

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 18 July 2019

**Public Authority:** The Governing Body of Kendrick School  
**Address:** London Road  
Reading  
RG1 5BN

#### Decision (including any steps ordered)

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1. The complainant has requested the responses to two consultation exercises that Kendrick School (the School) had carried out. The School refused the request under section 14(1) on the basis that it was vexatious. At the internal review stage the School also applied section 12 to refuse the request on the basis that the cost of compliance would exceed the appropriate (cost) limit.
2. The Commissioner's decision is that the School is not entitled to rely on either section 12 or section 14 to refuse the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - To issue a fresh response to the complainant in accordance with its obligations under the FOIA, which does not rely on sections 12, or 14(1)
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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

#### Request and response

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5. On 21 January 2019 the complainant made a multipart request to the School in the following terms:

"Given the problems I have had in getting information from the leadership team I would like to request the following information from the school's governing body.

- Details of how Kendrick School discharged its legal obligations to consult with those groups listed in s1.44 of the Schools Admissions Code. For example, copies of press releases or the dates of any interviews with local television or radio news between Monday 10<sup>th</sup> December and Tuesday 22<sup>nd</sup> January 2019.
  - Copies of the responses to both the June and Christmas consultations from members of the public (suitably redacted), neighbouring local authorities, local schools and MPs.
  - Minutes of governors meetings in which the leadership team presented any information about the SSEF bid and consultation to governors."
6. On 8 February 2019 the School responded. It provided some information in respect of the consultations it had carried out as requested in the first part of the request.
  7. The School refused to provide the information captured by part two of this request, i.e. copies of the consultation responses it had received, under section 14(1) of FOIA on the basis that the resources which would be required to deal with this element of the request rendered it vexatious.
  8. The School did however provide the minutes of the governors' meetings as requested in the third part of the request.
  9. On 13 March 2019 the complainant requested an internal review of the School's use of section 14 to withhold the consultation responses. On 4 April 2019 the School informed the complainant of the outcome of the internal review. The School maintained its position that the request was vexatious on the grounds of burden. The School also advised the complainant that the request could also be refused under section 12 on the basis that complying with the request would exceed the appropriate (cost) limit.

### **Scope of the case**

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10. The complainant contacted the Commissioner on 8 April 2019 to complain about the way his request for information had been handled.
11. The Commissioner considers that the matters to be decided are whether the School is entitled to rely on either section 12 or section 14 to refuse

the second part of the request, i.e. that element of the request which sought the consultation responses.

## Reasons for decision

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### Section 12 – the appropriate limit

12. Section 12(1) of the FOIA states that a public authority is not required to comply with a request for information if the public authority estimates that the cost of doing so would exceed the appropriate limit.
13. The appropriate limit is a cost limit established by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 SI 2004 No 3244, commonly known as the Fees Regulations. For public authorities such as the School the appropriate limit is set at £450. Where costs relate to staff time, a public authority is only allowed to estimate the cost based on a charge of £25 per hour. Therefore an appropriate limit of £450 equates to 18 hours of staff time.
14. Furthermore a public authority is limited in respect of what activities it can take into account when estimating whether the appropriate limit would be exceeded. Under regulation 4(3) of the fees Regulations a public authority is only allowed to take account of the following activities:
  - determining whether the information is held,
  - locating the information, or a document containing it,
  - retrieving information, or a document containing it, and
  - extracting the information from a document.
15. From the fourth bullet point above it can be seen that the Fees Regulations do permit a public authority to take account of the cost of extracting information from a document containing it. However this relates to the work involved in extracting the entire body of information captured by a request from a larger document. It does not relate to the time it would take to separate information which a public authority wished to withhold under an exemption from that which it was prepared to release. Furthermore, a public authority cannot include the time it estimates would be taken to consider the application of any exemptions or identifying all the information captured by that exemption.
16. The Commissioner understands that there are 106 consultation responses captured by the request. The School has explained that it estimates it would take around 30 minutes to print off each of these responses and then redact any third party personal data under the

exemption provided by section 40 of the FOIA in order to avoid breaching the Data Protection Act 2018 (DPA18) and the General Data Protection Regulations (GDPR). This time is broken down into an initial examination of each document, taking 20 minutes per document, followed by a second check by another member of staff to ensure nothing had been missed. This would take a further 10 minutes per document. It is clear to the Commissioner that the School is describing the process of considering the exemptions, rather than the far more limited tasks that are allowed under the Fees Regulations.

17. In light of the above the Commissioner is not satisfied that the simple tasks set out in regulation 4(3) of the Fees Regulation, which, broadly speaking, are limited to identifying the consultation responses and collating them, would exceed the appropriate limit. The Commissioner finds that the School is not entitled to rely on section 12 to refuse the request.
18. As section 12 does not apply the Commissioner will now go on to look at whether the School can rely on section 14 to refuse the request.

#### **Section 14 – vexatious request**

19. Section 14 of the FOIA states that a public authority is not obliged to comply with a request for information if the request is vexatious.
20. When considering whether a request is vexatious the Commissioner considers that the key question is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. This approach can take account of the burden of complying with the request and if a public authority can demonstrate that complying with the request would impose a grossly oppressive burden the Commissioner would accept that the request is vexatious.
21. The Commissioner has already concluded that the School cannot rely on section 12 to refuse the request. This was because the School had mistakenly taken account of the time taken to consider the application of exemptions. However, the School still maintains that the cost of going through all the consultation responses it had received in order to identify any third party personal data and then consider whether that personal data should be redacted under the exemption provided by section 40 of the FOIA, would be excessive. It is these costs that the School believes renders compliance with the request grossly oppressive and it for this reason that the School has applied section 14.
22. The Commissioner considers there is a high threshold for refusing requests on the grounds that a request places a grossly oppressive burden on a public authority. She would expect the public authority to be able to show that the complainant has asked for a substantial volume of information, that the authority has real concerns about the

information potentially containing exempt information and that the exempt information cannot be easily isolated because it is scattered throughout the requested material. However each case must be considered on its own merits and the resources available to the public authority.

23. As already explained there are a total of 106 consultation responses, in the form of emails, which would need to be considered. The School is concerned that the responses will contain personal data which would have to be identified. The School would then need to consider whether that personal data would have to be redacted under section 40 of the FOIA before the rest of the consultation response was disclosed, in order to prevent a breach of the DPA18. It originally estimated that this process would take around 30 minutes per email. Therefore the total time taken to consider the application of section 40 would be 53 hours.
24. During the course of the Commissioner's investigation the School carried out a sampling exercise based on five consultation responses. It found that some emails took longer than the estimated 30 minutes as they had considerable content. Other emails took less time. Overall the School is satisfied that it would take between 45 and 50 hours to properly consider the application of section 40 of the FOIA.
25. The Commissioner has carefully considered the School's arguments. She is satisfied that the consultation responses would be likely to contain personal data which would be exempt under section 40. This point is also acknowledged by the complainant.
26. As part of her investigation the Commissioner asked the School to provide a representative sample of the consultation responses. The School provided a sample of 10 emails, each an individual response. Six of these ran a full page of A4, others were shorter, for example, a couple of paragraphs or half a page of A4. On the basis of this sample the School would need to look through around 106 pages of A4 in order to identify any third party personal data and consider whether it needs redacting. This may not be an insignificant amount of information, but equally the Commissioner does consider it could be described as being particularly voluminous.
27. The Commissioner has gone on to consider whether the personal data contained in the responses could be easily identified, for example, by virtue of being contained in the header of the email, or its sign off. If so, the task of applying section 40 would not be particularly burdensome.
28. When submitting his complaint to the Commissioner the complainant provided a copy of consultation responses that he had received in response to a request made to a different school in support of his argument that his request to Kendrick would not impose an oppressive

burden. There were around 55 responses to that consultation and the Commissioner notes that, very importantly, the majority of the responses were provided by completing a pro-forma. The pro-forma simply asked tick 'Yes' or 'No' to indicate whether the respondent was in favour of the proposal being considered, allowed them to identify their relationship to the school, for example parent of a current pupil, provided a limited free text box for any additional comments and had a box in which to enter the respondent's name, which was optional. The use of the pro-forma therefore allowed the personal data of the respondent to be very quickly identified and redacted.

29. The sample provided by the School are all individual emails, however there is a comment in one of those emails that the email is being sent only because there is not sufficient space to capture everything the respondent wishes to submit in the 'official box'. This suggests that some responses may have been made through an online pro-forma.
30. However, even if the Commissioner assumed all consultation responses were individual emails rather than conforming to some form of standard template, she finds it difficult to justify a claim that it would take 30 minutes to read each email, identify the personal data, consider whether it was exempt and, if so, to then redact that personal data. Having looked at the ten emails in the sample, they all contain the respondents' personal data in the email address in the header and the emails usually sign off with the respondent's name. Five of them (50%) do however contain a limited amount of personal data within the body of the email. Nevertheless the Commissioner does not consider that it would be particularly onerous to spot the personal data. A member of the Commissioner's staff went through the ten emails in around 20 minutes. Even allowing for the fact that the sample provided by the school already had the personal data marked up, the Commissioner is satisfied that she has gained a sufficient understanding of the complexity of the task facing the School. The Commissioner considers a far more realistic estimate is 3 minutes per email to initially identify any personal data. This would mean the task could be accomplished in 5 hours 20 minutes. Even if the School found it necessary to double check the emails, the Commissioner would be very reluctant to find that the task would take longer than 8 hours in total. In making these estimates the Commissioner has factored in the fact that her staff would be far more familiar with the issues raised by the task than perhaps the School's staff would be.
31. As the Commissioner is not satisfied that dealing with the request could be objectively described as imposing a grossly oppressive burden, the Commissioner is not satisfied the request can be deemed vexatious on this basis alone. In reaching this conclusion the Commissioner has taken into account the fact that the School has advised her of the limited resources that it has at its disposal for dealing with requests of

this nature. The work would fall to two members of staff; if dealing with the request had taken them away from their main functions for a significant period there would be grounds for considering the request imposed a grossly oppressive burden. However the Commissioner does not consider the School has demonstrated this would be the case.

### **Other grounds for arguing the request is vexatious**

32. During the Commissioner's investigation the School expanded its grounds for relying on section 14. Having read the Commissioner's guidance 'Dealing with vexatious requests (section 14)', it now argued that the request was not only vexatious on the basis of the burden that this particular request placed on the School, but that the request also had be viewed in the context of the complainant's past pattern of behaviour. In particular the School argued that its experience of dealing with his previous requests suggested that no matter what information he is provided with, he will not be satisfied and will continue to submit numerous follow up requests.
33. The Commissioner acknowledges that such a pattern of behaviour, if substantiated, would support an argument that the request was vexatious. The Commissioner has therefore gone on to look at the history and context of the request.
34. There has clearly been a considerable amount of correspondence between the School and complainant. The complainant himself has provided a large amount of that correspondence in support of his complaint. The School has identified 5 information requests that were made prior to the one which is the subject of this notice, the earliest is from November 2014, the remaining four being between January 2016 and November 2018. Therefore his request of 21 January 2019 was the fifth in two years. The Commissioner does not consider this in itself would necessarily indicate an obsessive or overly persistent pattern of request making. From the complainant's own submissions the Commissioner understands that at least two of the previous requests relate to proposed changes of the admissions policy or the related issue of the expansion of the school. However the Commissioner has not been made aware of the focus of the other requests.
35. The School has also argued that the complainant has a website which includes negative and inflammatory content about the School. The Commissioner has visited the website in question. It clearly campaigns for improved access to selective schools for pupils from disadvantaged backgrounds. The Commissioner considers this to be legitimate issues of public concern, in terms of increasing the educational opportunities for children from less advantaged backgrounds and in respect of scrutinizing government policy in this area and transparency of how public money is spent. The Commissioner recognises that the website is very critical of

the admissions policy adopted by the School. However she has not identified any content that could be described as inflammatory, even if some of the articles are very dismissive of the School.

36. The School has cited the fact that the complainant made a complaint about its admissions policy to the School Adjudicator in 2015. Although it has not expanded on this argument the Commissioner has conducted an internet search and identified one determination by the School Adjudicator from September 2015. The Commissioner notes this determination did not uphold the objector's complaint in that case. Having compared the actual determination with reports on the complainant's website, the Commissioner is satisfied that she has identified the one in question. However without any explanation from the School on how that determination addresses the complainant's current concerns, the Commissioner has not given this element of the School's argument any great weight.
37. The School has also argued that the complainant has continued to exhibit a pattern of behaviour that is indicative of the request being vexatious since making his request of the 21 January 2019. The Commissioner considers that a public authority can take account of anything that happens within the period in which it is dealing with the request (so long as that is no longer than the twenty working days allowed under the FOIA). However it is not entitled to take account of behaviour or correspondence received after that time. Therefore the Commissioner has disregarded some of the matters put forward by the School.
38. Between the request being made and the response on 8 February 2019 there was an exchange of correspondence between the complainant and the School. The request of 21 January 2019 was contained in a letter which focussed primarily on what the complainant considered to be the School's failure to consult on its plans to expand and its proposed admissions policy. The information requests could be seen as a genuine attempt to obtain information so that the complainant can better understand the School's position or allow an informed challenge to that position.
39. Following the School's acknowledgement of the request, the complainant wrote to the school on 31 January 2019 and, amongst other things, asked whether his email of the 21 January 2019 had been passed to all members of the board of governors. The complainant has identified this question as an information request. There then followed a flurry of email exchanges between the two parties that same day. The School responded that the chair of the governors had been made aware of his request. However the complainant's concern was not in respect of whether the governors knew of his information request, but whether they had had access to the arguments he had presented in that same

piece of correspondence regarding the consultation process. The School confirmed that his correspondence had been considered alongside other responses to the consultation exercise on the admissions policy, but did not explicitly answer his question regarding whether it had been circulated to all the governors. This prompted the complainant to clarify that he wanted a direct answer to his question regarding whether his email had been passed to all governors and he was then advised by the School that there was no precedent for consultation responses to be passed to all governors.

40. The Commissioner considers that the only sensible interpretation of this response was that the School confirmed that his email of 21 January 2019 had not been circulated to all governors. A sense of mounting frustration can be detected on the part of both sides to the correspondence. Later on the afternoon of the 31 January 2019 the complainant wrote directly to the chair of governors regarding the consultation process. His email concluded by asking a further seven questions, again the complainant considers these to be information requests under the FOIA. That would make a total of 8 requests submitted by the complainant over one single day.
41. It appears to the Commissioner that the School and the complainant were initially at cross-purposes. The Commissioner recognises that given the nature of the correspondence between the School and complainant, which was an ongoing dialogue, the School may not have recognised every question posed by the complainant to be an information request, and indeed the complainant's approach may have contributed to the difficulty the School had in addressing his concerns in a constructive manner. She can understand therefore that the School might feel the complainant was demonstrating unreasonable persistence in the way he pursued the School regarding who had been provided with his copies of his email of 21 January 2019.
42. However the Commissioner also considers that the School's failure to directly answer the complainant's question regarding to whom that email was circulated, contributed to what the School may view as vexatious pattern of correspondence. The Commissioner also detects within the complainant's correspondence of 31 January 2019 a tendency by him to place a negative interpretation on the School's actions, or even to be questioning the integrity of those he is dealing with. The Commissioner can understand how this may lead to the staff involved feeling harassed. This is particularly so considering that the responsibility for dealing with the request and the complainant's follow up questions and requests fell to a very limited number of the school's staff.
43. The Commissioner notes that the complainant's initial complaint to the Commissioner included the school's handling of at least some of the

requests he made post his 21 January 2019 request. Taken on its own however the Commissioner does not consider the post request correspondence of the complainant is sufficient to conclude the request was vexatious.

44. Having considered the individual elements of the School's arguments, the Commissioner will now consider whether collectively they provide a persuasive case that the request is vexatious. It should be noted that the main issue when determining whether a request is vexatious is whether it is likely to cause a disproportionate, or unjustified level of disruption, irritation or distress. The Commissioner does not accept the School's estimate that dealing with the request would take up to 50 hours; a more realistic estimate would be around 8 hours. Therefore the Commissioner gives little weight to this strand of the School's argument.
45. The complainant is clearly very committed to resisting the School's proposal to change its admissions policy. His website demonstrates that he has campaigned against the changes, organising petitions and contacting the local media. The Commissioner therefore considers the School's argument that the complainant will persist in pursuing his concerns is plausible. The Commissioner would not describe the content of his website as inflammatory, but it is understandable that the tone of some of the material would cause irritation to the School.
46. The Commissioner also notes that the complainant has made a number of information requests prior to the one which is the subject of this notice. The complainant made up to 8 information requests in one day as part of ongoing email exchanges with the School and it is questionable whether he could realistically have expected the information access regime created by the FOIA to provide responses with the timeframe of that ongoing dialogue. Although the Commissioner is satisfied that he did genuinely want answers to the requests he posed, there is also the risk that he was using FOIA to catch the School out. There are clearly some indicators present in the pattern of request making that suggest the request is vexatious.
47. However the School's failure at times to directly address his concerns has contributed to the situation. The Commissioner also takes account of the seriousness of the issues at the heart of the request. The matter does appear to have attracted local media attention and some support from members of the community. Furthermore the Commissioner is not convinced that dealing with this particular request would place an oppressive burden on the School. The work involved is that which the School should be able to accommodate without causing too great a disruption to other aspects of school life.
48. In light of the above the Commissioner is not satisfied that the request would be likely to cause a disproportionate, or unjustified level of

disruption, irritation or distress. The Commissioner finds that the request is not vexatious and that the School is not entitled to rely on section 14 to refuse the request.

## **Right of appeal**

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49. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

50. 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.
51. 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**

**Rob Mechan**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**