

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 February 2012

Public Authority: Derbyshire County Council

Address: County Hall
Bank Road
Matlock
Derbyshire
DE4 3AG

Decision (including any steps ordered)

1. The complainant requested information relating to SEN statements for post-16 education. The council refused to supply the information on the basis that the exclusion under section 12 relating to the £450 cost limit applied.
2. The Commissioner's decision is that Derbyshire County Council ("the council") correctly applied section 12 however it did not provide reasonable advice and assistance in accordance with its duty under section 16. The Commissioner also found that the council breached its duty under section 10(1) to respond within 20 working days to requests for information and state, in accordance with section 1(1)(a), whether the requested information is held.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide reasonable advice and assistance to the requester in line with the obligation under section 16 and guidance provided by the Code of Practice under section 45.
4. 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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 29 July 2011 the complainant requested information from the council in the following terms:

"Please give me details of how many statements of SEN failed to be amended by February 15th the deadline as stated in the code of practise for children transferring from primary to secondary school and also for post 16 provision.

I'd like details for the last five years please".

6. The council responded on 5 September 2011. It said that it could only provide the last four years of data and it had not kept data regarding post 16 statements.

7. On the same day, the complainant wrote to request an internal review. She said that she did not accept that no information had been kept regarding the post 16 statements. The complainant also said the following:

"You have a duty to break down the request so that I get as close an answer as is possible.

Therefore to make it simple for you I have broken it down for you

So first

a) How many post sixteen phrase transfer statements did you have?

b) please tell me the dates in order of when they were done".

8. On 4 November 2011, the council completed an internal review. It said that it now accepted that it held the information but it said that it would take longer than 18 hours work to provide the information and this would exceed the "appropriate limit" provided by section 12 of the FOIA.

9. The complainant replied on the same day. She said:

"If you could now explain why your latest response fails to make any mention of the statistics regarding post-16 statements from 2008/2009 and subsequent years which by your own admission you now have electronic records for.

I am more than willing to amend my request to no longer include the 2007/2008 information if that would make it easier for you to provide the details I do want from more recent years".

10. The council replied on the same day and said that it considered that it had provided an adequate explanation of its position and the complainant should contact the Commissioner if she wished to challenge the decision.

Scope of the case

11. The complainant contacted the Commissioner to complain about the way her request for information had been handled. She specifically asked the Commissioner to consider whether the council had correctly applied section 12 of the FOIA. The complainant also raised concerns about how long the council had taken to respond, its failure to state clearly whether the information was held within an appropriate timescale and its failure to keep her informed of any delays.

Reasons for decision

Exclusion: Section 12(1)

12. Section 12(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. In the case of this authority, this would be £450.
13. When considering whether section 12 applies, the authority can only take into account certain costs as set out in Statutory Instrument no 3244 "The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004". Paragraph 4(3) states the following:
14. "In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in –
 - (a) determining whether it holds the information
 - (b) locating the information, or a document which may contain the information
 - (c) retrieving the information, or a document which may contain the information and
 - (d) extracting the information from a document containing it.
15. When estimating the cost of a staff member carrying out the above activities, the costs are taken to be at a rate of £25 per hour which equates to 18 hours work.

16. The council's time estimate focused on the years 2007/8. It explained that the information requested is not held centrally and it would be necessary to look through at least 403 files as this was the number of pupils with a statement in year 12 at the time. It said that these pupils may or may not have continued in further education so the information may not even be held on a particular file. The council explained that the files can vary substantially in size and some pupils have more than one file. The council said that the information is filed chronologically however, for those young people who remained in further education, the information would be "buried within the file as a result of subsequent annual reviews and correspondence. The council said it estimated that it would take 10 minutes per file to locate and extract the information. The council said that even if its estimate per file was halved, it would still take over 33 hours. This is before adding on the time it would take to retrieve the files that had been sent to off-site storage.
17. Based on the above, the Commissioner accepts that in its current form, the request made would exceed the appropriate limit under section 12 of the FOIA.

Procedural Issues

Advice and assistance: Section 16

18. If a public authority wishes to maintain that section 12 is engaged, it then needs to consider its duty to provide advice and assistance under section 16 of the FOIA. The Code of Practice under section 45 of the FOIA states the following on the subject:

"Where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12, 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".
19. When the Commissioner contacted the council about the complaint, he explained to the council that it did not appear that consideration had been given to this part of the FOIA. The council responded and said that it considered that by disclosing the information relating to children transferring from primary to secondary school, it had satisfied its obligation to provide reasonable advice and assistance because section 12 "could" have been applied to the information that it disclosed.

20. The Commissioner does not agree with the council that it has adequately discharged its obligations under section 16 on this occasion. The council did not apply section 12 to the initial request made on 29 July 2011 in its entirety. It responded to part of the request without making any contact with the requester to explore section 12 of the FOIA and its obligations under 16. The only outstanding issue then became access to the post-16 information which is made clear by the complainant's correspondence to the council on 5 September 2011. This prompted the application of section 12 of the FOIA by the authority. It is the Commissioner's view that the council's consideration of what reasonable advice and assistance it could provide should then have focused solely on the post-16 information and this should have triggered appropriate engagement with the requester to explore what information it would be possible to provide within the appropriate limit or whether the request could be refined. The Commissioner notes that the complainant tried to instigate this dialogue following the internal review by offering to refine her request, in particular so that it does not include information from the earlier years which the council had said was not covered by electronic records. However, the council did not engage with the requester.
21. As the complainant had raised the prospect of refining the request so that it did not include the earlier years, the Commissioner asked the council to address the complainant's comments that she would be willing to refine her request to focus only on the later years. This refinement was offered because in its internal review the council had made comments that indicated that electronic records were held after 2008. When the council replied to the Commissioner, it still estimated that it would take about 10 minutes per file to locate and extract. The Commissioner notes that the council did not provide any explanation to the Commissioner as to why it had estimated that it would take the same amount of time to obtain the information from the electronic records as it would from paper files. The Commissioner considers that it is important that the council explains why this would be the case when it engages with the requester about her request. Even if the appropriate limit would still be exceeded using electronic records, it is the Commissioner's view that appropriate advice and assistance could still be provided to explore what information could be provided within the appropriate limit and whether any further refinement would assist.

Time to comply: Section 1 and section 10

22. The council took longer to respond than the statutory deadline of 20 working days provided by section 10. When it did respond, it failed to state in line with section 1(1)(a) that it held the information.

Other Matters

23. The Commissioner notes that the council took longer than 20 working days to respond to the request for an internal review. Although there is no statutory time limit for carrying out internal reviews under the FOIA, this is not good practice and is contrary to the Commissioner's published guidance at the following link:
http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/TIME_LIMITS_INTERNAL_REVIEWS.ashx
24. The Commissioner trusts that the council will make improvements in the time taken to handle requests in the future. As a matter of good practice, the council should also in future inform members of the public if there are going to be any delays in responding to a request for information or completing an internal review.

Right of appeal

25. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

26. 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.
27. 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

Andrew White
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