

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 24 August 2010

Public Authority: Fortismere School
Address: Tetherdown
Muswell Hill
N10 1NE

Summary

The complainant submitted a request to Fortismere School ('the School') for papers submitted to the Governing Body and correspondence between the headteacher and the Chair of Governors. The School disclosed some of the requested information and refused to provide the outstanding information under section 12 of the Act. The Commissioner's decision is that section 12 is not engaged. The Commissioner also found that Fortismere School has breached section 10(1) of the Act in failing to comply with section 1(1) within twenty working days following receipt of the request. The public authority must take the steps required within 35 calendar days of the date of this notice.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 31 March 2009, the complainant submitted a request for the following information:

"1. All papers submitted to the governing body on admissions policy between 1 September 2008 and 31 March 2009.

2. All correspondence, including emails, between the headteacher of Fortismere and the Chair of the Governing Body on the subject of admissions between 1 April 2008 and 31 March 2009.
 3. All notes, including hand-written notes, taken by the Clerk to the Governors at the Governing Body's meeting held in March 2009.
 4. All submissions received by the Governing Body as a response its consultation on the admissions arrangement for Fortismere School in 2010."
3. On 25 May 2009, the complainant wrote to the School chasing a response to his request. As he received no response, he submitted a complaint to the Information Commissioner's Office on 6 June 2009.
 4. Following the intervention of the Information Commissioner's Office, the School acknowledged the complainant's request on 14 June 2009. This letter was from the School's Chair of Governors who stated that he had only just seen the letter containing the complainant's original request.
 5. On 15 June 2009, the complainant contacted the School and stated that he was willing to simplify his request in the interests of securing a prompt response. The request was refined to include only requests 1 and 2 as reproduced in paragraph 2 above, i.e. papers submitted to the governing body on the subject of admissions, and correspondence between the headteacher and chair of governors on the same subject.
 6. On 22 June 2009, the School contacted the complainant and confirmed that it had located the requested information. It asked the complainant to indicate his willingness to pay a charge to cover the cost of photocopying and "administrative time".
 7. The complainant responded on the same day and asked that a formal fees notice be issued. He also requested that the information be made available in electronic form.
 8. On 13 July 2009, the School issued a formal refusal notice stating that it considered the complainant's request to be exempt under section 12 of the Act.

9. The complainant requested an internal review of this decision on 2 August 2009.
10. The outcome of this review was communicated to the complainant on 10 November 2009. The review was conducted by a parent governor, and upheld the decision to refuse the information under section 12 of the Act. It also recommended that advice and assistance be provided to the complainant in order to help him clarify his request so that it fell within the appropriate limit.
11. On 16 December 2009, the School invited the complainant to a meeting to discuss his request. He declined this invitation but specified three papers that he was particularly interested in receiving.
12. The School sent these three documents to the complainant on 14 January 2010.

The Investigation

Scope of the case

13. On 30 November 2009, the complainant contacted the Information Commissioner's Office to make a complaint about the way his request for information had been handled. The complainant specifically asked the Commissioner to investigate the School's assertion that the cost of providing the requested information would exceed the appropriate limit.

Chronology

14. On 9 February 2010, the Information Commissioner's Office wrote to the School and asked that it provide further details about how it calculated that to comply with the request would exceed the appropriate limit.
15. The School responded to these queries on 10 March 2010.
16. On 19 March 2010, the complainant contacted the Commissioner to explain that he was particularly interested in papers considered at meetings on three specific dates, and correspondence between the Chair of Governors and the Headteacher on the subject of "proposals to include selection by musical aptitude as a criterion in the schools oversubscription criteria". In the interests of seeking an informal

resolution, the complainant stated that he would consider his request satisfied if he could receive these documents.

17. The Commissioner contacted the School to determine if the it would be willing to comply with this request on 19 March 2010.
18. On 16 April, the Commissioner again contacted the School to determine if it would be willing to comply with the above offer. The School was informed that should no reply be received by 23 April, the Commissioner would assume that the School wished for the complaint to be considered on its original basis.
19. On 26 April, the Commissioner wrote to the School and explained that as no response had been received, he would proceed with the investigation of whether the provisions of section 12 had been applied correctly. The Commissioner asked the School further questions about how the estimated cost of complying with the request was calculated, particularly in the context of the original response to the complainant on 22 June 2009.
20. The Commissioner received the School's response to these queries on 30 April 2010.

Analysis

Procedural Requirements

Section 11

21. On 22 June 2009, the complainant requested that the information be made available to him in an electronic format. However, it is apparent that he did not specify at the time of making his initial request that he required the information to be communicated to him in a particular way. Although section 11 states that a public authority should consider the applicant's preference for the method by which the information is communicated, the public authority is only obliged to do so when this preference is expressed, "on making the application." As the complainant made no specific request at the outset, the Commissioner is of the view that section 11 cannot apply in this case and therefore the School is under no obligation to comply with complainant's subsequent requirements for information to be provided electronically.

Section 12

22. Section 12(1) states that the public authority is not required to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the 'appropriate limit'. The Commissioner notes that in this case the complainant has made more than one request within a single item of correspondence.
23. Section 12(4) of the Act provides that, in certain circumstances set out in the Statutory Instrument 2004 No. 3244 "The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004" ("the Fees Regulations"), requests can be aggregated so that the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them. Regulation 5 of the Fees Regulations sets out the relevant condition in this case and provides that multiple requests can be aggregated in circumstances where the two or more requests relate to any extent, to the same or similar information.
24. Although the above test is very broad, it is possible that one or more requests may not meet this test and the Commissioner has therefore considered whether the requests relate to the same or similar information. In this case, the Commissioner is satisfied that the requests relate to similar information as they both relate to the School's admissions policy.
25. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Regulations") provide that this cost limit for non central government public authorities is £450. This is calculated at the rate of £25 per person per hour, providing an effective time limit of 18 hours. If a public authority estimates that complying with a request would exceed 18 hours, or £450, section 12(1) allows that the request may be refused.
26. The School has argued that to comply with the complainant's request would take in excess of 20 hours. This would cost over £500 and therefore would exceed the appropriate limit.
27. The School has stated that "thousands" of files would need to be searched in order to locate the requested information. It also states that information may be held in a variety of formats, locations, and by different individuals.
28. The Commissioner notes that the initial response to the complainant's request, sent on 22 June 2009, stated "We have spent a considerable amount of time finding the information that you requested and are now

29. In its fees notice, the public authority included a charge for "administrative time", which included searching files and documents. In accordance with the Regulations a public authority can make no charge for these activities when issuing a fees notice although they may be taken into account when applying the appropriate limit under section 12.
30. Whilst the public authority is entitled to levy a charge under section 9 of the Act to cover disbursements such as the cost of photocopying and postage, it cannot include these activities in its calculation of the time taken when applying the appropriate limit under section 12. The time spent in printing emails, redacting confidential information, and photocopying documents can also not be included.
31. Regulation 4(3) provides that the following factors can be taken into account by a public authority when formulating a cost estimate:
 - determining whether it holds the information;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
32. In its response to the Commissioner of 16 March 2010, the School stated that in addition to locating the requested documents, it would need to "locate the relevant portion of any such document and extract this (without redacting or editing) in order to preserve the possible confidentiality within other sections of such documents". It reiterated in its letter received on 30 April 2010 that whilst it did not intend to redact information, it had included activities such as "checking for other non-relevant confidential information" in its estimate of the cost of complying with the request.
33. The Commissioner accepts that exempt or irrelevant information may be contained within these documents. The School has included the time it anticipates spending on extracting the relevant information within its

cost estimate. However, it is the Commissioner's view that to "extract" relevant portions of the documents would be analogous to redacting the irrelevant or exempt information.

34. The Commissioner's view is that redacting the exempt information cannot fall within the activities included in the fees regulations and therefore the time taken cannot be taken into account. He is supported by the Information Tribunal in *Jenkins v the Commissioner and Defra* ([EA/2006/0067](#)). The Tribunal addressed the issue of whether the words "extracting the information from a document containing it" include the redaction of exempt information containing it:

"The Tribunal agrees with the Commissioner that such an act of deletion, i.e. removal of what may be thought to be exempt material, even at the stage at which the exercise is carried out, cannot sensibly be viewed as coming within the provisions of Regulation 4(3)(d) as it is presently drafted."

35. The School states that the remaining work that would be necessary to comply with the remainder of the request would take in excess of eight hours. However, the School has included activities such as "ensuring all photocopies are dated" and "producing a covering letter summarising the contents" in this estimate. These activities cannot be taken into account in an estimate of the time taken to comply with the request.
36. The Commissioner notes that on 22 June 2009, the School indicated that the requested information had been located and was ready to be photocopied. These activities had taken a total of ten hours. Therefore, the Commissioner does not accept that to comply with the complainant's request would exceed the appropriate limit of 18 hours.
37. The Commissioner is therefore unable to accept the public authority's estimate as it takes into account activities which are not allowed by the Fees Regulations. It follows that the estimate is unreasonable and that the public authority has not applied section 12(1) correctly and it cannot rely on this exclusion for this information.

Section 16

38. Section 16(1) of the Act requires a public authority to provide reasonable advice and assistance to applicants. Section 16(2) outlines that any public authority which conforms with the Code of Practice issued under section 45 of the Act, is to be taken to comply with the duty imposed by section 16(1).

39. The Code of Practice outlines that, where an authority is not obliged to comply with a request for information because the cost of complying would exceed the "appropriate limit" (i.e. cost threshold), the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focusing their request, information may be able to be supplied for a lower or no fee.
40. In the Information Tribunal case of *Barber v The Information Commissioner* (EA/2005/0004) the Tribunal stated that it will generally be appropriate for the Commissioner to consider whether it was reasonable to expect a public authority to have provided more advice and assistance and, if had it done so, whether this might have had an impact upon how the request was handled.
41. The School's internal review of the handling of the complainant's request recommended that the complainant be offered appropriate advice and assistance in order to allow him to refine his request so that it could be dealt with within the appropriate limit. However, the School did not offer the complainant any such advice.
42. Although the Commissioner has concluded that section 12(1) does not apply in this case, he is also of the opinion that when the Council issued a refusal notice on this basis, it should have offered appropriate advice and assistance to the complaint on refining his request so that it could be dealt with within the appropriate limit.
43. Therefore, the Commissioner finds that the Council failed to conform to the Code of Practice, and, therefore breached section 16(1) of the Act.

Section 10

44. The Commissioner finds that the School has breached section 10(1) of the Act as it failed to comply with section 1(1)(a) within twenty working days following the date of receipt.

Section 17

45. The complainant submitted his original request for information on 31 March 2009. A refusal notice was not issued until 13 July 2009.
46. The Commissioner considers that the School has breached the requirements of section 17(5) by failing to issue a refusal notice informing the complainant of the exemption being relied upon to withhold the requested information within the statutory time for compliance.

The Decision

47. The Commissioner has found that the School incorrectly applied the exemption at section 12 to the requested information.
48. The Commissioner has also found that the School did not deal with the request for information in accordance with part 1 of the Act in that it breached the following provisions:
 - Section 16(1) for failing to provide reasonable advice and assistance to the complainant in refining his request
 - Section 17(5) for failing to issue a refusal notice within the statutory time limit.

Steps Required

49. The Commissioner requires that the School respond to the complainant's request by either disclosing the requested information or by issuing a valid refusal notice in accordance with section 17 of the Act.
50. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

51. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

52. 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
Arnhem House
31 Waterloo Way
Leicester
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is sent.

Dated the 24th day of August 2010

Signed

**Rachael Cragg
Group Manager Complaints Resolution**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides 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.”

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

Exemption where cost of compliance exceeds appropriate limit

Section 12(1) provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”