

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 February 2017

Public Authority: Royal Borough of Kensington and Chelsea

Address: Town Hall
Hornton Street
London
W8 7NX

Decision (including any steps ordered)

1. The complainant has requested from Royal Borough of Kensington and Chelsea (the "Council") information regarding ABA (Applied Behaviour Analysis) programmes.
2. The Commissioner has determined that the Council was correct to apply section 12 of the FOIA to the request. Therefore, she does not require the Council to take any steps.

Request and response

3. On 13 July 2016 the complainant wrote to the Council and requested information in the following terms:

"(A) we want to see information regarding the triboroughs policy to ABA (Applied Behaviour Analysis) programmes for autistic kids.

(B) we want to know how many ABA programmes are currently being funded by the triborough"
4. The Council acknowledged the request on the same day and responded on 10 August 2016. It confirmed that it holds the information requested and applied section 12 of the FOIA to the request.

5. Following an internal review the Council wrote to the complainant on 8 September 2016. It stated that it does not have an ABA policy and it does not hold a central record of the information referred to in part (A) of the request. With regards to part (B), the Council applied section 12 of the FOIA.

Scope of the case

6. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
7. The Commissioner considers the scope of this case is to determine if the Council correctly applied section 12(1) of the FOIA to part (B) of the request.
8. The Commissioner will also consider whether the Council had taken reasonable steps to provide advice and assistance in accordance with section 16(1) of the FOIA to the request.

Reasons for decision

Section 12 – the cost of compliance

9. Section 12(1) allows a public authority to refuse to comply with a request for information if the authority estimates that the cost of compliance would exceed the 'appropriate limit', as defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Regulations").
10. This limit is set in the fees regulations at £600 for central government departments and £450 for all other public authorities. The fees regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 18 hours in this case.
11. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) states that an authority can only take into account 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; and
 - extracting the information from a document containing it.
12. The four activities are sequential, covering the retrieval process of the information by the public authority.
 13. The Council explained that:

"The provision of therapies, including ABA is not recorded in a reportable format and in order to fully comply with this request, we will need to review every Statement/EHC Plan (and annual reviews) to determine the numbers in receipt of ABA. There are approximately 500 children currently in the Royal Borough of Kensington and Chelsea on a Statement or EHC Plan."
 14. The Council stated that this figure does not change as new plans begin and old statements cease. It estimated that it would take the Council 30 minutes (approximately) to review each Statement/EHC Plan in order to provide the requested information. The Council also estimated that it would cost £6250 to comply with the request.
 15. Further to the complaint's confirmation that he is happy to narrow his request to the beginning of 2015, the Council considered this but it said that this would not make any difference to the estimation. The Council explained that it would still need to manually search through the records of all current children who are on statement or EHC Plan to identify those who are in receipt of ABA. This amounted to approximately 500 children at the time of the request. The Council added that it would then have to identify those who have been in receipt of ABA since 1 January 2015.
 16. The Council estimated the time to locate each statement or EHC plan and to read through it to find the information requested. Its figure was 20-30 minutes and it estimated the time to locate, extract and retrieve the information which totalled 160 hours approximately.
 17. The Council was asked to conduct a sampling exercise, as the Council had professed that its estimations were based on an educated guess by officers who work for Children's Services and who are familiar with the information. The Council clarified that the records of five children had been selected at random for the exercise and it had taken 15 minutes (on average) to read through each record. It estimated that it would take approximately 125 hours to locate, extract and retrieve the information. Its calculation is - approximately 500 children's records x 15 minutes.

18. The Council said that there is no easy way to identify if a child is in receipt of ABA. If a child is in receipt of ABA, this information is written within the file notes. The Council added that there is no other indicator within the file for example a separate page or tick box. Therefore, an officer would need to read the file in full to be certain whether or not a child is in receipt of ABA.

The complainant's view

19. The complainant disputed the Council's response. He is of the view that the information requested is retrievable within five minutes from the Council's systems and had been the subject of extensive internal analysis. The complainant stated that he had had this confirmed by numerous professionals who have worked in SEN with the Council or directly at the Council. He argued that there had been a deliberate breach of the FOIA and said that the information could be produced in about five minutes for zero marginal cost.

The Commissioner's position

20. When dealing with a complaint to the Commissioner under the FOIA, it is not the Commissioner's role to make a ruling on how a public authority deploys its resources, on how it chooses to hold its information, or the strength of its business reasons for holding information in the way that it does as opposed to any other way. Rather, in a case such as this, the Commissioner's role is simply to decide whether or not the requested information can, or cannot, be provided to a requester within the appropriate costs limit.
21. The Commissioner has considered the Council's estimation for complying with the request and she is satisfied with the Council's explanation as to why compliance to this request would exceed the appropriate limit. Section 12(1) of the FOIA therefore applies and the Council had correctly applied this exemption to the request.

Section 16 – advice and assistance

22. Under section 16 of the FOIA the Council is obliged to provide the complainant with advice and assistance to help the complainant refine the request to fall within the cost limit or explain why this would not be possible.
23. In this case, the Commissioner acknowledges that the Council had considered whether it had complied with its duty under section 16 to provide advice and assistance. This is in order to help the complainant narrow his request to bring it within the appropriate limit.

24. The Commissioner has reviewed the process involved in searching for the information requested and she notes the wide scope of the request. Also, she notes the fact that the information is not held by the Council in a format which can be easily searched and reported on. Therefore, it is clear that the Council could not have offered any significant advice on how to refine the complainant's request. The Commissioner considers that the Council complied with its obligations under section 16 of the FOIA.

Right of appeal

25. 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

26. 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.
27. 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

Rachael Cragg
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