

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 November 2020

Public Authority: The Board of East Sussex College Group
Address: Cross Levels Way
Eastbourne
East Sussex
BN21 2UF

Decision (including any steps ordered)

1. The complainant requested a variety of information about personalised provision. The Board of East Sussex College Group ("the College") refused the request as vexatious.
2. The Commissioner's decision is that the request was vexatious and therefore the College was entitled to rely on section 14(1) of the FOIA to refuse it.
3. The Commissioner does not require further steps to be taken.

Reaction

4. The matter at the heart of this case is a sensitive one and one which involves the personal data of the complainant and a third party. As the personal data and the analysis in the decision are inextricably linked, the Commissioner has been unable to produce a fully reasoned decision notice that would be suitable for publication. Whilst the complainant and the College will both be provided with a complete version of the decision notice, the published version will be substantially redacted.

Request and response

5. On 4 April 2019, the complainant wrote to the College and requested information in the following terms:

Below is information requested under the Freedom of Information Act.

- 1) *No of hours and No of lessons per week for the following subjects*
 - A) *A Level Photography*
 - B) *As Level Film Studies*
 - C) *GCSE Maths*
 - D) *BTEC Level 3 IT*
- 2) *Example of Year 12 Timetable studying*
 - A) *BTEC Level 3 IT*
 - B) *1 A Level, 1 AS Level & 1 GCSE*
 - C) *1 A Level, 1 AS Level & 1 GCSE and BTEC Level 3*
- 3) *The College have stated that the Colleges admissions policy, SEND Local Offer policy and Equality policy are NOT applicable, therefore please clarify what policy/ies are applicable and please supply copies.*

The Following are Specific to Personalised Provision

I understand that there are currently 24 students on roll for personalised provision, (PP)

- 1) *ALL courses currently being studied by the 24 PP students*
- 2) *ALL exams and exams results for PP students for years 2017 & 2018 and exams being taken 2019*
- 3) *How many of the 24 PP students have all their studies delivered in the PP unit?*
- 4) *How many of the 24 PP students have all of their studies delivered in the mainstream college?*

- 5) *How many of the 24 PP students have their studies delivered within the PP unit and within the mainstream college?*
 - 5a) *Please break down for the 24 students the time each spends in PP unit and in mainstream college per week.*
- 6) *How many of the 24 PP students have their studies delivered within the PP unit, mainstream College and Ore Campus?*
 - 6a) *Please breakdown for each of these students the time spent in PP unit, mainstream college and Ore Campus per week.*
- 7) *How many of the 24 PP students have their studies delivered at the Ore Campus?*
 - 7a) *How do they get to the campus?*
 - 7b) *How many students have Ore campus courses delivered in the PP unit?*
- 8) *How many of the 24 PP students have..*
 - 8a) *Physical Disability/ies?*
 - 8b) *Behavioural Difficulties / Issues?*
 - 8c) *Require access to mentors / therapists for behaviour?*
 - 8d) *Require access to mentors / therapists for mental health issues which could include self harm?*
- 9) *How many of the 24 PP students have come from a specialist East Sussex state secondary placement?*
 - 9a) *How many have come from 'units' in mainstream East Sussex state secondary placement?*
- 10) *How many of the 24 PP students receive extra funding, (i.e. above the £4,000 per student)?*
 - 10a) *How many receive extra funding direct from ESFA?*
 - 10b) *How many receive extra funding direct from the LA?*
 - 10c) *The maximum cost of funding available / college can claim for a single PP student.*

- 10d) *The current maximum funding received for an individual pupil in PP unit.*
- 11) *How many of the 24 PP students have a full time LSA?*
- 11a) *How many of the 24 PP students have 1:1 with specialist subject teacher?*
- 11b) *How many of the 24 PP students have full time LSA and 1:1 with specialist subject teacher?*
- 12) *How many of the 24 PP students are selectively mute?*
- 12a) *How many members of PP staff working a) directly and b) indirectly with students have full specialist training for selective mutism?*
- 13) *How many of the 24 PP students have been placed without college offering a place?*
- 13a) *How many of the 24 PP students did not make an application to the college for a placement?*
- 13b) *How many of the 24 PP students did not make a request via the LA for a placement at the college?*
- 14) *How many fo the 24 PP students are 'commissioned' placements?*
- 14a) *Maximum funding that can be received for a 'commissioned' placement?*
- 14b) *Maximum funding currently being received for a commissioned placement?*
- 15) *How many of the 24 PP students are unable to see or come into contact with their peers / other students?*
- 16) *Which areas of the college are accessible to members of the public?*
- 17) *Example of current 'bespoke' PP timetable*
6. At a later date, the complainant added to her request:
- Additional Questions since 4th April*
- 18) *Number of FULL time LSA's working with single student*

19) Wage range of FULL time LSA working with single student

20) Number of students in personalised provision who go between Hastings and Ore campus and how this is carried out.

7. The College responded on 5 April 2019. It stated that the request was vexatious and advised that it would not be responding further.
8. The complainant sought an internal review on 25 July 2019, it is not clear whether the College carried out a review or not, but it made clear to the Commissioner that it wished to maintain its position and that entering into further correspondence with the complainant would be unlikely to resolve matters.

Scope of the case

9. The complainant first contacted the Commissioner on 1 July 2019 to complain about the way her request for information had been handled. At that point she had yet to seek an internal review of the way her request had been handled. When the College failed to complete its review within a reasonable period of time, despite a reminder, the Commissioner decided to exercise her discretion and accept the case for formal investigation.
10. In the period between the case being accepted (26 September 2019) and the Commissioner opening her investigation, the College contacted her to confirm that it wished to maintain its position that the request was vexatious. It provided the Commissioner with a schedule of correspondence and argued that this demonstrated unreasonable behaviour on behalf of the complainant.
11. At the outset of her investigation, on 17 January 2020, the Commissioner wrote to the complainant and, drawing on the correspondence summary, advised the complainant that the College's case appeared strong. She therefore asked the complainant to consider withdrawing the complaint.
12. The complainant disputed the Commissioner's view and put forward several arguments which, she felt, justified the volume of correspondence and increased the value of the information sought. The Commissioner will consider these arguments more fully below.
13. Noting that a decision notice would not assist either party and mindful that the complainant's arguments did raise some valid questions about the College's approach, the Commissioner did attempt, in January 2020, to mediate between the two parties in an attempt to resolve the

complaint informally. This did unearth some additional information (though not information which would have fallen within the scope of this request).

14. Whilst the College was reconsidering its stance, the Covid-19 pandemic began in the United Kingdom. With the College unable to respond, the Commissioner was left with no option but to put this complaint on hold for several months until the College's staff were able to gain full access to buildings and records.
15. Once the Commissioner was able to restart her work in September 2020, with the complainant disputing that she had received all the information she had requested and the College now wishing to maintain its previously adopted stance, the Commissioner has been left with no option but to issue a decision notice to conclude the case.
16. The Commissioner considers that the scope of the decision notice is to determine whether or not the request was vexatious.

Reasons for decision

Section 14 - Vexatious

17. Section 1(1) of the FOIA states that:

Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.*

18. Section 14 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.

19. The term "vexatious" is not defined within the FOIA. The Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). It commented that "vexatious" could be defined as the "manifestly unjustified, inappropriate or improper use of a formal procedure". The Upper Tribunal's approach in this case was subsequently upheld in the Court of Appeal.

20. The *Dransfield* definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
21. *Dransfield* also considered four broad issues: (1) the burden imposed by the request (on the public authority and its staff), (2) the motive of the requester, (3) the value or serious purpose of the request and (4) harassment or distress of and to staff. It explained that these considerations were not meant to be exhaustive and also explained the importance of: "...adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests." (paragraph 45).
22. The Commissioner has published guidance on dealing with vexatious requests¹, which includes a number of indicators that may apply in the case of a vexatious request. However, even if a request contains one or more of these indicators it will not necessarily mean that it must be vexatious.
23. When considering the application of section 14(1), a public authority can consider the context of the request and the history of its relationship with the requester, as the guidance explains: "*The context and history in which a request is made will often be a major factor in determining whether the request is vexatious, and the public authority will need to consider the wider circumstances surrounding the request before making a decision as to whether section 14(1) applies*".
24. However, the Commissioner is also keen to stress that in every case, it is the request itself that is vexatious and not the person making it.
25. In some cases it will be obvious when a request is vexatious but in others it may not. The Commissioner's guidance states: "In cases where the issue is not clear-cut, the key question to ask is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress."

The complainant's position

26. In summary, the complainant argued that her request was justified because of the sensitive matter involved. She also argued that the

¹ <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

College had failed to respond appropriately to information requests and had, on occasion asked her to redirect her inquiries to other staff members – resulting in duplication or overlapping correspondence.

27. [redacted]²
28. [redacted]
29. In requiring her to submit correspondence through external solicitors, the complainant argued that the College was attempting to intimidate her into dropping her challenge.
30. [redacted]
31. Whilst accepting that some of the correspondence was either duplicated or overlapping, the complainant argued that she had been told on some occasions that she had directed her correspondence to the wrong person, causing her to re-send or make fresh contact with the correct person. She also noted that her correspondence was not always acknowledged which (she argued) necessitated her following up that correspondence to check that it had been received.
32. Finally, the complainant stated that she believed that her earlier information requests (in particular her SARs) had not been responded to properly and that information had been withheld from her. She argued that she had been required to keep submitting information requests to the College to acquire this information.

The College's position

33. In summary, the College argued that, at the time of the request, the frequency and volume of the complainant's correspondence had become disproportionately burdensome and that staff now felt harassed. It also argued that responsibility for the sensitive matter at the heart of the dispute lay with the local authority and not the College.
34. The College drew attention to the amount of correspondence which it had received from the complainant in the seven weeks prior to the request which is the focus of this notice. The schedule of correspondence evidenced around 60 separate emails from the complainant and the emails suggested there were also several phone calls during that time as well.

² [redacted]

35. Such a volume of correspondence was, the College argued, placing a considerable burden (at the time the request was made) on the relatively small number of staff tasked with responding – who felt “harassed” as a result of the “tone and frequency” of the correspondence.
36. The College noted that the complainant would frequently make use of the FOIA process to make SARs and vice versa. It argued that it had responded to all the requests it had received prior to the request in question both in full and within the required timescales. It noted that it did not hold some of the requested information, was not required to do so and had informed the complainant accordingly – but the complainant persisted in asking for the same information.

37. [redacted]

The Commissioner's view

38. The Commissioner considers that, when set in context, the request was vexatious. The point at which the test should be applied is the point at which the request was made. Thus the Commissioner has had to have regard to matters as they existed in April 2019.
39. In summary, the Commissioner's view is that, at the point the request was made, the level of correspondence had reached a level which was disproportionate to the value of the request and had become unduly burdensome. Whilst the Commissioner does not accept the all the College's arguments, she does consider that, although the complainant clearly set out with good intentions, those intentions had drifted to the point of vexatiousness.
40. As the *Dransfield* judgements point out, a request which appears simple and benign on its face may still be considered to be vexatious when it is considered in its broader context. A public authority is not required to consider every request in isolation.
41. [redacted]
42. The Commissioner also considers it reasonable to note that she does not accept, based on the supporting evidence, some of the arguments the College has put forward.
43. Firstly, it is not acceptable to claim, as the College did, that confusing SAR and FOIA requests is an example of vexatious behaviour. Not many complainants (and, indeed, a surprisingly small number of public of public authorities) are fully aware of the nuances between the various information access regimes and it is unfair to penalise a requestor for a lack of familiarity with the legislation.

44. In any case, the Commissioner notes that, regardless of the regime a requestor purports to be submitting their request under, it is the responsibility of the public authority in question to determine the appropriate regime and respond accordingly. The Commissioner does not accept that dealing with a request under SAR, that has been submitted as a FOIA request (or vice versa), imposes any meaningful burden.
45. Secondly, the Commissioner was not persuaded that the tone of the complainant's correspondence came close to the threshold at which it would have become vexatious. The Commissioner does expect public authorities to deal with a certain amount of annoyance from requestors – even when that annoyance is expressed in robust terms. It is true that the complainant did, on occasion, accuse the College of [redacted], failing to respond adequately to her SARs or failing to meet other legislative requirements. However, the Commissioner has not identified correspondence in which the complaint is insulting, aggressive or using foul language. Nor do the accusations appear to be wholly unfounded – although the Commissioner accepts that the College may dispute the merits of the accusations.
46. Having reviewed the correspondence, the Commissioner is satisfied that, at worst, the tone of the correspondence is one of a person [redacted], who feels that they are not getting the level of service they require. This does not cross the boundary into vexatiousness.
47. In addition to these points, the Commissioner notes that the College could have reduced the amount of correspondence by incorporating some form of automated acknowledgement into its information request process. This would mean that the requestor would know almost immediately that their request had been received and could be used to inform requestors of the statutory deadlines so that their expectations were managed from the outset – all without the need for a member of staff to be diverted. This is something that the Commissioner raised with the College during the course of her investigation and she is somewhat disappointed to note that, as of the date of this notice, that suggestion does not appear to have been taken up.
48. [redacted]. However, as an independent person standing outside the process, it is clear to the Commissioner that, at the time the request was made, the College was having to spend a disproportionate amount of time dealing with the complainant's correspondence [redacted].
49. The Commissioner also accepts that, whilst the College appears to be quite a large institution, the majority of the burden of dealing with the frequent correspondence is likely to have fallen upon a relatively small

number of individuals. The resources that would have needed to be diverted to this task were, the Commissioner accepts, considerable.

50. The Commissioner is not wholly persuaded by the complainant's argument that the volume of correspondence has been inflated by the College's lack of acknowledgement of her emails and voicemails. In the Commissioner's view the complainant has, at times, expected responses unjustifiably early – especially in relation to information requests which have statutory deadlines yet were chased significantly earlier.
51. The complainant also announced, on 1 March 2020 that she would be making weekly SAR requests. The Commissioner cannot see how this could objectively be viewed as reasonable behaviour.
52. Whilst the complainant has argued that information which she requested under SAR has not been provided, the Commissioner notes that the appropriate course of action would have been for the complainant to have referred the matter to her as a data protection complaint – not to continue to submit more requests for the same information.
53. [redacted]
54. However, whilst the Commissioner is happy to accept that the complainant started out with the best of intentions and has never intentionally tried to harass the College or its staff, the intensity of her correspondence has gone beyond reasonable persistence. When viewed from the outside, the Commissioner does not consider that a reasonable person could conclude that such a large volume of correspondence, in such a short space of time, would not distract the College from its activities. Whilst the complainant may not have intended for her correspondence to have caused such disruption, that is the effect that it has had. Again, when looked at objectively, it is not surprising that the small number of staff dealing with these inquiries might feel harassed.
55. Had the request in question been submitted as one of the earlier pieces of correspondence, the Commissioner might have taken the view that the burden had not reached sufficient level to outweigh the value of the request. Unfortunately, during March 2019, the complainant's correspondence drifted into vexatiousness. By the time this request had been made, the circumstances rendered it disproportionate to the value of the information requested.
56. Whilst the College (somewhat surprisingly) did not raise this matter in its submission, the Commissioner also notes that the complainant's original request sought 45 individual categories of data (with three more added at a later date). The Commissioner does not consider that the breadth of the request would be sufficient alone to render the request

vexatious and it is not clear whether the request could have been answered within the cost limit. Nevertheless the Commissioner considers that the breadth of the request would have added considerably to the ongoing burden caused by the complainant's correspondence.

57. The Commissioner is therefore satisfied that the request was vexatious and thus the College was entitled to rely on section 14(1) of the FOIA to refuse it.

Other matters

58. The Commissioner is conscious that this complaint has taken more than a year, from the point at which she accepted the complaint, to issue her decision. Whilst some of the factors that have caused this delay were beyond her control, she is grateful to both the complainant and the College for their patience.

Right of appeal

59. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

60. 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.
61. 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

Phillip Angell
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