclosed, the Council's explanations as to why there is no further information held and the complainant's concerns.
25. Having considered the scope of the request, the Commissioner is satisfied that the Council carried out necessary searches to identify the requested information that was held at the time of the request.
26. The Commissioner appreciates the complainant's concerns, however, she notes that those concerns were more focused on what information the Council should have been recording to demonstrate transparency of the process. In her submissions to the Commissioner, the complainant stated:

"I requested information about the process that went into the change of logo and the council refused to provide copies of emails and paperwork that demonstrate the investigation and research that went into the change of logo which is a big identity change for the council."
27. The Commissioner reiterates that as the regulator of FOIA, her investigation are limited only to the information held in recorded form. She cannot make any judgment about the type of information that public authorities should keep recorded or whether the recorded

information is accurate and complete. Similarly, she cannot make a judgment on the performance of a public authority.

28. In the absence of evidence to the contrary, the Commissioner is satisfied that the Council has provided the complainant with all of the relevant information which it held falling within the scope of the first and the third part of the request.
29. Therefore, the Commissioner is of the view that, on the balance of probabilities, the Council did not hold further information within the scope of these parts of the request.

Section 14(1) – vexatious request in relation to part 2 of the request

30. Section 14(1) of the FOIA states that a public authority is not obliged to comply with a request if the request is vexatious. The term “vexatious” is not itself defined in the legislation, but in *Information Commissioner v Devon County Council & Dransfield*¹ the Upper Tribunal commented that:

“The purpose of section 14... must be to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA.”

31. The Upper Tribunal concluded that “vexatious” could be defined as the:

“...manifestly unjustified, inappropriate or improper use of a formal procedure.”

32. In this case, the Council explained that the burden in preparing the response to this part of the information request, including identifying and redacting any exempt material, would be disproportionate in relation to its value.
33. In her letter to the Council the Commissioner explained her approach to investigating the application of section 14(1). She asked the Council to provide detailed representations in support of its position that the request in this case was vexatious. In line with her standard approach, she asked the Council to provide:

- details of the detrimental impact of complying with the request;

¹ UKUT 440 (AAC), 28 January 2013

- why this impact would be unjustified or disproportionate in relation to the request itself and its inherent purpose or value; and
 - if relevant, details of any wider context and history to the request if the Council believes that this background supports its application of section 14(1), including relevant documentary evidence to support such a claim.
34. The Council stated that it was established that the change of its visual identity and logo was necessary *"in order to ensure it was fit for purpose and allowed the Council to meet accessibility requirements, other than this there is no impact on the public from this decision."*
35. The Council maintained that in order to fulfil the complainant's request for *"copies of all documents and emails with in the council that relate to or are about the logo change"* it would have to conduct extensive searches that would impose a significant and disproportionate burden on its resources.
36. Normally, where the concern of a public authority is about the burden of a request, the relevant provision of the FOIA would be section 12. This section provides that a public authority is not obliged to comply with requests where the cost of doing so would exceed a set limit.
37. The Council stated that it could have applied section 12 as it believed that complying with this part of the request would have exceeded the fees regulation. However it decided to consider this part of the request as vexatious because it considered that complying with it would be a disproportionate burden in relation to its value.
38. The Commissioner's guidance on section 14(1) states at paragraph 70 that a public authority *"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."* The guidance goes on to state about situations of this kind *"...we consider there to be a high threshold for refusing a request on such grounds"* and that *"we would expect the authority to provide us with clear evidence to substantiate its claim that the request is grossly oppressive"*. In addition, it states that *"the bar for refusing a request as 'grossly oppressive' under section 14(1) is likely to be much higher than for a section 12 refusal."*
39. The Commissioner has considered the representations received from the complainant and the Council in order to understand to what extent the request would impose a burden.

40. The Council was asked to provide reasoning in support of its position. In its response, the Council explained that when it consulted its Head of Service for Communications, it was advised that there were at least 52 key personnel including elected representatives who may have been involved in this process. The Council added *"At the time of the request, the issue identified was that in conducting a search using the key word 'logo' within any one mailbox returns almost all email communication as we have a logo as part of our signatures. Therefore a search using the key word logo would return thousands of emails which would need to be reviewed manually to identify whether they fell within the scope of the request."*
41. The Commissioner reiterates that activities, such as opening emails to identify the information requested, extracting and saving in a separate location the identified information, removing out of scope information and assessing additional supporting information are activities that can be taken into account when forming a cost estimate in relation to citing section 12 of the FOIA. Whilst the burden of a request can be valid to the citing of section 14(1), as noted above the Commissioner applies a higher bar in this situation than for the citing of section 12.
42. The Council stated that when it decided to consider this part of the request as vexatious, as part of the wider context and background of the request, it took into account a previous request submitted by the same applicant on 6 February 2020. The Council stated that in that previous request, the complainant *"expressed her personal view that she did not agree the logo should be changed and that she did not like the new logo, nor did she agree we should be spending money on changing the logo."*
43. The Council considered that if it were to comply with the part of the request in question here, it *"would be grossly oppressive in terms of the resource and time required to identify the information which would fall within the scope of the request."*
44. The Council concluded that *"This significant and disproportionate burden on the Council and its staff would be for a request that has little or no value to our residents as the decision had been taken, scrutinised by elected representatives and would not change, especially as we had already published the costs associated with the change and the rationale for its change."*
45. The Commissioner appreciates the Council's concern that the complainant expressed a personal view, disagreement or dislike of a specific decision, which may suggest that the complainant would not be satisfied even if the Council had complied with her request. However, the Commissioner considers that having only one previous recorded

request by the same complainant is not sufficient to establish that other requests would follow.

46. Having considered the Council's arguments as summarised above, the Commissioner considers that they were construed more as arguments in support of the application of section 12 than section 14(1) of FOIA. As such the presented arguments were not sufficiently convincing to prove that this part of the request was vexatious as per section 14(1) of FOIA.
47. Therefore, the Commissioner finds that the Council has not demonstrated that compliance with the request would impose a grossly oppressive burden as elaborated in her published guidance on section 14(1). In conclusion, the Commissioner requires the Council to revisit the second part of the request and issue a fresh response to the complainant that does not rely on section 14(1).

Right of appeal

48. 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@justice.gov.uk

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

49. 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.
50. 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

Ben Tomes
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