

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 14 June 2023

**Public Authority:** London Borough of Sutton  
**Address:** Civic Offices  
St Nicholas Way  
Sutton  
Surrey  
SM1 1EA

#### **Decision (including any steps ordered)**

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1. The complainant has requested a range of information from the London Borough of Sutton (the 'Council') relating to school age children. The Council advised that it did not hold recorded information for questions three and four.
2. The Commissioner's decision is that, on the balance of probabilities, the Council holds no recorded information relevant to the complainant's request in questions three and four and has complied with section 1(1) of FOIA. However, by not responding within 20 working days following the date of receipt of the request, the Council breached section 10(1) of FOIA.
3. The Commissioner does not require the public authority to take any steps.

#### **Request and response**

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4. On 5 September 2022, the complainant wrote to the Council and requested information in the following terms:  
  
"I am requesting you release the following information for Kingston & Richmond boroughs.

1. How many statutory school age children live in your borough (as of 01.09.2022)
  2. How many statutory school age children attend school in your borough (as of 01.09.2022)?
  3. How many primary school vacancies do you have in your borough (as of 01.09.2022)?
  4. How many secondary school vacancies do you have in your borough? (as of 01.09.2022)?
  5. How many statutory school age children are registered as Electively Home Educated (EHE) in your borough (as of 01.09.2022)
  6. How many statutory school age children are registered as Children Missing Education (CME) in your borough (as of 01.09.2022)
  7. What was the total number of statutory school age children who were registered as Electively Home Educated (EHE) in the 2021-2022 academic year?
  8. What was the total number of statutory school age children who were registered as Children Missing Education (CME) in the 2021-2022 academic year?
  9. How many School Attendance Orders (SAO) were served in the 2021-2022 academic year?
  10. How many Fixed Penalty Notices were served for Non-School Attendance in the 2021-2022 academic year?
  11. How many Education Supervision Orders were served in the 2021-2022 academic year?
  12. Please can you send me your School Attendance Policy."
5. Later that day, the Commissioner understands that the complainant sent an email correcting the named public authority in the request from 'Kingston & Richmond Boroughs' to 'Sutton Council.'
6. The Council responded on 16 November 2022. In relation to questions three and question four, the response said:
- "Information on schools with vacancies, and the year group these vacancies are in, can be found on the Sutton school vacancy checker, linked to below: <https://www.sutton.gov.uk/-/sutton-schools-vacancy-checker>"

7. On 15 January 2023, the complainant requested an internal review in relation to questions three and four. They said:

"The website link does not tell me how many [primary/secondary] school vacancies your borough has - the link only tells me what schools have a vacancy"

8. The Council provided an internal review on 8 February 2023. It revised its original position and, although it did not say so explicitly, the response indicated that the Council did not hold the information requested for questions three and four. The Council said:

"The service has explained that we are unable to publish the number of vacancies on our website as this is constantly changing; also we have to rely on schools telling us the number of vacancies they have (as most schools are their own admissions authority), and so the information we hold on numbers is often outdated.

There is so much pupil movement as of 1st September each year, it is impossible to provide exact vacancy numbers, hence we only hold a list of schools with vacancies, rather than number of vacancies.

We advise the enquirer to contact a school directly for up to date information."

### **Scope of the case**

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9. The complainant contacted the Commissioner on 11 April 2023 to complain about the way their request for information had been handled. The complainant said that they were dissatisfied:

"because the council do hold the information I requested; this has been confirmed by a senior leader within the council."

10. The Commissioner will therefore consider whether the Council holds information falling within the scope of questions three and four and whether on the balance of probabilities the Council has met its obligations under section 1 of FOIA.

## Reasons for decision

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### Section 1 – information not held

11. Under section 1(1) of FOIA, anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b), to have the information communicated to them if it is held and is not exempt information.
12. FOIA concerns recorded information only. It does not require a public authority to answer general questions, provide opinions or explanations, generate answers to questions, or create or obtain information it does not hold. The information must already be held at the point a request is made. Nor does the legislation require a public authority to amend or verify the accuracy of the information it holds.
13. In cases where there is a dispute as to the information held by a public authority, the Commissioner will use the civil standard of proof, ie on the balance of probabilities. In order to determine such complaints, the Commissioner must decide whether, on the balance of probabilities, a public authority holds any information which falls within the scope of the request. If a public authority does not hold recorded information that falls within the scope of the request, the Commissioner cannot require the authority to take any further action.
14. The Commissioner asked the Council to provide a full explanation of its response for the requested information, and how it had concluded that it did not hold it. The Commissioner also asked the Council to provide details of the searches it carried out for information falling within the scope of the request. His remit is not to determine whether information should be held, but only whether, on the balance of probabilities, the requested information was held at the date of the request.
15. Accordingly, the investigation will consider the scope, quality, thoroughness, and results of the searches, and other explanations offered by the Council as to why the information in questions three and four is not held. The Commissioner will also consider any arguments put forward by the complainant as to why the information is likely to be held (as opposed to why it ought to be held).
16. The complainant's request in questions three and four is for the total number of (1) primary and (2) secondary school pupil vacancies in the Sutton Borough on 1 September 2022.

17. The complainant's reasons for believing that the Council hold further information which has not been disclosed appear to be because:
  - the website link provided in the Council's initial response only provides what schools have a vacancy but did not provide how many primary/secondary school vacancies the Borough had; and
  - an (unspecified) senior leader within the Council told them that the Council did hold the information requested.
18. The Council has explained to the Commissioner that the total number of pupil school vacancies in the Sutton Borough as at 1 September 2022 was not held by it in any form.
19. The Council told the Commissioner that it had made enquiries within its relevant operational areas. Both the Council's Head of Pupil Based Commissioning and the Strategic Lead for Education confirmed that the information requested is not held. The Head of Pupil Based Commissioning carried out searches for information in all relevant records but did not locate the requested information.
20. The Council explained to the Commissioner that the information is not held by it because exact school pupil vacancies data is the responsibility of individual schools to hold and maintain for their particular school. Further, the Council does not regularly receive from each school details of the exact number of vacancies each school has. It is for this reason the Council say it cannot publish the total vacancy numbers on its website. In addition, the Council explained that some schools only confirm to the Council whether or not they have a vacancy and not the exact number of vacancies.
21. Accordingly, the Council explained that the information published on the Council's website provides a table listing all schools and has a column for each school's year group setting out whether the school has any vacancies or not by indicating 'yes' or 'no' for each school year in the school. The exact number of vacancies is not set out. A link to this table of information was provided to the requester in the Council's original response.
22. Therefore the Council is of the view that it does not hold the information requested by the complainant.
23. The Commissioner has carefully considered the points made by the complainant and the Council.
24. The Commissioner is satisfied that adequate searches were carried out by the Council to determine whether recorded information within the

scope of questions three and four was held. Furthermore, the Commissioner is satisfied that appropriate consultations took place with Council staff and that should information within scope of the request have been held, those staff who were consulted would have been aware of such information.

25. The Commissioner accepts that the specific information that the complainant has asked for is not held. The Commissioner finds the argument that schools advise the Council of vacancies - but not how many - to be a particularly persuasive argument.
26. It is the Commissioner's view that the Council simply does not have the 'building blocks'<sup>1</sup> necessary to answer questions three and four of the request. The information cannot be compiled or extracted from raw data that the Council already possesses. Instead, to answer the questions, the Council would first need to obtain the actual raw vacancy number data from the schools themselves and then calculate the totals - the Commissioner understands from his own research that there are approximately 80 schools in the borough<sup>2</sup>. As mentioned above, the Council is not required under FOIA to obtain information it does not hold in order to answer a requester's question and creation of new data is not a requirement of the FOIA. Its obligation is to supply information it held at the time of the request.
27. As the Council was aware, and as mentioned to the complainant, many schools are public authorities in their own right and the FOIA does not place an obligation on the Council, in the circumstances of this case, to try to obtain the requested information from the schools themselves. The Commissioner notes that is why the Council suggested to the complainant in its original response to contact the schools directly for up to date information.
28. The Commissioner is aware that the complainant considers that the Council *should* have been able to provide them with information about how many places there were in total, at the date of the request. Whilst the Commissioner understands why the complainant would consider that such data was held, he notes the Council's reasons above for why it is not held.

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<sup>1</sup> The matter of 'building blocks' is discussed in the Commissioner's guidance on determining whether information is held: <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/determining-whether-we-hold-information/>

<sup>2</sup> The schools are listed here: <https://www.sutton.gov.uk/w/sutton-schools-vacancy-checker>

29. Having considered all the circumstances, on the balance of probabilities, the Commissioner therefore accepts the Council's position that it does not hold recorded information falling within the scope of questions three and four. As such, the Commissioner has decided that the Council has complied with section 1(1)(a) of FOIA.

**Section 10 – time limits**

30. Section 10(1) of FOIA states that a public authority must respond to a request promptly and "not later than the twentieth working day following the date of receipt".
31. The date of receipt in this case was the day on which the request was electronically delivered to the Council. The Council acknowledges the date it received the request was 5 September 2022.
32. The Council did not respond until 16 November 2022. The Council has explained to the Commissioner that the request was not correctly logged until 31 October 2023 due to confusion at the Council as the complainant had submitted two different requests three days apart.
33. From the evidence provided to the Commissioner in this case, it is clear that the Council did not deal with the request for information in accordance with FOIA. The Commissioner finds that the Council has breached section 10(1) by failing to respond to the request within 20 working days.

## Right of appeal

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

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

35. 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.
36. 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

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