Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 July 2015

Public Authority: Buckinghamshire County Council
Address: County Hall
Walton Street
Aylesbury
Buckinghamshire
HP20 1UA

Decision (including any steps ordered)

1. The complainant has requested information on 11+ examination test results and other information related this process in the Buckinghamshire Area over a number of years from Buckinghamshire County Council ("the council"). The council refused to comply with the request, relying on section 14(1) (vexatious requests).

2. The Commissioner's decision is that the council was correct to apply section 14(1) to the request.

3. The Commissioner does not require the council to take any steps.

Request and response

4. On 19 May 2014 the complainant wrote to the council and requested information in the following terms:

"It has been indicated to me by the Information Commissioner that the information requested below would indeed fall in the scope of the new data set provisions.

Therefore I repeat this request:

Could you please provide me with the following information related to

11+ results.
1) School
2) VRTS Score
3) Attitude to Work
4) Academic Recommendation
5) 1st Test Score
6) 2nd Test Score
7) Both Test Dates
8) Plus, if tested by us other than at a school, the test venue and time for each test
9) Plus, if there has been an application for test modifications, there is a more detail just to record the application process and outcome.
10) plus 'Order of Suitability' for the years that this was included.

I require this information for the secondary school entry 2005 to 2012.

The information is required for each child at each school in the Bucks area.

I require the information in a non-propriety standard such as csv…

In addition, I would like to make another request. For the years given above, I would like all the additional data (i.e. not part of the data requested above) held in the 2 Microsoft Access data base tables (or anywhere else) concerning any aspect of the 11+ testing process related to each child, again in csv form."

5. The council responded on 6 June 2014. It applied section 14(1) to the request (vexatious).

6. Following an internal review the council wrote to the complainant on 2 October 2014. It upheld its earlier decision.

Scope of the case

7. The complainant contacted the Commissioner on 15 August 2014 to complain about the way his request for information had been handled. At that time a review had not been carried out.

8. The question of datasets which was raised by the complainant is, in the context of this complaint, secondary to the Commissioner's decision in this case due to the application of section 14 to the request. Whether there is an onus on the authority to provide the information in a

reusable form is a question dependent entirely on whether there is an obligation on the council to respond to the request under the Act or not.

9. A successful application of section 14(1) negates the requirement to respond to a request further as required by section 1(1), other than to issue a refusal notice stating why the exemption has been applied. This is the question which the Commissioner must therefore consider within this decision notice. If his decision is that section 14(1) was not applicable then the Commissioner would initially include steps within the notice requiring the council to issue a new response to the request without relying upon section 14(1). At this point the question as to whether the information is a dataset or not becomes relevant.

10. The Commissioner therefore considers that the relevant aspect of the complaint which he must consider is whether the council has correctly applied section 14(1).

Reasons for decision

11. Section 14(1) of the Act provides that

> *"Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious".*

Section 14(2) provides that

> *"Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with a previous request and the making of the current request."*

12. The term vexatious is not defined in the legislation. In Information Commissioner vs Devon County Council & Dransfield *UKUT 440 (AAC), (28 January 2013)* the Upper Tribunal took the view that the ordinary dictionary definition of the word vexatious is only of limited use, because the question of whether a request is vexatious ultimately depends upon the circumstances surrounding that request. The Tribunal concluded that 'vexatious' could be defined as the "…manifestly unjustified, inappropriate or improper use of a formal procedure.' The decision clearly establishes that the concepts of 'proportionality' and 'justification' are central to any consideration of whether a request is vexatious.

13. The Commissioner has identified a number of "indicators" which may be useful in identifying vexatious requests. These are set out in his published guidance on vexatious requests. The fact that a request

contains one or more of these indicators will not necessarily mean that it must be vexatious. All of the circumstances of the case must be taken into consideration before reaching the conclusion that the request is vexatious.

Would responding to the request place a disproportionate burden on the council?

14. The Commissioner's guidance suggests that 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. Where this is not clear, the Commissioner considers that a public authority should weigh the impact of the request upon it and balance this against the purpose and value of the request. Where relevant, public authorities will also need to take into account wider factors such as the background and history of the request.

15. The council outlined its reasons for applying section 14 to the Commissioner:

- The council has been in correspondence with the complainant on issues surrounding 11+ tests since 2005, and there have been over 200 items of correspondence
- The complainant has submitted 43 largely related requests for information to the council
- There have been a number of appeals to the Commissioner (and beyond), 2 of which were based on versions of requests that the complainant had not in fact sent to the council
- It says that the complainant has argued that the council have been 'uncooperative' when responding to requests. The council argues however that the Commissioner has not found the council in breach of Section 16 and throughout the complainant's most recent appeal process decision the Information Commissioner, the First Tier Tribunal (Information Rights), the Upper Tribunal and Court of Appeal did not find that the council had failed in its duties to advise and assist the complainant under Section 16, despite this being one of the complainant's grounds of appeal.
- The complainant has set out, over a number of years, his apparent concerns over the 11+ test's susceptibility to coaching however the test is no longer used in the county.

16. The Commissioner accepts that there has been a long history leading up to this request. This context and history is relevant. Previous requests

have subsequently resulted in appeals, up to the Court of Appeal, over issues relating to 11+ tests.

17. The complainant has received very similar information to part 1 of the request from the council in the past. The information provided related to the dates 2007-2010 and were provided to the complainant as a PDF document. As this format is not easily manipulated to research the results overall the complainant appealed to the tribunal and requested it in Microsoft Excel format. Following further appeals up to the Court of Appeal the court decided that the complainant was entitled to receive the information in an Excel format.

18. The current request includes this information but requests information from additional years. It also adds an additional request for any other data held on the Access databases.

19. The council said that although the request is relatively simple it would involve searching the records of over 58000 children and for each and every child potentially up to 240 fields of data from a Microsoft Access database.

20. The complainant has requested some of the information which he has received previously, together with further information. He has expressed his wish to receive the information in a non-proprietary format such as csv. He argues that the information forms a 'dataset' for the purposes of the Dataset Provisions under section 102 of the Protection of Freedoms Act 2012. As stated above however this is the primary issue for this decision notice as the Commissioner must initially simply decide whether section 14 was applied correctly by the council.

21. The council has not claimed section 12(1). This section allows an authority to refuse a request on the grounds that responding to it would exceed the appropriate limit of (for local authorities) £450. This is because the council's issue with responding to the request is not about locating or retrieving the requested information. The issue, insofar as the council is arguing, is that the information contains personal data which it considers should not be disclosed due to the provisions of the Data Protection Act 1998 (the 'DPA'). It argues that identifying and redacting that would require a disproportionate effort compared to the value and purpose of the request and the value of disclosing the information to the public. An authority cannot claim section 12 for the cost and effort associated with considering exemptions or redacting exempt information. The council therefore needed to apply section 14(1) as section 12(1) could not feasibly be applied.

22. The Commissioner's guidance on vexatious requests points out that the Commissioner places a high threshold on the application of section 14 in

such circumstances where the central argument relies upon an argument that responding would cause a disproportionate burden on the authority to apply section 14. He identifies however that an authority is most likely to have a viable case where:

- The requester has asked for a substantial volume of information and
- The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the ICO and
- Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.

23. The council highlighted that the issue is more difficult than simply providing a copy of the raw data held in the database due to the nature of the information requested. The information relates to children who have taken the 11+ test in the county. The information is therefore primarily personal data, although the council admits that the redaction of some information could anonymise the data and allow it to be disclosed. It argues however that the work involved in identifying and redacting the personal data would require a significant amount of work and cause it a substantial burden.

24. The council argues that there are a number of different fields in the database which might contain personal data and that each section would therefore need to be checked to determine whether information is held within a field which could allow the identification of the child. The complainant however argues that only one field, or a few children's records need to be checked to determine which fields will potentially contain personal data. If a particular field is identified as being likely to contain personal data which would identify an individual child then it can be redacted from the results for all of the children relatively easily. He therefore considers that his request does not place an onerous burden upon the council.

25. The council provided the Commissioner with a copy of some of the database pages to allow him to consider this. There are many different fields where it would be possible to add notes, or add information which then might provide details which would allow a child to be identified. The potential is that information which is held in these fields might either identify a child directly, or it might contain information which could be combined with other information already in the public domain to determine the identity of the child or their parents.

26. Notes are allowed to be input as free text in particular fields on the database. It is possible that the notes for individual children might contain information which might allow the children to be identified, and the only way to be sure that that is not the case is for the authority to read each note.

27. For instance if a member of the public were aware that only a handful of children were placed in a high school from one primary school, information held within the fields might allow some members of the public to identify the child who the records belongs to specifically. Similarly, a child who had moved from one primary school to another prior to the tests may have this fact recorded, and this might allow subsequent identification from the remainder of the records or information already within the public domain.

28. The council argues that it would extremely burdensome to go through the information to extract fields which contain information which might allow a child to be identified given the number of fields where such an entry might be held. It pointed to the decision of the First-tier Tribunal in *Department for Education v ICO and Laura McInerny EA/2013/0270* as evidence that where large amounts of personal data is included within the scope of a large amount of requested information and would be difficult to identify and redact then this case be considered as a burden to the authority for the purposes of the application of section 14(1). The decision of the First-tier was also supported by the Upper Tribunal, following an appeal by Ms McInerney.

29. The Commissioner accepts the council's argument in this respect. Whilst it would not be the case with all records, identifying one, or a small number of children would still be a disclosure of personal data. To fully ensure that no personal data is disclosed the council would need to check through a large number of entries in order to determine whether it was possible to identify any children from the information contained within the fields.

30. The Commissioner also recognises that the council would want to take considerable care examining the data as it relates to children. The complainant's suggested methodology does not provide a means of assuring the council that some personal data would not be disclosed in spite of the redaction of some fields.

31. The issue is whether *any* member of the public could identify a child if this information were to be disclosed, not whether the complainant might. Clearly there will be a risk of this, and this needs to be taken into account by the council when it is considering how it addresses the request, and how much time it would take it to identify, redact and provide the information.

32. The council has argued that the risk of this, and the clear burden which would occur in seeking to prevent this, is a factor in determining whether the request is vexatious. The council argues that the complainant is fully aware of the work which would be involved by the council from the previous requests which he has made for similar information.

33. Nevertheless the Commissioner notes that some of the information requested has been disclosed to the complainant in response to previous requests. He must therefore take into account the fact that it is possible for the information to be disclosed in an anonymised form.

34. The Commissioner considers that even this argument strengthens the case that section 14(1) was applied correctly. The complainant has clearly partially repeated his request for this information when it is clear that he already holds some of this data.

35. The council has not said that it is not possible to provide this information. Its point is that the substantial burden in responding to the complainant's request makes the request vexatious when taken in context with the previous requests, correspondence and appeals it has already dealt with from this the requestor.

Does the request has any serious purpose or value?

36. The council argues that the complainant's request has no serious purpose or value which it can identify. It points out that the county no longer uses the tests which the data relate to and said that this would render any direct comparisons meaningless. It also said that the grammar schools which utilise the present 11+ tests are now academies and free from local authority control. The council does not hold information for the new tests as they are administered by the schools themselves. It therefore considers that any conclusions the complainant's might reach from any data disclosed would be of no great value now, and the council could take no specific action, in relation to the 11+ test, anyway.

37. The Commissioner considers that there is a value in older data being disclosed to interested parties. Although it could have no direct effect in the current system an analysis of previous results could feasibly allow interested parties to highlight flaws or areas of concern which the new system might not have addressed. It might also allow an analysis of how the newer system compares with the older one if similar information could be obtained from the academies on their results.

38. Nevertheless it is fair to say that the changes which have occurred will weaken the argument for the data to be disclosed. The tests

administrators have changed, in some cases the tests themselves have changed in order to try to reduce the ability to coach children, and the responsibility for admissions has moved out of local authority control to the schools themselves. The value of the information being disclosed has therefore weakened substantially.

Would the request have the effect of harassing the public authority or its staff?

39. The council considers that whilst the amount of work which the request would entail is significant and the purpose behind the request unclear the consideration of this point does not add anything to the arguments in favour of applying section 14(1) in this case.

Is the request is designed to cause disruption or annoyance?

40. The council argues, due to the complainant's extensive experience and background in requesting information of this sort he would be fully aware of the significant amount of work that he was asking the council to undertake when requesting the information. The council also argue that he would also be fully aware of the personal data issues which were likely to arise from his request. In short, the council argues that it would have been clear to the complainant that the only response which the council could possibly give to his request was to refuse it. The Commissioner agrees that it was reasonable for the council to assume that the complainant would have been aware of the impact of the request and how the latest request related to the previous requests.

41. The council therefore said that that it was left with the assumption that the request was partially designed to cause disruption or annoyance or to provoke a confrontation with the council over the issues.

42. The Commissioner gives some weight to this argument. He would add to the above that the past history of similar requests made by the complainant over the same issues would have amounted to a significant amount of work. Given previous level of work involved, together with the level of information which has already been provided to the complainant previously, the council would see this further request as designed to cause annoyance and disruption.

Conclusions

43. In *Information Commissioner vs Devon County Council & Dransfield [2012] UKUT 440 (AAC), (28 January 2013)*, Judge Wikeley recognised that the Upper Tribunal in *Wise v The Information Commissioner (GIA/1871/2011)* had identified proportionality as the common theme underpinning section 14(1) and he made particular reference to its comment that;

'Inherent in the policy behind section 14(1) is the idea of proportionality. There must be an appropriate relationship between such matters as the information sought, the purpose of the request, and the time and other resources that would be needed to provide it.'

44. A useful first step for an authority to take when assessing whether a request, or the impact of dealing with it, is justified and proportionate, is to consider any evidence about the serious purpose or value of that request.

45. The council has not been able to identify a strong value and purpose to the request. It has suggested that the complainant was initially interested in the effect of coaching on the results of children and their ultimate school placement when he first started making requests. The complainant himself has said that he believes that the information is of great value.

46. Whilst the requested information would provide some degree of transparency on the way that the tests were administered previously, and for previous school years, the system has now been changed and responsibility for its administration has moved on. Historical data would inevitably refer to children who would have been placed within their schools some years ago.

47. This lack of a strong and identifiable purpose or value to the requests weakens the arguments in favour of compliance with the request. In the current context this argument is not strong when compared to the council's arguments regarding the substantial burden which responding to the request would require. The Commissioner also understands the council's concerns that there is a possibility that data allowing children to be identified may be disclosed.

48. The Commissioner considers that there are a small number of factors which hold significant weight in this complaint. The primary factor is the fact that the tests which the complainant is asking about are no longer used by the local authority. Additionally the academy schools now conduct their own tests and act as their own admission authorities. This significantly weakens any argument for a disclosure of this data when compared to the burden which this would place on the council to respond to the request, together with the burden and impact of assessing personal data that could be disclosed and specific children being able to be identified. These arguments in favour of the request being vexatious are supported by the context and history of the complainant's previous interactions and requests to the council. Whilst there is still a value in a disclosure of the data it is nevertheless a much weaker argument given the change in the tests and how they are now administered.

49. The weakening of the arguments for disclosure of the information is compounded by the amount of work which the council has previously undertaken responding to the complainant's previous requests, together with the substantial amount of work which would be required to respond to this request.

50. Given the context and history of the circumstances of the case, and for the reasons outlined above, the Commissioner is satisfied that the council was correct to apply section 14(1) to this request.

Right of appeal

51. 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@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

52. 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.

53. 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 .....

Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF