

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 July 2015

Public Authority: London Borough of Hackney

Address: Hackney Town Hall
Mare Street
London
E8 1EA

Decision (including any steps ordered)

1. The complainant has requested to know what pre-prepared media statements London Borough of Hackney ("the Council") holds in the event that it is approached by the media for comment on particular matters. The Council refused the request, citing sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) (prejudice the effective conduct of public affairs) and section 14(1) (vexatious requests). The Commissioner's decision is that the Council is not entitled to rely upon the exemptions at section 36(2) to withhold the information and that it has failed to demonstrate that the request is vexatious.
2. The Commissioner requires the Council to disclose the requested information to the requester.
3. 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.

Background

4. The Council explained that "if asked" statements (or "reactive use" statements) are draft media statements which are prepared in advance of potential enquiries being received, to assist the Council to manage media enquiries and to respond promptly.

5. These statements represent the Council's position on issues at the point in time when they are prepared. Where media enquiries are received whilst the position is still current, the statements are released. Where no media enquiries are received, they are kept on the Council's press office system so as to provide future context on an issue for any officer viewing it. Often they will be superseded by other prepared statements as a particular issue develops or further details become known.

Request and response

6. On 17 January 2014 the complainant made the following request for information:

"Please send me all your 'if asked' media statements that were prepared for publication between September the 1st and December 31st of 2013. 'If asked' statements are those which are prepared for publication by the press office but then withheld unless someone in the press asks. Please send all statements whether they were actually released to the press or not."

7. The Council acknowledged receipt of the request the same day, quoting the text of the request in its acknowledgment.
8. It sent the complainant a refusal notice on 17 February 2014, citing section 36(2). The text of the request quoted in that notice was substantially different to the request submitted by the complainant.
9. Nevertheless, the complainant asked for an internal review of the decision on 13 March 2014. On 9 June 2014 the Council provided the internal review response, confirming its decision to refuse the request.

Scope of the case

10. The complainant contacted the Commissioner on 31 July 2014 to complain about the way her request for information had been handled. She disputed the application of section 36(2).
11. The Council introduced section 14(1) for the first time during the course of the Commissioner's investigation. Following the combined cases of the Home Office v Information Commissioner (GIA/2098/2010) and DEFRA v Information Commissioner (GIA/1694/2010) in the Upper Tribunal a public authority is able to raise a new exemption or exception either before the Commissioner or the First Tier Tribunal and both must consider any such new claims.

12. The Commissioner has therefore considered whether the Council is entitled to rely upon section 36(2)(b)(i),(ii) and 36(2)(c) to withhold the requested information or, in the event that it is not, whether the request is vexatious within the meaning of section 14(1).

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

13. The Council's refusal notice stated that section 36(2) applied, but it did not identify the relevant subsections. In its internal review, the Council stated that the relevant subsection was "2(i)", which does not exist. It clarified during the Commissioner's investigation that it was relying upon sections 36(2)(b)(i) and (ii), and 36(2)(c).

14. Section 36(2) FOIA provides that,

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

...

(b) would, or would be likely to, inhibit-

i. the free and frank provision of advice, or

ii. the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

15. To find that any part of section 36(2) of the FOIA is engaged, the Commissioner must be able to establish that a qualified person gave an opinion which found that the exemption applied, and that the opinion was reasonable. Therefore, when considering a claim that section 36 applies, the Information Commissioner must firstly be satisfied that the person who gave the opinion was entitled to act as the qualified person.
16. The qualified person is not chosen by the authority itself. Section 36(5)(a) to (n) defines who the qualified person is for a number of specific authorities. Subsection (o) permits that for public authorities not described in subsections (a) to (n), the qualified person may be designated by a Minister of the Crown.

17. Principal local authorities such as the Council are not described in subsections (a) to (n) and so under (o), the "qualified person" has been designated as a council's Monitoring Officer or its Chief Executive¹.
18. The Council provided a copy of the opinion, which was signed by its Corporate Director of Finance and Resources. When the Commissioner queried this, the Council conceded that he did not meet the requirements set out in section 36(5)(o) for being the Council's qualified person.
19. The Council subsequently provided a copy of an opinion signed by its Monitoring Officer, dated 8 January 2015. It stated that in the reasonable opinion of the qualified person, the information was exempt from disclosure by virtue of section 36(2)(b)(i), (ii) and 36(2)(c).
20. While the Commissioner accepts that the Council's Monitoring Officer is a qualified person for the purposes of section 36, clearly the time the opinion was given post-dates the time at which the decision to withhold the requested information was made.
21. However, as set out in paragraph 11, above, the Commissioner must consider the late application of an exemption during the investigative process. The Commissioner has therefore treated the Council's late introduction of a valid qualified person's opinion as though it was a late application of section 36 and he is satisfied that an opinion as to its engagement has been given by the appropriate qualified person.
22. Turning to whether the opinion was reasonable, the Commissioner's approach here is that an opinion must simply be objectively reasonable. This means that it must be an opinion that a reasonable person could hold and not necessarily the most reasonable or only reasonable opinion that could be held.
23. The qualified person's reasons for believing section 36(2) to be engaged are as follows:
 - Section 36(2)(b)(i): disclosure would be likely to inhibit staff when providing advice and exchanging views in future due to fear that

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<http://webarchive.nationalarchives.gov.uk/20100512160448/http://www.foi.gov.uk/guidance/exguide/sec36/annex-d.htm#part2>

background working information might be disclosed before a fully considered response is finalised, taking into consideration all relevant circumstances at the date of publication.

- Section 36(2)(b)(ii): disclosure would work directly against facilitating the free and frank exchange of views during discussions as it would inhibit officers from exploring ideas/options due to fear that such ideas/options might be disclosed.
 - Section 36(2)(c): it is likely that if the requested information were to be disclosed, Council resources would need to be diverted to respond to further requests for information in pursuing a line of enquiry identified from the requested information. The diversion of resources to deal with such requests would have a detrimental effect on the Council's ability to manage and deal with its workload.
24. When considering whether the qualified person's opinion was reasonable, the Commissioner has had particular regard to the content of the statements. They comprise seven very brief and broad outline responses on specific matters. Most contain quotes attributed to individual Council staff or representatives. Each statement is dated and the Commissioner notes that they were between 1 and 4 months old at the time the request was received. At the time they were prepared they represented what the Council was prepared to say publically about a variety of local matters, if asked.
25. With regard to sections 36(2)(b)(i) and 36(2)(b)(ii), the Council has advanced what amounts to a "chilling effect" argument. "Chilling effect" arguments are directly concerned with the argued loss of frankness and candour in debate or advice which, it is said, would lead to poorer quality advice and less well formulated policy and decisions.
26. The qualified person has implied that the press statements themselves are not a considered response. The Commissioner does not agree with this assessment of the statements. He considers that the press statements represent the Council's considered response, at the time they were prepared. They will have been drawn up carefully, in consultation with Council staff and representatives who are able to inform on the issues in question. The Commissioner accepts that the passage of time may have invalidated some of the contents and/or facts as presented in the statements, but this does not mean that they were not carefully considered responses.
27. Furthermore, the qualified person refers to "background working information" being disclosed in the statements, the disclosure of which would be likely to result in a chilling effect. However, the Council has not specified what this background working information is and the

Commissioner has not been able to identify it from reading the statements. Had the request asked for recorded information about the drafting process behind the press statements then the Commissioner accepts that this might reveal frank exchanges and advice by members of staff. As it is, the statements are very broad and offer little more than an acknowledgment in respect of the particular issues and the fact remains that the Council would, a few months earlier, have disclosed them. The Commissioner simply does not see how the disclosure of the statements themselves would lead staff to feel inhibited when acting in an advisory capacity. This is especially so given that relatively cursory searches of the internet have identified that much of the information contained in the statements is already in the public arena.

28. Taking all the above into account, the Commissioner considers that the qualified person's opinion is not reasonable and therefore that sections 36(2)(b)(i) and 36(2)(b)(ii) are not engaged.
29. Turning to the application of section 36(2)(c), the qualified person expressed the view that disclosure of the information would generate further FOIA requests on the subjects covered by the media statements, and that the Council would be required to divert resources in order to deal with them. This would have a detrimental impact on the Council's ability to manage its workload.
30. With the exception of the duty to provide advice and assistance at section 16, the FOIA only has effect in respect of requests for information which have already been made. The Council is not entitled to include speculation about the requests a particular requestor might make in the future, in a decision as to whether or not an existing request should be complied with. Any concerns about the burden caused by a particular request may be considered under section 12 (costs) or section 14 (vexatious requests) should such requests be received.
31. The Commissioner therefore considers that the qualified person's opinion is not reasonable and that section 36(2)(c) is not engaged.

Section 14 – vexatious requests

32. Section 14(1) of the FOIA states that section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.
33. The term "vexatious" is not defined in the FOIA. The Upper Tribunal considered the issue of vexatious requests in the case of Information

Commissioner v Devon CC & Dransfield (UKUT 440 (AAC), 28 January 2013)². 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.

34. In the Dransfield case, 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 authority and its staff); (2) the motive of the requester; (3) the value or serious purpose of the request; and (4) the 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 request.” (paragraph 45).

35. 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.
36. 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 requests³. 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.

² <http://www.ossccsc.gov.uk/Aspx/view.aspx?id=3680>

³ <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

Evidence from the parties

The complainant

37. Since the Council has not informed the complainant that it considered her request vexatious, she has not had the opportunity to respond to the claim. However, the Commissioner notes that the complainant works for a local newspaper, and that the requested information falls within the type of information that she might reasonably be expected to seek access to in the course of her work. The request is concise, polite and there is nothing to suggest that it forms part of a wider pattern of requests or correspondence between the complainant and the Council.

The Council

38. The Council referred to the Upper Tribunal's comments in the Dransfield case, specifically that the purpose of section 14 of the FOIA must be to protect the resources (in the broadest sense of that word) of the public authority from being squandered by disproportionate use of the FOIA⁴.
39. It further stated that all the circumstances need to be considered in reaching what is ultimately a value judgement as to whether the request is vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of the FOIA.
40. Finally, the Council referred to the Information Commissioner's own guidance on vexatious requests, which it said states that if a request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress then this will be a strong indicator that it is vexatious⁵.
41. The Council's position was that the request for information was essentially a fishing expedition. The request was not a request for information about a particular event or issue within or impacting on the Borough. Rather, it was a request for whatever information the Council had prepared during a specific three month period. As such, the Council said it had no value.

⁴ <http://www.osscc.gov.uk/Aspx/view.aspx?id=3680> paragraph 10

⁵ <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf> paragraph 39

42. The Council said that it often receives requests for information on specific issues from journalists and that the FOIA is often used to obtain information so that a genuine line of enquiry can be pursued. It recognised the public interest in such approaches. However, it said that this was the first time that the Council had received a request from a journalist with such a wide scope.
43. It said it considered that journalists have the capability to construct focussed, specific requests. It concluded that rather than following a genuine line of enquiry this request was cynically relying upon "pot luck" to reveal something which might be of journalistic interest.
44. The Council referred the Commissioner to paragraph 80 of his guidance on vexatious requests, stating that it supported the view that the request may be vexatious. Paragraph 80 sets out the Commissioner's view on "fishing expeditions" and states:

"Whilst fishing for information is not, in itself, enough to make a request vexatious, some requests may:

- *Impose a burden by obliging the authority to sift through a substantial volume of information to isolate and extract the relevant details;*
 - *Encompass information which is only of limited value because of the wide scope of the request;*
 - *Create a burden by requiring the authority to spend a considerable amount of time considering any exemptions and redactions;*
 - *Be part of a pattern of persistent fishing expeditions by the same requester."*
45. The Council conceded that it could not produce further evidence to substantiate its claim *"as this is the first time that a request of this kind has been received by it"*. However, it was satisfied that it would be likely that Council resources would need to be diverted to respond to further requests for information in pursuing a line of enquiry identified from the disclosed information. The Council therefore concluded that dealing with the request for information would require effort and resources from the Council which would be unjustified and disproportionate, and therefore that the request was vexatious.

The Commissioner

46. When reviewing the evidence and representations put to him, the Commissioner has had regard to his own guidance on vexatious requests and to the set of indicators he uses following the decision in Dransfield.
47. The Commissioner considers that the Council's position can be summarised as being that because the request is widely drawn, it has no obvious value; complying with it would involve unjustified and disproportionate effort, both in respect of the work involved in dealing with it and that involved in dealing with any future requests it might generate.

The value of the request

48. Section 1(1) of the FOIA establishes a right to information held by public authorities. There is no obligation on requestors to justify their requests in order for them to be considered valid. While the purpose of a particular request will sometimes be relevant when considering the issue of vexatiousness, the Commissioner expects that a public authority will either have taken steps to establish that purpose or have evidence to support its evaluation of it.
49. In this case, the Council appears to have merely assumed from the nature of the information requested that the request has no serious purpose. It has not asked the complainant why she has requested the information. There is apparently no wider history of dispute or correspondence with the complainant and the Council has freely stated that this is the first time that it has received such a request.
50. The Commissioner notes that the Council has been quite critical of the quality of the request, dismissing it as unfocussed and suggesting that it was not well-constructed enough for the Council to be expected to respond. Set against this is the fact that, in responding to the request, the Council's own refusal notice quoted the text of an entirely different information request to the one submitted by the complainant.
51. Although the Commissioner has drawn the Council's attention to this, it has not acknowledged or accounted for this apparent discrepancy. The Commissioner considers one possible explanation is that the Council copied and pasted its response from a similar request and failed to alter the particular details of the request. This further suggests that the Council failed to engage properly with the complainant's specific request and that it relied upon assumptions and templated arguments, rather than considering all the circumstances of the particular case.

52. Taking all the above into account the Commissioner places little weight on the Council's claim that the request is of "no value".

Disproportionate work and effort involved in complying with the request

53. As set out in paragraph 35 above, the key elements to consider here are whether complying with a person's access rights under the FOIA would involve disproportionate or unjustified levels of disruption, irritation or distress for the public authority.
54. The Council has not argued that compliance would involve irritation or distress. Its arguments appear to focus on the unwarranted disruption involved in complying with the request, and, by implication, the burden this would impose on it.
55. The withheld information comprises seven very brief statements, each of only a few lines. The Commissioner has therefore considered whether complying with the request could be described as likely to be unjustifiably disruptive to the Council's work.
56. Referring back to his own guidance, as quoted by the Council, the Commissioner does not accept that the work involved in complying with the request could be described by bullet points 1, 3 or 4 (bullet point 2 having been addressed at paragraphs 49 - 52, above). While there will always be resource implications when dealing with any request for information under the FOIA, it is far from evident in this case that significant resources would have to be diverted to deal with the request, or that the effort involved would be disproportionate to the value of the request. The withheld information is to hand, not voluminous and could be disclosed readily and inexpensively. The Council has only identified one other exemption as requiring consideration in the event that section 14 does not apply. And it does not face a wider burden from requests for this information, having admitted that it is the only one of its type that it has received.
57. In short, although the Council itself flagged up the need to take account of all the circumstances of the case when reaching a decision that complying with the request would involve disproportionate disruption, it has failed to do this. The disruption it has identified as being involved in complying with the request would appear to be minimal and, therefore, not disproportionate.
58. The Council's final argument was that if it complied with this request the complainant would be likely to use the information gained to make further requests, and that this would be burdensome.
59. As set out at paragraph 30, above, the Council is not entitled to include speculation about the requests a particular requestor might make in the

future, in a decision as to whether or not an existing request should be complied with.

60. Taking all the above into account the Commissioner places very little weight on the Council's claim that complying with the request would involve disproportionate or unjustified levels of disruption.
61. Having considered all the above points and having regard to the general public interest in transparency, the Commissioner is satisfied that the request is not vexatious and that the Council is not entitled to rely on section 14(1) to refuse to comply with it.

Other matters

62. The Information Commissioner expects that where a public authority offers an internal review, this should be conducted within 20 working days or, in exceptional circumstances, 40 working days.
63. In this case the review period was 58 working days. There does not appear to have been anything in the Council's internal review response to suggest that this case was exceptional (indeed, the internal review merely reiterated the original decision and failed to provide any additional analysis of the decision).
64. The Commissioner regards such delays as not conforming with the section 45 code of practice.

Right of appeal

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

66. 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.
67. 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

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