

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 November 2022

Public Authority: Bristol City Council
Address: The Old Council House
Corn Steet
Bristol
BS1 1JG

Decision (including any steps ordered)

1. The complainant submitted seven requests for information related to Special Educational Needs and Disabilities (SEND) from Bristol City Council ('the Council'). The Council refused all requests on the basis of section 14(1) (vexatious requests) as it considered that compliance would impose a disproportionate burden on its resources. During the course of the Commissioner's investigation, the Council informed the Commissioner that in the event that he concluded that section 14(1) did not apply, it wished to rely on section 12(1) (cost of compliance exceeds appropriate limit) FOIA in respect of four of the requests and section 21 (information accessible to the applicant by other means) in respect of three.
2. The Commissioner's decision is that section 14(1) does not apply to any of the requests for information. The Commissioner has also determined that the Council was entitled to rely on section 12(1) in respect of the three cases it was able to aggregate, but that it does not apply to the request it was not entitled to aggregate. The Commissioner has also determined that the Council was not entitled to rely on section 21 in respect of requests 3 and 5.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - issue a fresh response to the complainant's requests 3, 5 and 6 which does not rely on section 14(1), section 12(1) or section 21 FOIA.
 - in compliance with section 16 FOIA, provide advice and assistance to the complainant in respect of requests 1, 2 and 4 to see if they can be refined to bring them within the appropriate limit.

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

Request 1 (19100493)

5. On 23 August 2021, the complainant wrote to the Council and requested the following information:

"In accordance with regulation 6.1(h) of The Special Educational Needs and Disability Regulations 2014 a parent may 'reasonably request [sic] that the local authority seek advice from' any person during an EHC Needs Assessment.

Please could you inform me of the criteria that BCC SEND team use for every aspect of the EHCP process."

Request 2 (20032457)

6. On 10 September 2021 the complainant requested:

"...(i) details for the agreement that you have with Bristol, North Somerset and South Gloucestershire CCG regarding contributions to EHC Needs Assessments.

I assume there must be a service level agreement and/or standard operating procedure so please provide me with both of them and any other information around this area.

(ii) how many times in the last 12 months have you advised a parent/carer/child or young person that health advice can not be obtained if the C/YO has not seen the service in the last 12 months or is not known to the service or anything along those lines.

(iii) How many times in the last 12 months have you advised a parent/carer/child or young person to refer to a health service via a single entry.

(iv) How many times in the last 12 months someone employed as part of the SEND team / other BCC employee referred a C/YP via single entry for health advice.

(v) All information relating to Specialist Health Advisors for SEND, a role they play in EHC Needs Assessments.”

Request 3

7. On 23 September 2021 the complainant requested the following information:

“1. Between 1st July 2021 and 26th August 2021, how many needs assessment requests you received

2. Between 1st July 2021 and 26th August 2021, how many EHCPs were issued.

Request 4 (20433821)

8. On 5 October 2021 the complainant requested the following information:

“1. As of 26 September 2021 can you tell me how many ‘live’ EHCPs BCC are currently processing. To clarify a ‘live’ EHCP@ is any EHCP between decision to carry out a needs assessment and the child / young person receiving a final EHCP.

2. Of these EHCPs how many have been in progress for longer than 20 weeks?

3. For any EHCPs which have been in progress for longer than 20 weeks can you tell me how many are:

3.1 between week 20 and 30

3.2 between week 30 and 40

3.3 over 40 weeks

4. How many EHCPs are being mediated.

5. How many EHCPs are being appealed

6. Between 27 August 2021 and 26 September 2021, how many needs assessment requests you received.

7. Between 27 August 2021 and 26 September 2021, how many children did you decide to issue an EHCP to.

8. Between 27 August 2021 and 26 September 2021, how many ECHPs were issued.”

Request 5 (20457024) – 10 October 2021 (withdrawn)

9. On 10 October 2021 the complainant requested:

“Between January 2019 and Dec [sic] 2019 BCC received 626 Education and Health Care Plan Needs Assessment requests.

1. During this period how many times did BCC decide not to carry out an Education Health Care Plan Needs Assessment after receiving the initial request? Please provide the figure for the number refused at Panel 1 prior to mediation / appeal.
2. During this period how many needs assessments were carried out?
3. During this period how many times did BCC decide not to issue a Educational Health Care Plan following EHC Needs Assessments? Please provide the figure for the number refused at Panel 2 prior to mediation / appeal.”

Request 6 (20457721) – 10 October 2021

10. On 10 October 2021 the complainant requested the following information:

“How many children have been excluded from school between 1st September 2021 and 12 October 2021.”

Request 7 (20472621) – 11 October 2021

11. On 11 October 2021 the complainant submitted a request for information which the Council has stated appears to be deleted from its system as it believes it was withdrawn:
12. The Council responded to all 7 requests in one letter dated 11 October 2021, refusing them all on the basis citing section 14(1) FOIA on the basis that they were vexatious and cited section 14(1) FOIA.
13. Following an internal review, the Council wrote to the complainant on 12 November 2021 upholding its original response to the requests.

Scope of the case

14. The complainant contacted the Commissioner on 12 November 2021 to complain about the way their requests for information had been handled.
15. During the course of the Commissioner’s investigation, the Council stated that in the event that he concludes that section 14(1) does not

apply, that it would seek to apply section 12(1) to four of the requests, and section 21 to three. It also stated that request 7 dated 11 October 2021 was withdrawn and appears to be deleted from its system.

16. The scope of the Commissioner's investigation is to consider whether the Council was entitled to rely on section 14(1) and since he has determined that it does not apply, he has gone on to consider the Council's application of sections 12(1) and 21 FOIA. The Commissioner has no evidence that request 7 was withdrawn, however since no details have been provided by either party what it is in relation too, he has not been able to consider it.

Reasons for decision

Section 14(1) – vexatious requests

17. The Commissioner considers that a request can be vexatious for two reasons: firstly if the request is patently unreasonable and secondly where compliance with the request would incur a grossly oppressive burden on the public authority in terms of the costs or the diversion of resources. In this case, the Council has relied upon the latter.
18. Section 14(1) of FOIA is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress.
19. FOIA gives individuals a greater right of access to official information in order to make bodies more transparent and accountable. As such, it is an important constitutional right. Therefore, engaging section 14(1) is a high hurdle.
20. The emphasis on protecting public authorities' resources from unreasonable requests was acknowledged by the Upper Tribunal in the leading case on section 14(1), *Information Commissioner vs Devon County Council & Dransfield* [2012] UKUT 440 (ACC), (28 January 2013).
21. The term 'vexatious' is not defined in FOIA. The Upper Tribunal (Information Rights) considered in some detail the issue of vexatious requests in the case of the *Information Commissioner v Devon CC & Dransfield* (GIA/3037/2011). 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.

22. 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) harassment or distress of and to staff.

23. 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 requests” (paragraph 45).

24. The Commissioner’s guidance suggests that if a request is not patently vexatious the key question the public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. In doing this the Commissioner considers that a public authority should weigh the impact of the request on it and balance this against the purpose and value of the request.

25. Where relevant, public authorities need to take into account wider factors such as the background and history of the request.

The complainant’s view

26. The complainant does not accept that the Council’s application of section 14(1) to refuse their requests is justified. They confirmed to the Commissioner that they submitted 31 requests over a period of approximately 18 months in connection with Special Educational Needs (SEND), with around 15 specifically related to the work of the SEND team. However, they argued that it was necessary to submit some similar requests because the responses from the Council were unclear/ambiguous, but stressed that none of the requests were duplicated.

27. The complainant further informed the Commissioner that it was never their intention to cause disruption, irritation or distress. They stated that they had informed the Council in their request for an internal review that it would be helpful if the information requested was available within the public domain so they did not need to make FOIA requests. The complainant also informed the Commissioner that they had asked the

Council if it would be helpful if they limited their requests to two per month, but did not receive a response to this suggestion.

28. The complainant further informed the Commissioner that the requests enabled them to obtain important information around the Council's statutory Education and Health Care Plans (EHCP's) and how many were delayed. They added, that at the same time, the local press began to highlight a local SEND issue and they were able to obtain evidence about possible unlawful procedures which the Council was then forced to change via legal action. The complainant further alleged that around the time of the requests, subject to the Council's application of section 14(1) FOIA, they had discovered potential further unlawful policies in place which prompted their requests.

The Council's view

29. The Council informed the complainant in its original response that it was refusing all seven requests based on the volume and frequency of their historic SEND requests which it considered were imposing a significant burden on its resources, adding that any response is likely to lead to a significant number of further requests.
30. In its internal review, the Council informed the complainant that between March 2020 to October 2021 they had submitted 35 FOIA requests with the SEND Team the main target. It added that the processing of these requests requires the re-allocation of the Council's already limited resources and places a burden on its SEND team in particular, who are responsible for processing needs assessment requests and issue Education and Health Care Plans (EHCPs) within prescribed statutory deadlines and distracts from the Council fulfilling its core functions. The Council further stated that their last 4 requests were all received between 5 to 10 October 2021, which, the Council argued was neither proportionate or reasonable, and does not allow the statutory 20 working days for complying with the request before the next is due.
31. The Commissioner contacted the Council for further submissions and evidence of the volume of the requests it had referred to in paragraph 30 of this notice.
32. The Council informed the Commissioner that whilst it accepts that the complainant may never have intended to cause disruption, annoyance, irritation or distress, their frequent and often voluminous requests have had that effect on a department struggling to deliver a statutory service.
33. Additionally, although the Council accepts that, to the complainant, the requests had a significant purpose and value, it considers that the

accountability of the Council was assured via other channels, of which the complainant was an active member.

34. For example, the Bristol Parent Carers Forum (BPCF) which was set up under the 'Special Educational needs and disability code of practice' and published in 2015, had representatives on various strategic groups such as the SEND Improvement Board and SEND Partnership Group.
35. The BPCF also co-produced the Council's Written Statement of Action (WSOA) and were involved in drafting the Standard Operating Procedures (SOPs) the complainant requested in their FOIA request. Additionally, as the strategic partner for SEND, BPCF would have access to data, reports and presentations and would be part of shaping local area strategy and plans. The Council considers that all questions could therefore have been raised at strategic partnership meetings.
36. The Council has argued that the purpose and value of the complainant's requests is diminished by the fact the complainant was an active member of the BPCF and would have access to information via the working partnership between the Council and BPCF at the time they were submitting this and many other requests. In the Council's view, the complainant could have sought a more collaborative route placing less burden on its SEND officers to respond to frequent and often voluminous requests.
37. The Council further informed the Commissioner that it estimated that it would take in excess of 334.5 hours to comply with the seven requests which it has applied section 14(1) to. It did not however provide any details of how it arrived at this figure.

The Commissioner's conclusion

38. The Commissioner has considered the arguments presented by both parties. He accepts that the volume of requests submitted by the complainant appears high. He also notes the complainant's comments that they submitted similar (but never duplicate) requests because the responses from the Council were unclear or ambiguous, and would point out that they could have requested an internal review, or contacted the Council for clarification.
39. Nevertheless, the Commissioner is also mindful that the number of requests averages out at less than two per month.
40. It is also evident that the complainant had a clear purpose to the requests, and there is no evidence that the requests were ever intended to be annoying or disruptive, a point which the Council has acknowledged. The Commissioner is however mindful that when considering the burden of request, it is not the intention of the

requester, but the impact on the public authority which is the significant factor.

41. The Commissioner also notes that the complainant did suggest that the Council publish the information which formed the basis of their requests to minimise the need for such requests in the future. However, it does not appear that the Council considered whether a more pro-active disclosure of this type of information is something it could do to reduce the burden of requests for this type of information.
42. In respect of the Council's arguments that the purpose and value of the requests is diminished by the complainant's membership of the BPCF allowing access to the information, the Commissioner would point out that there is no evidence that the actual information the complainant was seeking via their FOI requests would be available through this alternative route.
43. Further, whilst the Council has argued that the complainant could have adopted a more collaborative route, there is no evidence that the Council has ever attempted to engage with the complainant in this regard. Moreover, it does not appear to have responded to their offer to restrict the number of requests submitted on a monthly basis, which the Commissioner notes they made as soon as they were aware that the volume of their requests was having a negative impact on the Council's resources.
44. The Commissioner considers a determination of whether the requests are vexatious is finely balanced. However, on the basis that the requests averaged out at less than two per month, that the Council made no attempt to engage with the complainant to address the volume of requests before applying section 14(1), yet the complainant asked the Council to consider pro-active disclosure of the information, and offered to restrict the volume of their requests, the Commissioner's decision is that the Council was not entitled to apply section 14(1) to the requests. He would however recommend that both parties work together going forward to establish a more co-operative approach to requests.
45. As the Commissioner has determined that section 14(1) does not apply, he has gone on to consider the Council's late application of section 12(1) and section 21 FOIA.

Section 12 – cost of compliance exceeds the appropriate limit

46. Section 12 of the FOIA states 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.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit."

47. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the 'Regulations') sets the appropriate limit at £450 for the public authority in question. Under these Regulations, a public authority can charge a maximum of £25 per hour for work undertaken to comply with a request. This equates to 18 hours work in accordance with the appropriate limit set out above.
48. A public authority is only required to provide a reasonable estimate or breakdown of costs and in putting together its estimate it can take the following processes into consideration:
 - (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.
49. The Commissioner has first considered whether the Council was entitled to aggregate the requests for the purpose of section 12(1) FOIA.

Aggregation of requests

50. The Commissioner's guidance confirms that:

"When a public authority is estimating whether the appropriate limit is likely to be exceeded, it can include the costs of complying with two or more requests if the conditions laid out in regulation 5 of the Fees Regulations can be satisfied. Those conditions require the requests to be:

- made by one person, or by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign;
- made for the same, or similar information; and

- received by the public authority within any period of 60 consecutive working days.
51. It is not in dispute that the complainant submitted the requests the Council is looking to aggregate.
 52. The Commissioner has also considered the requests, and notes that with the exception of request 6, which asked for information in respect of school expulsions, they all relate in some way to SEND and EHCP Needs Assessments. He is therefore satisfied that there is a common theme to three of the four requests that the Council has aggregated for the purpose of section 12(1) and these were appropriately aggregated.
 53. The Commissioner has therefore gone on to consider whether these three requests fall within the 60 working day timeframe. He notes that the requests which the Council is looking to aggregate were dated from 23 August to 10 October 2021. He is satisfied therefore that they fall within the required 60 working days.
 54. Based on the above, it is clear that three of the requests fulfil the criteria specified in regulation 5 of the fees regulations for aggregation. The Commissioner has therefore gone on to consider the Council's estimate of costs in relation to each request it is relying on section 12(1) for.

Request 1

55. This request concerned the criteria the Council applies in relation to section 6.1 of the Special Needs and Disability Regulations 2014 which grants parents the right to 'reasonably request' that the local authority seek advice from any person during an EHC Needs Assessment. It also included a request for a copy of every SOP that the Council's SEND team use for every aspect of the EHCP process.
56. The Council informed the Commissioner that at the time of the request, there were 40 SOPs relating to the EHCP process. Each would need to be checked for officer names and contact details. It added that there are 151 pages and allowed 4 minutes to undertake the searches and extract the relevant data. It estimated the total amount of time necessary to complete this request would be 10 hours.
57. The Commissioner is not certain how the Council arrived at this estimate. It provided no further detail or explanation regarding how it determined its estimate of 4 minutes, whether there are 151 pages in total or per SOP or how it arrived at a total estimate of 10 hours. The Commissioner is therefore unable to make an assessment whether this figure is reasonable.

58. Additionally, he would point out that the Council's reference to checking officer names and contact details appears to be including time taken to consider exemptions in its calculation, yet as indicated in paragraph 48 of this notice, this is not something that can be included in a public authority's estimate.

Request 2

59. This request, (dated 10 September 2021), asked for various information in respect of an agreement with Bristol, North Somerset and South Gloucestershire Clinical Commissioning Group, regarding contributions to EHC Needs Assessments, and for various statistics in relation to access to health advice and services for the last 12 months.
60. The Council has estimated that it would take 312 hours to comply with this request. It confirmed that 624 EHCPs were finalised in the timeframe specified by the complainant, and estimated that the search could be completed in 30 minutes per case record to arrive at the 312 hour total. It has not however provided any further information in respect of this calculation for the Commissioner to determine whether its 30 minute estimate is reasonable. Nevertheless, even if it were to take only two minutes per case record, this would equate to 20.8 hours.

Request 3 (complainant's request 4)

61. The Council is looking to apply section 12 to only part of this request. He would however point out that if section 12 applies to part of it, it will apply to the whole request. This request was in relation to the total number of EHCPs the Council were processing as of 26 September 2021, and also broken down to those in excess of 20, 30 and 40 weeks.
62. The Council has estimated that it would take a total of 4.5 hours to comply with items 3, 4 and 5 of this request. However, it has provided no further detail in support of its estimate for the Commissioner to determine whether it is reasonable.

The Commissioner's conclusion

63. On the basis of the details provided for each of the three requests which fulfil the criteria for aggregation, although the Council has failed to provide sufficient details for the Commissioner to judge the reasonableness of its estimates, since compliance with request two alone would take a minimum of 20.8 hours, the Commissioner considers that to comply with the combined three requests, would take it in excess of the appropriate limit and that it was therefore entitled to apply section 12 to these three requests. He would however point out that he

expects public authorities to provide appropriate details and evidence in support of any application of section 12(1).

64. The Commissioner would however expect the Council to comply with its obligations under section 16(1) FOIA to provide suitable advice and assistance to the complainant in respect of how they may refine these requests to bring them within the cost limit.

Request 6

65. In respect of this request, which does not meet the aggregation criteria, the Council estimated that it would take a total of eight hours to comply with this request, however the Council has acknowledged the service area has not provided sufficient evidence in support of this estimate. Section 12(1) clearly therefore, does not apply to this request.

Section 21 – Information accessible to the applicant by other means

66. Section 21 of the FOIA provides an exemption to information which is reasonably accessible to the applicant otherwise than under section 1 of the FOIA. The purpose of the section 21 exemption is to ensure that there is no right of access to information via FOIA if it is available to the applicant by another route. Therefore, unlike most exemptions, the circumstances of the applicant can be taken into consideration.
67. Although the information may be available elsewhere, a public authority will need to consider whether it is actually 'reasonably accessible' to the applicant before it can apply section 21. Defining 'reasonably accessible' is open to interpretation, however it generally applies to the following:
- Information available via the public authority's publication scheme will be reasonably accessible to an applicant.
 - There is another existing, clear mechanism by which the particular applicant can reasonably access the information outside of FOIA. For example, under the Access to Health Records Act 1990.
68. Section 21 is an absolute exemption which means that where the exemption is engaged, a consideration of the public interest test is not necessary.
69. The Council has applied section 21 to request 3, items 1, 2, 6, 7 and 8 of request 4 and the whole of request 5. Since the Commissioner has already determined that that the Council was entitled to rely on section 12(1) in respect of the complainant's request 4, this will apply to the whole request. The Commissioner has not therefore considered the Council's arguments in support of section 21 FOIA for request 4.

Requests 3

70. Request 3 asked for information in respect of the total number of Needs Assessments received and issued in a specified period.
71. The Council informed the Commissioner that this is information the Council publishes once data has been verified, which takes up to two months. Verified data is then available on the Council's microsite. The Council added that the complainant is well aware of the process of verification prior to publishing, and is also aware of where the information is published. The Council further stated that it is not possible to produce data for partial months so the data would be available for a whole calendar month as opposed to the specific period the complainant requested.
72. The Commissioner would point out that the public authority must consider the situation at the time of the request. Information intended for future publication at the time of their request would not therefore constitute information 'reasonably accessible' to the applicant by other means. As the information requested was not available at the time of the requests were submitted, section 21 cannot therefore apply to this request.

Request 5

73. Request 5 asked for various statistical information in relation to EHCPs from January 2019 to December 2019 broken down into three separate items.
74. The Council has stated that this request was withdrawn, but that in any event the information was publicly available at the time of the request. The Commissioner has not seen any evidence that the request was withdrawn so has therefore considered whether section 21 applies.
75. The Council has stated that the DfE publishes 'SEND2' data annually in March for the preceding calendar year. It added, that as the request was dated 10 October 2021 this was publicly available at the time of the request. However, the Council has not provided any evidence, such as a link to the relevant DfE website to demonstrate that this is correct for any of the three items specified in the request, and has failed therefore to demonstrate that section 21 applies to this request.

Right of appeal

76. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

77. 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.

78. 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

**Catherine Dickenson
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Wycliffe House
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SK9 5AF**