

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 27 July 2009

Public Authority: City of Westminster Council
Address: Westminster City Hall
62 Victoria Street
London
SW1E 6QP

Summary

The complainant requested information from the City of Westminster Council (“the council”) for 13 sets of information for each of 4 year groups for 7 academic years relating to 2 schools. The council refused to provide this as, when aggregated with requests from others acting together, compliance would exceed the appropriate cost limit. The Commissioner has investigated and found that the council were not obliged to comply with the request by virtue of section 12(1). The Commissioner also found that the council breached the requirements of section 17(5) for not issuing the refusal notice within the statutory timeframe and for not explicitly stating that it was relying on section 12. The Commissioner also found a breach of section 16(1) and requires the council to contact the complainant in order to refine his request in line with its duty under section 16 to provide advice and assistance.

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. The complainant made the following request to the council on 22 December 2007:

“I would like information pertaining to the following academic years for both schools (Pimlico and Quanton Kynaston).

Year 7, 9, 11 and 13 Sept '00 - July '01
Year 7, 9, 11 and 13 Sept '01 - July '02
Year 7, 9, 11 and 13 Sept '02 - July '03
Year 7, 9, 11 and 13 Sept '03 - July '04
Year 7, 9, 11 and 13 Sept '04 - July '05
Year 7, 9, 11 and 13 Sept '05 - July '06
Year 7, 9, 11 and 13 Sept '06 - July '07

i) Total no. of students year 7 - 11, and 12-13 (Please break down all information with 6th form separate)

ii) Total no. of SEN students

Please also break this down into: total School Action students
: total School Action Plus students

iii) Total no. of free school meal students

iv) Total no. of Looked After Children

v) Total no. of Refugee Status children

vi) Total no. of Disapplied students

vii) Ethnicity of students

What were the Relative [sic] Performance Indicators for the above years?

WHAT WERE THE CONTEXTUAL VALLU [sic] ADDED OR VALUE ADDED SCORES FOR THE ABOVE ACADEMIC YEARS AND HOW WERE THEY ARRIVED AT?

I would also like to see the exam results for years 7, 9 11 and 13 for academic years set out above.”

3. The council provided a response on 6 February 2008 in which it refused to disclose the information requested. It stated that four requests have been received from the complainant and a number from members or associates of the Pimlico Support Association, that it is satisfied that the requests meet the criteria for the purposes of aggregation, and that the aggregated cost of responding to the requests received up to the current request exceeds the appropriate limit.
4. On 18 February 2008 the complainant requested an internal review of that decision stating that she is not acting as a part of a campaign and setting out why the requests are separate and cannot be aggregated.
5. The council responded with the details of the result of the internal review stating that it was upholding the decision to refuse the information requested on the basis

that the complainant appeared to be acting in concert or in pursuance of a campaign.

The Investigation

Scope of the case

6. On 31 March 2008 the complainant contacted the Commissioner to complain about the way her request for information had been handled.
7. The Commissioner has considered whether the council was correct to apply the provision at section 12(1) of the Act to the request and whether it responded to the request in accordance with the procedural requirements of the Act.

Chronology

8. On 27 April 2009 the Commissioner wrote to the council requesting that it confirms whether it holds the information, requiring further explanations as to how the estimated cost of compliance with the request would exceed the appropriate limit and a breakdown of those costs.
9. By email of 2 June 2009 the council responded explaining in more detail why it believed the complainant was acting in pursuance of a campaign and why the requests could be aggregated. It provided details of all the requests it believed to be part of the campaign and a breakdown of how to respond to the request in question would exceed the appropriate limit.
10. The Commissioner telephoned the council on 3 June 2009 to clarify some of the points made by the council in the above correspondence.
11. In the meantime, the complainant wrote to the Commissioner on 8 May 2009 providing background information to the request and stating that there is no large cost implication because the information should be easily available through RAISE through the DCSF. RAISE is an abbreviation for 'Reporting and Analysis for Improvement through School Self-Evaluation'.

Analysis

Substantive Procedural Matters

Section 12 'Appropriate Cost Limit'

12. Section 12(1) states:

“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.”

13. Section 12(4) states:

“The Secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority-

- (a) by more than one person, or
- (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

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.”

14. The Commissioner notes that in this case the complainant has made more than one request within a single item of correspondence. Section 12(4) 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. Although this test is very broad, it is possible that one or more requests may not meet this test and the Commissioner has therefore considered whether he is satisfied that the requests made by the complainant on 22 December 2007 relate to the same or similar information.
15. In the letter in which the requests were made, the complainant states that she is requesting information relating to 2 schools and the Commissioner is of the view that it is clear from the wording of the requests that they relate to similar information.
16. The Commissioner considers that as the requests made on 22 December 2007 are clearly from the same person, relate to similar information and were received on the same day, the council are entitled to aggregate the requests in considering if compliance would exceed the appropriate cost limit.
17. The Commissioner also notes that the council wish to aggregate this request with others made by members or associates of the Pimlico Support Association. As stated in paragraph 14 above, regulation 5 of the Fees Regulations sets out the relevant conditions for aggregating requests. Those pertinent to the issue here are Regulation 5(1)(b), Regulation 5(2)(a) and Regulation 5(2)(b).

18. Regulation 5(1)(b) provides that requests made by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign can be aggregated.
19. The Commissioner acknowledges the complainant's assertion that she is not acting as part of a campaign and that there have been no orchestration of FOI requests. However, the council have submitted that the requests are from people acting in pursuance of a campaign to overturn the decision to make Pimlico School an academy and have provided evidence of a group created on Google Groups to aid this campaign. The Commissioner is of the view that it is reasonable for the council to be of the opinion that the requesters are acting in concert or in pursuance of a campaign and that this satisfies the regulation which merely requires the appearance of acting in concert or in pursuance of a campaign to the public authority rather than any strict evidential proof.
20. Regulation 5(2)(a) 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. As detailed in paragraph 14, although this test is very broad, it is possible that one or more requests may not meet this test and the Commissioner has therefore considered whether he is satisfied that the requests from different individuals relate to the same or similar information. The council supplied the Commissioner with the wording of the other requests it is aggregating with the complainant's request. It argued that they all relate to information on the change of status of Pimlico School from local authority control to academy status including comparative data with Quintin Kynaston School, a position with which the Commissioner agrees.
21. Furthermore, the Tribunal is of the opinion that the test for aggregation is very wide as it stated in the case of *Ian Fitzsimmons v Information Commissioner & the Department for Culture, Media and Sport EA/2007/0124*:

"The test in Regulation 5 of the Fees Regulations seems to us to be very wide; the requests need only relate *to any extent* to the same or *similar* information [Tribunal emphasis]". (para 43)
22. Regulation 5(2)(b) states that the requests to be aggregated must be received within any period of 60 consecutive working days. The council sent details of 11 requests received. Seven of these were received within 60 consecutive working days prior to the date of the request and can be aggregated in accordance with the Fees Regulations.
23. The Commissioner considers that the council are entitled to aggregate seven of the requests received from different persons in considering if compliance would exceed the appropriate cost limit as the requests relate to similar information, were received within 60 days and the requesters appear to the council to be acting in pursuance of a campaign.

24. Section 12(3) states that:

'In subsections (1) and (2) "the appropriate limit" means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.'

The appropriate limit is currently set out in the Fees Regulations. A public authority may take into account the cost of locating, retrieving and extracting the requested information in performing its calculation. The cost limit is currently set at £450 for local government and equates to 18 hours work at £25 per hour.

25. Under regulation 4(3) a public authority may, for the purposes of its estimate of the cost limit, take account only of the costs it reasonably expects to incur in

- determining whether it holds the information;
- locating a document containing the information;
- retrieving a document containing the information;
- extracting the information from a document containing it.

These activities are sequential, covering the retrieval process of the information requested from the public authority's information store, no matter how or where the information is held.

26. The council expressed its view that to provide the requested information would exceed the cost limit. However, the council did not initially provide a breakdown or any details to support this.

27. Subsequently, at the request of the Commissioner, the council provided some details and calculations to support its view that complying with the request would exceed the cost limits set out in the Regulations.

28. The council provided the Commissioner with a breakdown of the time it would take to answer each of the individual requests made by the complainant on 22 December 2007 together with details of why it would take the time stated. It noted the individual amount of time it would take to determine and locate the data for each of the 10 questions that the request is broken into and the type of information available to respond to those questions. This time totalled 18.5 hours and the council submitted that it would take a further 4 hours to retrieve and extract the data from over 49 databases. It stated that it would need to examine 7 different databases: Autumn roll, PLASC return, Summer roll return, KS2_final, KS3_final, GSCE and VA final, A-level_final for 7 academic years. It therefore submitted that it would take 22.5 hours in total to provide information of the description specified in the request.

29. The council also submitted that it had already spent 19 hours responding to five of the other requests, mentioned in paragraph 23, that it is entitled to aggregate in considering if compliance would exceed the appropriate cost limit.

30. The Commissioner therefore notes that the total amount of time that would be spent on the aggregated requests is 41.5 hours.

31. In the case of Mr William R Urmenyi v Information Commissioner & the London Borough of Sutton (EA/2006/0093) the Tribunal stated that;
- “...the Commission[er] and the Tribunal can enquire into whether the facts or assumptions underlying this estimation exist and have been taken into account by the public authority. The Commission[er] and the Tribunal can also enquire about whether the estimation has been made upon other facts or assumptions which ought not to have been taken into account. Furthermore the public authority's expectation of the time it would take to carry out the activities set out in regulation 4(3) a-d must be reasonable”. (para 16)
32. The Commissioner has examined the evidence and made enquiries with the council as to whether its estimation is reasonable. As a result of this investigation the Commissioner is satisfied that the council's assessment, that to respond to the aggregated requests would exceed the appropriate limit, is reasonable because of the level of information required. For example, question iii) 'the total no. of Refugee Status children' may appear to be simple and quick to answer but 56 figures are required in order to answer the question for each of 4 year groups for 7 academic years relating to 2 schools, i.e. 4 multiplied by 7 multiplied by 2. In this particular example the council have stated that it would take an hour to determine and locate the data which the Commissioner views as plainly justifiable. Indeed, it is the Commissioner's assessment that to respond to the request made on 22 December 2007 alone would exceed the appropriate limit as it would take 22.5 hours.
33. It is noted that the complainant, when making the request, stated:
- “I am aware that this information is available on RAISE online provided by the DCSF so should be easily available to you.”
34. The Commissioner made enquiries as to the validity of the above statement and was informed by the council that RAISE is a tool used to upload certain information to the DCSF and as a lot of the information requested is not required by the DCSF it would not be uploaded onto RAISE. The council also asserted that because information cannot be exported from RAISE, even if all the requested information was held, it would have to be manually entered into a document to be made available to the requester.
35. On the basis of the above, the Commissioner is satisfied that section 12(1) is engaged as to comply with the request would exceed the appropriate cost limit.

Procedural Requirements

Section 16 'Duty to provide advice and assistance'

36. Section 16(1) provides that:

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it”.

37. Section 16(2) provides that:

“Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case”.

38. Where a public authority refuses a request because the appropriate limit has been exceeded, paragraph 14 of the “Secretary of State for Constitutional Affairs’ Code of Practice on the discharge of public authorities’ functions under Part I of the Freedom of Information Act 2000” recommends that the public authority should consider providing an indication of what, if any, information could be provided within the appropriate limit, and also consider advising the applicant that a narrowed or refocused version of the request could be handled within the limit.

39. The council did not invite the complainant to refine this request in order to bring it within the appropriate limit. The Commissioner therefore considers that the council breached the requirements of section 16(1).

Section 17 ‘Refusal of request’

40. Section 17(5) states:

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

41. The complainant’s request for information of 22 December 2007 was refused on 6 February 2008, after the time limit set in section 10(1) had elapsed, in breach of section 17(5).

42. The refusal notice and response to the request for review stated that the aggregated costs of providing the information to the complainant and others acting together exceeds the appropriate limit as stated in the Fees Regulations but did not explicitly state that the council was applying section 12 of the Act, in breach of section 17(5).

The Decision

43. The Commissioner’s decision is that the public authority dealt with the request for information in accordance with the Act in that section 12(1) was applied correctly.

44. However, the Commissioner also finds that the public authority failed to comply with the following procedural requirements of the Act:

- i) section 17(5) for the late issue of the refusal notice and for not explicitly stating that section 12 applies.
- ii) section 16(1) for failing to provide adequate advice and assistance.

Steps Required

- 45. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
 - i) Provide the complainant with advice and assistance in bringing the request within the appropriate cost limit in compliance with the section 45 Code of Practice and the requirement of section 16(2).
- 46. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

- 47. 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.

Other matters

- 48. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
- 49. The Commissioner notes that there is no statutory requirement for a public authority to provide the complainant with a breakdown as to how they have reached their estimate but considers that as a matter of good practice they should do so. The Tribunal offered support for this approach in the case of *Gowers v Information Commissioner & the London Borough of Camden* (EA/2007/00114) in which it was said that a public authority should demonstrate how their estimate has been calculated:

“...a public authority seeking to rely on section 12 should include in its refusal notice, its estimate of the cost of compliance and how that figure has been arrived at, so that at the very least, the applicant can consider how he might be able to refine or limit his request so as to come within the costs limit...” (para 68)

50. Whilst the council provided a brief explanation as to why providing the information sought would exceed the cost limit, it did not provide a breakdown which could have assisted the complainant in refining his request. The Commissioner would advise the council that including a breakdown of costs in a section 12 refusal notice is likely to make it easier to comply with the section 16 duty to advise and assist an applicant on what could be provided within the cost limit.

Right of Appeal

51. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

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 served.

Dated the 27th day of July 2009

Signed

**Steve Wood
Assistant Commissioner**

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

Legal Annex

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.”

Section 12(2) provides that –

“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.”

Section 12(3) provides that -

“In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.”

Section 12(4) provides that –

“The secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –

- (a) by one person, or
- (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

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.”

Duty to provide Advice and Assistance

Section 16(1) provides that -

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it”.

Section 16(2) provides that –

“Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case”.

Refusal of Request

Section 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”