Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 February 2013

Public Authority: Wigan Metropolitan Borough Council
Address: Town Hall
Library Street
Wigan
WN1 1YN

Decision (including any steps ordered)

1. The complainant made four requests for information to Wigan Metropolitan Borough Council ('the Council') over a short period of time, broadly relating to the provision and processes regarding Special Education Needs (SEN) within the Council. The Council considered that the requests were vexatious and relied on section 14(1) of the FOIA. The Commissioner considers that the requests were vexatious and that section 14(1) was correctly engaged. The Commissioner requires no remedial steps to be taken.

Request and response

2. Between 18 March 2012 and 5 April 2012 the complainant submitted four requests to the Council, three of which were multi-part requests. Details of these requests have been placed in Annex A to this notice

3. The Council issued a response to all four requests on 30 April 2012 stating that it was refusing the requests on the basis of section 14 of the FOIA as the requests were considered to be vexatious.

4. On 30 April 2012, the complainant requested an internal review of the Council's handling of the four requests and its decision that the requests were vexatious.

5. The Council provided the outcome of its internal review on 28 September 2012 and upheld its position that the requests were vexatious, and as such section 14 of the FOIA applied.

Scope of the case

6. The complainant initially contacted the Commissioner on 9 July 2012 to complain about the delay in the Council providing the outcome of its internal review which she has requested on 30 April 2012.

7. Following correspondence from the Commissioner, the Council provided the outcome of its internal review on 28 September 2012. The complainant contacted the Commissioner on 1 October 2012 to confirm that she had received the outcome of the Council's internal review, and she remained dissatisfied with its decision to apply section 14 of the FOIA to the requests.

8. The Commissioner has decided it is appropriate in the circumstances to address collectively the four requests made by the complainant. This is because the Council issued a single "global" response to the four requests stating that its position is effectively the same or hinges on the same substantive issues.

Reasons for decision

Section 14 - Vexatious Requests

9. Section 14(1) of the FOIA states that, section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

10. The Commissioner's approach to determining what constitutes vexatious request is set out in his guidance on section 14. This outlines a number of factors that may be relevant as to whether a request is vexatious, namely whether:

- whether compliance would create a significant burden in terms of expense ***and*** distraction
- whether the request is designed to cause disruption or annoyance
- whether the request has the effect of harassing the public authority or its staff
- whether the request can otherwise fairly be characterised as obsessive or manifestly unreasonable
- whether the request has any serious purpose or value.

11. In establishing which, if any, of these factors apply, the Commissioner will consider the context and history of the request as well as the strengths and weaknesses of both parties' arguments. The Commissioner has therefore taken into account the complainant's

previous interaction with the public authority when determining whether the requests can be correctly characterised as vexatious. This means that even if the requests appear reasonable in isolation, they may be vexatious if they demonstrate a continuation of behaviour which is obsessive and/or represents a significant burden when considered collectively.

12. The Commissioner agrees with the Tribunal that the bar need not be set too high in determining whether to deem a request vexatious. He also agrees with the Tribunal that the term 'vexatious' should be given its ordinary meaning, which is that it 'vexes' (causes irritation or annoyance; in relation to section 14(1), the annoyance must be caused by the process of complying with the request). The Information Commissioner recognises, however, that it is the request and not the requester that must be vexatious for section 14 to be engaged.

13. It is not necessary for all of the five factors listed in paragraph 10 to be engaged, however these are elements which are commonly encountered and the balance of these factors can be helpful in illustrating the reasons for any decision. The Council has given its position, in its submissions, which takes these five factors into account. The analysis below will therefore use factors as convenient headings, but the matter will also be considered 'in the round'.

Would compliance create a significant burden in terms of expense and distraction?

14. The Council advised that since July 2011 it has responded to a significant number of information requests about various matters associated with policies and procedures concerning provision and processes regarding SEN within the Council. In relation to the majority of these requests, the information requested (where held) has been provided.

15. In the period June 2011 to April 2012, the complainant submitted over fifteen information requests to the Council (including the four requests which are the subject of this notice). In the period from 8 February 2012 to 5 April 2012, the complainant made 9 information requests. Many of the requests contain multiple individual requests/questions, including some of the requests which are the subject of this notice. For example, one of the requests made on 18 March 2012 comprised of 5 main requests and 12 sub-requests. In addition, following receipt of the Council's response to some of the requests the complainant has made, she has submitted, further follow-up requests within a short space of time.

16. In addition to information requests, the Council has dealt with a number of communications from the complainant relating to complaints about three issues around the same subject matter ie SEN provision and processes. Each of the complaints on the three issues have been escalated through the Council's internal staged complaints procedure.

17. The Council argues that responding to continued requests in the volume they are being received would place a substantial burden on its financial and human resources. The Council advise that officers responsible for collating responses to the complainant's requests are front-line staff, with responsibilities to support service users within the Borough. Continued resources utilised in responding to requests received from the complainant would divert and distract these officers from carrying out their core roles.

18. The Commissioner has considered the requests in detail and specifically within their context and history. He is of the view that the context and history of the requests is relevant to a consideration of the burden that complying with the requests would impose on the Council. The Commissioner considers that complying with the requests would have caused a significant burden in terms of both costs and diverting staff away from their core functions. The Commissioner also considers it likely that complying with the requests would likely result in further requests which would likely be of such a nature as to be significantly burdensome; such is the pattern of the requests evidenced to the Commissioner. He therefore considers that complying with the requests would impose a significant burden.

Whether the request is designed to cause disruption or annoyance

19. The Council submitted limited arguments in support of its position that the request is designed to cause disruption or annoyance. The Council simply stated that it is of the view that the complainant is submitting requests to cause disruption to the Council, rather than having a genuine need for the information to be disclosed into the public domain. However, the Council has not submitted any evidence to support this view.

20. In her internal review request, the complainant confirmed that her requests were made to provide the public with information about how decisions are being made by the Council and how money is spent by the Council.

21. As this factor relates to the requester's intention, it can be difficult to prove. Cases where this is a strong argument are therefore likely to be rare. However, if a requester explicitly states that they want to cause maximum inconvenience, the request will almost certainly be vexatious.

22. Having considered the representations provided by the Council, and the background, context and subject matter of the request, the Commissioner is not satisfied that there is any real evidence to support the argument that the complainant intended to cause disruption and annoyance to the Council and its staff.

Whether the request has the effect of harassing the public authority or its staff

23. Again, the Council submitted limited representations in respect of this factor, and have simply stated that the volume and frequency of correspondence has had the effect of harassing the organisation. Staff within its SEN service area have expressed concern about the stress the continued requests are having on them and as a result, the Council believes the "requests are becoming harassing".

24. The Commissioner appreciates that to harass is a strong verb and emphasises that it is the effect of the requests and not the requester that must be considered. It is an objective test: so a reasonable person must be likely to regard the requests as harassing or distressing. The Commissioner's guidance states that the features that could make a request have the effect of harassing the public authority or its staff are:

- The volume and frequency of correspondence;
- The use of hostile, abusive or offensive language;
- An unreasonable fixation on individual members of staff; and
- The mingling of requests with accusations and complaints.

25. It is important to note that it is not the intention of the request that is the key point here but the likely effect of the request. The Commissioner has taken into account the fact that the complainant submitted a large number of requests over a short period of time, the majority of which consisted of multiple requests. The complainant has also made a number of complaints to the Council about the subject matter, the majority of which she has escalated through the various stages of the Council's internal complaints procedure.

26. The Commissioner considers that when the context and history of the complainant's requests and contacts are taken into account, the effect of the requests which are the subject of this notice is likely to have the effect of harassing the Council. While this may not have been the intention of the complainant and there is no evidence that her requests have contained hostile or abusive language, the Commissioner considers that the volume of requests and the pattern of submitting request after request has the effect of harassing the Council and the members of staff who have to deal with the requests.

Whether the request can otherwise fairly be characterised as obsessive or manifestly unreasonable

27. An obsessive request is often a strong indication that the request is vexatious. Contributory factors can include the volume and frequency of correspondence and whether there is a clear intention to use the request to reopen issues that have already been addressed.

28. In the Commissioner's view, the test to apply here is one of reasonableness. In other words, would a reasonable person describe the request as obsessive? The Commissioner's published guidance states that although a request in isolation may not be vexatious, if for example if it is the latest in a long series of overlapping requests or other correspondence then it may form part of a wider pattern of behaviour that makes it vexatious.

29. The Commissioner accepts that at times there is a fine line between obsession and persistence and although each case is determined on its own facts, the Commissioner considers that an obsessive request can be most easily identified where a complainant continues with the request(s) despite being in possession of other independent evidence on the same issue. However, the Commissioner also considers that a request may still be obsessive even without the presence of independent evidence.

30. The Council's position is that the information requests and other correspondence from the complainant, when taken together, formed evidence of a pattern of obsessive correspondence and requests to the point that it might reasonably regard the most recent requests as vexatious. The Council believes that the requests and correspondence from the complainant all relate to the same subject matter – the provision and processes regarding SEN within the Council.

31. The complainant is of the view that her requests relate to different subjects, and therefore cannot be deemed obsessive.

32. The Commissioner has considered the nature of the requests submitted by the complainant and he agrees that they follow an overarching theme and common thread relating to the Council's policies and procedures in respect of provision of SEN. The requests submitted relate to the following topics:

    - June 2011 - details of SEN Multi-professional green paper working group.
    - June 2011 – Details of children with SEN statements.
    - June 2011 – Details in relation to SEN Task Group.

- July and August 2011 –Request and follow-up request about SEN Moderating panel.
- July 2011 – Pupils without SEN statements in Wigan special schools.
- February 2012 – Request and follow-up request about children in Wigan with a certificate of visual impairment.
- February 2012 – 3rd party occupational therapy companies used by the Council
- February and April 2012 – Request and follow-up request about the provision of equipment to disabled children
- March 2012 – Decision making under the Education Act/SEN decision making (*this is one of the requests considered in this notice).
- March 2012 – Educational services provided for children with SEN (*this is one of the requests considered in this notice).
- March 2012 – Roles and responsibilities of staff responsible for SEN in the Council (*this is one of the requests considered in this notice).
- March 2012 – Follow up request regarding details of children with SEN statements (*this is one of the requests considered in this notice).

33. In addition to the information requests which the complainant has submitted, she has also submitted complaints about three separate issues related to the Council's policies and procedures about the provision of SEN. All of these complaints have been escalated through the various stages of the Council's internal complaints procedure. In addition, the complainant has made three complaints to the Local Government Ombudsman ('LGO'), and a complaint to the Department for Education ('DfE') which again relate to the same subject matter.

34. Due to the sensitivity of the subject matter, further details of the complaints made to the Council, the LGO and the DfE are contained within a confidential annex to this notice. The annex will be issued to both parties, but will not be published with the anonymised notice on the Commissioner's website. However, the outcomes of the complaints can be summarised as follows:

    - Complaints against the Council –Council maintained that it is complying with SEN processes and procedures.
    - Complaints against LGO – one complaint outside jurisdiction, one complaint LGO discontinued investigation, one complaint LGO decided not to investigate.
    - Complaint to DfE – Secretary of State determined there was no evidence to warrant intervention.

35. The Commissioner considers there to be a clear link between the four requests which are the subject of this notice and her complaints to the Council, the LGO and the DfE. Despite the complaints to the LGO and DfE, the complainant appears determined to pursue matters associated with the Council's SEN policies and procedures through further requests to the Council.

36. In this case, taking into account the context and background to the requests, in conjunction with the number of requests and complaints to both the Council and other organisations about the subject matter, the Commissioner considers that the requests can fairly be seen as obsessive.

Whether the request has any serious purpose or value

37. The only argument that the Council has submitted in terms of the request having any serious purpose of value is that the purpose and value of the requests has diminished due to the sheer number of requests received on the subject matter. The complainant has argued that her requests have been made to provide the public with information about how decisions are being made by the Council about SEN and how money is spent on such provisions.

38. The Commissioner considers that the requests do have serious purpose and value in terms of accountability and transparency. However, the Commissioner considers that any serious purpose or value in these requests does not in itself outweigh the other vexatious elements which he considers to be present.

Conclusion

39. The First-tier Tribunal has commented that consideration of a request as vexatious may not necessarily lend itself to an overly structured approach and has provided its opinion that it will be obvious from an examination of the facts of the case if the request is vexatious. The Commissioner acknowledges this position and in addition to his analysis of the five factors set out above, considers that the requests are clearly vexatious when set against the history of correspondence between the complainant, the Council and other organisations. The Commissioner considers that in this case there is evidence to demonstrate that the requests can fairly be characterised as obsessive, the volume of requests has the effect of harassing the Council and that complying with the requests would impose a significant burden. Taking these into account, and despite the serious purpose or value of these requests, he has concluded that the Council was correct to apply section 14(1) to the requests.

Other matters

Internal review

40. Whilst there is no explicit timescale laid down by the FOIA for completion of internal reviews, the Commissioner considers that they should be completed as promptly as possible. The Commissioner believes that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.

41. The Commissioner is concerned that in this case, it took over 100 working days for an internal review to be completed. The Commissioner does not believe that any exceptional circumstances existed to justify that delay, and he therefore wishes to register his view that the Council fell short of the standards of good practice by failing to complete its internal review within a reasonable timescale. He would like to take this opportunity to remind the Council of the expected standards in this regard and recommends that it aims to complete its future reviews within the Commissioner's standard timescale of 20 working days.

Right of appeal

42. 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: 0116 249 4253
    Email: informationtribunal@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

43. 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.

44. 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 .....

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex A – a schedule of the requests

Request 18 March 2012 – Decision Making under the Education Act

"I write with the following requests for information under the Freedom of Information Act. The questions relate to your statutory powers of decision-making under the Education Act 1996.

1. Who is the statutory decision-maker?

Please confirm who is responsible for exercising statutory decision-making powers on behalf of your authority under the Education Act. These powers include, but are not limited to, the responsibility for agreeing to statutory assessments of SEN and for making decisions on the issue of, or provision in, a statement.

2. Is information about the decision-maker shared with parents?

(i) Please confirm whether the identity of the person/persons responsible for decision-making under the Education Act is explicitly communicated to the parents, i.e. are parents told that a specific person or body will be responsible for making decisions on behalf of the authority?

(ii) If it is, please confirm how this is done.

(iii) If it is not done, please explain why.

3. Do you have a SEN Panel?

(i) If your local authority utilises a SEN Panel system, please confirm its role and its place within the statutory SEN system.

(ii) Please confirm who sits on the Panel and how they are appointed.

(iii)Please also confirm whether the role of the SEN is communicated to parents and, if so, how this is done. If this is not done, please explain why.

4. Is your SEN Panel the statutory decision-maker?

(i) Does your SEN Panel make statutory decisions about the provision in or the issue of a statement? If it does, is any oversight exercised in relation to the panel by executive officers of the authority or by elected members?

(ii) Please confirm whether parents or parental representatives may attend meetings which make decisions about their child.

(iii) If your SEN Panel has a decision-making role, please confirm whether information about the identity of those making the decisions is shared with parents.

(iv) Please confirm whether SEN Panel meetings are minuted. If they are minuted, is the decision-making process or just the decision recorded? Is this information available to parents? If so, how is it made available, e.g. does it have to be requested under the FOI Act?

(v) If your SEN Panel exercises statutory powers of decision-making under the Education Act but does not minute its meetings or record its decision-making or share these decisions with parents, please explain why.

5. Duty to explain decisions under the Education Act

(i) Irrespective of the identity of the statutory decision-maker, please confirm how decisions on SEN issues under the Education Act (for example, about the quality or quantity of provision or undertaking a statutory assessment) are recorded and whether decision-making is then shared with parents. This question refers not to the fact of the decision but the reason for it and relates to the guidance set out in para 8.32 in respect of decision-making.

(ii)Para 8:32 of SEN COP, advises local authorities, in the event of an evidential dispute about the nature or quantity of provision, to resolve and give reasons for their conclusions on the choice of opinions or evidence. How does your authority comply with this statutory guidance? If it does not, please explain why".

Request 18 March 2012 – Educational services provided for children with Special Education Needs

"In Wigan, if a child has a statement of special educational needs (a statement), please could you explain the following:

1. if physiotherapy is specified in part 3 of the statement, where does the funding come from to pay for it and how is this arrangement arrived at. Please note that I would like specific information about this. I would like information included about the role of joint commissioning and how this is used to provide physiotherapy.

2. The same Q as no1, but relating to occupational therapy.

3. The same as Q1 and 2, but relating to speech and language therapy.

4. If a school/child requires support from one of the Outreach Services in Wigan (SEN & Disabilities), whose budget pays for this service, and how much does it cost to receive this service. As the amount of Outreach varies from child/school to another, please specify the cost per xx.

5. Please could you provide a breakdown of how much the following have cost in the last 5 years, and if relevant, whether the funding has come from joint commissioning funding,or Wigan Council budgets:

Children's physiotherapy
Children's occupational therapy
Children's speech and language therapy.

Please also say whether any of the services above cost Wigan Council nothing as they were provided using funding from NHS".

Request 27 March 2012 – Roles and Responsibilities within SEN & Disability service

"Please could you tell me the job title of the person/people responsible for statutory assessments of SEN. By this I mean the person/people who would receive a request, process the request, ask for advice from involved parties, advise involved parties of the decision to assess or not, if the decision is to assess, to process the assessment and issue a decision whether to issue a statement or not.

For each of the job titles provided above, how many of these posts are there within the team (per job title).

How are details of statutory assessments recorded/stored, and for how long is the council required to keep these documents for?

Please could you provide a job description for the SEN Assessment and Commissioning Manager.

Finally, please could you tell me how many Annual Review (of statement of SEN) meetings the SEN Assessment and Commissioning Manager has attended in the last 12 months, and the reasons for this attendance".

Request 5 April 2012

The complainant submitted a refined request to the Council on 14 July 2011 regarding statements of SEN at a particular school. The Council initially

stated that, to comply with the request would exceed the appropriate cost limit and refused the request under section 12 of the FOIA. This request was the subject of a previous complaint to the Commissioner under case reference number FS50415856[1]. During the Commissioner's investigation of that complaint, the Council withdrew its reliance on section 12 and provided the information requested on 5 April 2012.

Following provision of this information, on 5 April 2012, the complainant submitted a new request for:

"You told me in a previous message that there are 14 children within the youngest group who don't have a statement. Are these 14 included in the spreadsheet? If so, please indicate in some way which age corresponds to these 14 children. This should not enable anyone to identify these children. If they are not included in the spreadsheet, please can I have the age at which their statutory assessment was started."

[1] http://www.ico.gov.uk/~/media/documents/decisionnotices/2012/fs_50415856.ashx