

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 October 2022

Public Authority: Council of the University of Kent
Address: The Registry
Canterbury
Kent
CT2 7NZ

Decision (including any steps ordered)

1. The complainant has requested information about a particular module called "Expect Respect." The above public authority's ("the public authority's") final position was that the request could not be responded to without exceeding the appropriate limit.
2. The Commissioner's decision is that the request would exceed the appropriate limit and the public authority is therefore entitled to rely on section 12 of FOIA to refuse it. As the public authority failed to rely on section 12 to refuse the entire request within 20 working days, it breached section 17(5) of FOIA. The Commissioner also considers that the public authority failed to comply with its section 16 duty to provide advice and assistance.
3. The Commissioner does not require further steps.

Request and response

4. On 30 September 2021 the complainant requested information of the following description:

"[1] I am requesting a full copy of the Expect Respect online course. Some aspects of this course were reported in the press (e.g. The Times, 28 September) but I would like to see the full course. One possibility would be to make the online course available to the general public, not only to members of the University. In any

case, I request a screenshot of every page of the course, along with a list of the correct answers to all the questions.”

5. On 1 October 2021, the complainant added to his request:

“[2] Any e-mails sent to students and/or staff concerning this course.

“[3] Any information or instructions on the University website concerning this course.

“[4] In particular, I would like to know whether completion of this course is mandatory for staff and/or students, and if so, by what date, and with what potential penalties for noncompliance.”

6. On 2 October 2021, the complainant added to his request a second time:

“[5] All public statements, or statements to the press, made by the University concerning the Expect Respect module, from 1 January 2020 to the present date, along with the name and title of the spokesperson. Please also confirm the accuracy of any press citations. I am aware of

https://urldefense.proofpoint.com/v2/url?u=https-3A_www.kentonline.co.uk_canterbury_news_compulsory-2Duni-2Dwhite-2Dprivilege-2Dcourse-2Dbranded-2Dthought-2Dpol-2D254801_&d=DwIDaQ&c=slrrB7dE8n7gBJbeO0g-IQ&r=uoMQgjd_S5rjPC_Na7UWLg&m=sOfBJIS1tgvvN37pA5PyLM_mnrkHFXzXGECXqFauS4Nk&s=zMkjmxcOMks_t1jAHxfriWateNEWmJrA4WVEyheWLZc&e=https://urldefense.proofpoint.com/v2/url?u=https-3A_www.kentlive.news_whats-2Don_whats-2Don-2Dnews_university-2Dkent-2Ddebunks-2Dclaims-2Dstudents-2D5989708&d=DwIDaQ&c=slrrB7dE8n7gBJbeO0g-IQ&r=uoMQgjd_S5rjPC_Na7UWLg&m=sOfBJIS1tgvvN37pA5PyLM_mnrkHFXzXGECXqFauS4Nk&s=pjSxEE8h8kUqHrriyhVN3AKU-lmROXPaxLh6CyMuZdw&e=
but there may be others.”

7. On 19 October 2021, he submitted a second request:

“For the version of the Expect Respect E-module that is currently in use:

“[6] Please disclose, separately for each section of the module:

(a) The names and titles of all (co)-authors.

(b) The names and titles of everyone who was involved in or contributed to its preparation.

"For staff that are senior, decision-making and/or public-facing, please provide the full name, department or office, and title(s). For junior staff and students, it suffices to state the department or office or organisation, and the title or role; if the "organisation" is a network of the Student Union (<https://kentunion.co.uk/networks>), please state which network. For outside consultants (if any), provide the full name, organisation and title(s).

- "[7] Were any academics or other subject experts, at the University of Kent or elsewhere, consulted during the preparation of this module? If so, please disclose their names, titles, areas of expertise, and the sections of the module on which they were consulted.
- "[8] Who took the decision to make this module compulsory for all students? Please also give the date(s) on which this decision was made and/or reaffirmed.
- "[9] And finally, please disclose all communications to students, staff or the general public -- whether by private e-mail, mass e-mail, webpage, press release, information to the press, or any other method -- that announced this decision. I am aware of the following webpages announcing this decision, but there may be others:
<https://blogs.kent.ac.uk/staff-student-news/2018/07/02/expect-respect-e-module/> (2 July 2018)
https://media.www.kent.ac.uk/se/19094/BT_130842_EDI2019-20_update_Final_webtake2.pdf#page=10 (2019-20 Annual EDI Report)
<https://blogs.kent.ac.uk/staff-student-news/2020/10/08/launch-of-the-expect-respect-module/> (8 Oct 2020)
<https://blogs.kent.ac.uk/staff-student-news/2021/02/09/take-the-expect-respect-module/> (9 Feb 2021)
<https://www.kent.ac.uk/equality-diversity-inclusivity/training> (26 Apr 2021)
<https://www.kent.ac.uk/challenging-racism/student-demands> (3 Aug 2021)
- "[10] Who took the decision to state publicly that this module is not compulsory? And who was the spokesperson who made this statement?

<https://www.kentlive.news/whats-on/whats-on-news/university-kent-debunks-claims-students-5989708>

"[11] How does the University reconcile the public assertions cited in #3 and #4 above?

"[12] If the University now maintains that the module is not compulsory, please disclose all communications to students or staff -- whether by private e-mail, mass e-mail, webpage, press release, information to the press, or any other method -- expressing this fact.

"[13] Was the university's Senate, or any of its committees, consulted during the preparation of this module, or prior to the decision to make it compulsory for all students?

"[14] Finally, for the Antiracism Strategy paper dated July 2021
<https://www.kent.ac.uk/office-vice-chancellor/executive-group/576/a-new-approach-to-antiracism-at-kent>
https://blogs.kent.ac.uk/executive-group/files/2021/08/BT_130984_Antiracism-Strategy_July_2021.pdf
please also answer questions #1 and #2 above.

8. On 25 October 2021, the public authority responded as follows:

- Elements [1] and [2] were refused as the cost of compliance would exceed the appropriate limit
- It withheld the information within the scope of elements [3] and [5] and relied on section 21 of FOIA to do so as the information was reasonably accessible to the complainant.
- It provided information within the scope of element [4]

9. The complainant requested an internal review on the same day. He challenged most of the University's responses and attempted to refine his request as follows:

"The e-mails sent to students and/or staff concerning this course (here I am referring only to the 2020-2021 version) presumably emanated from a small number of individuals, such as EDI director [redacted], Deputy Vice-Chancellors [redacted] and [redacted], and the Vice-Chancellor (and probably not even all of these). There are presumably a small number of such e-mails. I am here referring principally to *mass* e-mails to staff and/or students; there may be only one or two of these, and certainly not a large number. There may

be also a few e-mails to individual students or staff who inquired about various aspects of the policy; I would like to see these too, of course with names and other personal identifying information redacted. However, if the number of the latter exceeds 20 (which I highly doubt), then I am willing to see a representative sample of 20 of them.”

10. The public authority sent the outcome of its internal review on 19 November 2021 and now also responded to elements [6] to [14]. The internal review largely upheld the public authority’s original response to elements [1] to [5], although it accepted that some information within the scope of element [5] was exempt under section 40(2) of FOIA. It also noted that section 43 of FOIA would apply to information within the scope of element [1].
11. However, the public authority considered that it was entitled to have regard to the aggregated cost of complying with all fourteen elements and that, having done so, the total cost of complying with all elements would exceed the appropriate limit. It also considered that the requests were vexatious and that it was therefore entitled to rely on section 14 of FOIA to refuse them.

Scope of the case

12. The complainant contacted the Commissioner on 22 November 2021 to complain about the way his request for information had been handled.
13. At the outset of the investigation, the Commissioner contacted the public authority to ask it to justify the stance it had taken. The Commissioner noted that, based on the evidence in its previous responses, the public authority would be unlikely to be able to rely on section 14 of FOIA, but that he would consider whether dealing with all elements of the request would exceed the appropriate limit, providing that appropriate evidence was provided.
14. The public authority instead decided to issue a fresh response to the request on 26 August 2022. It provided some information and withheld some information. However it maintained that dealing with elements [2] and [9] would exceed the appropriate limit.
15. The complainant disputed almost every aspect of the public authority’s fresh response – in particular arguing that the public authority had failed to take account of his attempts to refine this part of the request.
16. Given that its fresh response had not satisfied the complainant, the Commissioner asked the University whether it had considered the

aggregate cost of responding to **all** the elements of the request and if it now wished to rely on section 12 of FOIA in respect of the request as a whole.

17. The public authority responded on 27 September 2022 to state that it now wished to rely on section 12 in respect of the entire request.
18. The Commissioner considers that the scope of his investigation is to determine whether the request would exceed the appropriate limit.

Reasons for decision

Section 12 – cost of compliance

19. 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.”

20. Section 12 of the FOIA states that:

“(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

- (2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.”

21. The “Appropriate Limit” is defined in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Regulations”) and is set at £600 for government departments and £450 for all other public authorities. The Regulations also state that staff time should be notionally charged at a flat rate of £25 per hour, giving an effective time limit of 18 hours.

22. When estimating the cost of complying with a request, a public authority is entitled to take account of time or cost spent in:

- (a) determining whether it holds the information,
 - (b) locating the information, or a document which may contain the information,
 - (c) retrieving the information, or a document which may contain the information, and
 - (d) extracting the information from a document containing it.
23. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v Information Commissioner & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the Commissioner considers that any estimate must be “sensible, realistic and supported by cogent evidence”.¹ The task for the Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.

The public authority's position

24. The public authority explained to the Commissioner that, up to the point of issuing its response of 26 August 2022, it had already exceeded the appropriate limit because it had spent over 22 hours responding to the request – even without accounting for time spent carrying out internal reviews or dealing with the Commissioner's enquiries.
25. The public authority explained that responding to the complainant's original request had required a total of ten hours to determine the information that was held, locate it and where necessary, retrieve or extract the information that was relevant.
26. Issuing the fresh response in August 2022 took, the public authority explained, a further 12 hours of staff time in identifying the information that was relevant.
27. Furthermore, the public authority explained that, to respond to the remaining elements of the request (that it had previously relied on section 12 of FOIA to refuse) would require at least five hours' additional work.

¹ <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf>

28. It explained that it would need to set up a specialist search to trawl through relevant mailboxes. Including the time spent designing the search, running it, checking the results and determining whether the information identified did or did not fall within the scope of the request would take around two and a half hours – but would need to be done twice to seek information within the scope of both element [2] and element [9].
29. The public authority also noted that this estimate was based on all relevant information being identified on a single run of the search: were either search to be re-run that would add an extra hour for each additional round of searching carried out.
30. Therefore, in total, the public authority noted that, by the time it had complied with the request as a whole (were it required to do so) it would have devoted 27 hours of staff time to dealing with the request – which would carry a notional cost of £675, far in excess of the £450 appropriate limit.

The Commissioner's view

31. Based on the evidence provided, the Commissioner accepts that the public authority has reasonably estimated that the cost of complying with the request would exceed the appropriate limit.
32. This is an unusual case where the public authority has already carried out a substantial amount of work, prior to relying on section 12 of FOIA. Whilst it considers that the amount of additional work required is relatively small, the public authority also considers that it has in fact already exceeded the appropriate limit and thus should not be required to carry out further work.
33. Where a requestor submits a request that contains multiple parts, each individual part should technically be treated as a separate request for information – although in practical terms a public authority will usually issue a single response that deals with each element.
34. Where a requestor submits multiple requests within a period of 60 consecutive working days relating to the same or similar information, a public authority is entitled to consider the combined cost of responding to all the requests when deciding whether the appropriate limit would be breached.
35. In this case, the four items of correspondence containing the fourteen elements listed above were clearly submitted within 60 working days of each other and by the same individual. The Commissioner is satisfied that the requests have the same underlying theme (the Expect Respect

module) and therefore the public authority was entitled to aggregate them when considering the cost of complying.

36. The Commissioner is of the view that an estimate of the cost of compliance will always be more robust where it is based on real world data – whether that be a sampling exercise or, as in this case, actual work that has been carried out.
37. The Commissioner has approached the public authority's inclusion of the time spent producing its response of 26 August 2022 with some caution. In principle, there is nothing to prevent a public authority from including costs that it did not incur (or did not think it would incur) at the point it first responded to the request. The Commissioner also notes that the public authority was, by this point, no longer relying on section 14 to refuse any elements of the request and that it disclosed additional information beyond that already identified.
38. However looking at the tasks the public authority says it carried out to produce the fresh response, the Commissioner considers that there was likely to be a certain amount of duplication of effort from tasks that had already been carried out when the public authority originally responded to the request. It would clearly be contrary to the spirit of FOIA if a public authority were able to inflate its estimate because it did not carry out adequate searches at the outset.
39. That being said, the Commissioner notes that issuing the fresh response would have required searching for information that the public authority had not needed to search for previously (ie. the parts of the requests it had relied on section 14 to withhold). He does not consider that any duplicated work could realistically account for more than about five hours of staff time – and likely much less.
40. Even if the Commissioner were to find that the public authority had in fact only carried out 17 hours of work to date, that would leave a single hour to respond to the remaining elements without exceeding the appropriate limit – and the Commissioner considers this to be unrealistic.
41. The public authority has estimated that it would need around five hours to search for information within the scope of elements [2] and [9]. Whilst it indicated to the Commissioner previously that it could not comply with these elements in under 18 hours, it now considers it can - based on the complainant's attempts to refine his request. However, the Commissioner considers this to be inaccurate.

42. The public authority originally stated that it could not comply with these elements because of their wide scope and the potential volume of information that would need to be searched.

43. The complainant has argued that he has now revised these elements when he contacted the public authority to say that:

“The e-mails sent to students and/or staff concerning this course (here I am referring only to the 2020-2021 version) **presumably** emanated from a small number of individuals, such as EDI director [redacted], Deputy Vice-Chancellors [redacted] and [redacted], and the Vice-Chancellor (and probably not even all of these). There are **presumably** a small number of such e-mails. **I am here referring principally to *mass* e-mails to staff and/or students; there may be only one or two of these, and certainly not a large number.** There may be also a few e-mails to individual students or staff who inquired about various aspects of the policy; I would like to see these too, of course with names and other personal identifying information redacted. However, if the number of the latter exceeds 20 (which I highly doubt), then I am willing to see a representative sample of 20 of them.” [emphasis added]

44. The complainant then added, when contacting the Commissioner, that:

“For avoidance of doubt, I am willing to restrict my Additional Item #1 to e-mails sent by those four named individuals or their staff. This should surely reduce the search time to less than an hour.” [original emphasis]

45. Having considered the matter, the Commissioner is not convinced that either of the above items of correspondence amounts to a substantive refining of the request that the public authority was required to process.

46. The suggestion of restricting the scope of both elements to only the four individuals identified in the correspondence of 25 October 2021 was not made to the public authority, but to the Commissioner – and as part of a larger document in which the complainant set out his grounds of complaint. Whilst the public authority was copied in to this correspondence, the Commissioner considers that it would be unreasonable to have expected the public authority to have reviewed a document (which ran to 69 pages) that it had only been copied into in order to check whether it contained an information request.

47. The Commissioner does not therefore consider that the correspondence to his own office of 22 November 2021 is a request that has been appropriately put to the public authority – the public authority is therefore under no obligation to comply with it.

48. The correspondence of 25 October 2021 **was** put to the public authority and the Commissioner has therefore considered whether this correspondence does in fact narrow the request – he has concluded that it does not.
49. The email that the complainant sent does not include any definitive instruction to the public authority to include or exclude any particular category of information. The complainant presumes that the information he is interested in would have emanated from one of four individuals – but there is no language that could reasonably be interpreted as restricting the request to just these individuals. Given that the quoted paragraph formed part of a large complaint about the way his original request had been handled, the Commissioner considers that the public authority is entitled to regard the correspondence as seeking to challenge its application of section 12 to the original request – not seeking to submit a fresh request.
50. The original wording of element [2] was:

“Any e-mails sent to students and/or staff concerning this course.”
51. The complainant indicates that he is primarily interested in mass emails, but then expands the request by saying that he is also interested in any emails that were sent by staff or students querying the Expect Respect module.
52. The complainant has indicated that he thinks that the mass emails would have come from one of the four individuals identified in his correspondence of 25 October 2021 – however the Commissioner does not consider that the complainant would be justified in such an assertion. Firstly, the Commissioner notes that the complainant does not appear to be a member of staff or a student of the public authority – so his inside knowledge of the information the public authority holds is likely to be limited.
53. Secondly the Commissioner notes that, even if one of the four individual signed off one or more mass emails (and there would potentially be other individuals who did instead), there is no guarantee that such emails emanated from their work email account. The correspondence could have been sent on their behalf by an assistant using their own account, or could have been sent from a generic organisation email address – not linked to a particular individual.
54. This element of the request could also include any emails students or staff sent to each other about the module – for example, if a student had emailed numerous members of their faculty encouraging other

students to take (or not take) the module, that would appear to qualify as a "mass" email sent between students and/or staff.

55. The Commissioner is therefore satisfied that, in order to comply with element [2] and element [9] of the request, the public authority would need to extend its search significantly beyond the mailboxes of the four individuals identified by the complaint. Whilst these may be the four individuals most likely to hold the information the complainant is interested in, there is no guarantee that these are the only individuals who will hold information that falls within the scope of the actual request that was received by the public authority. In *Kirkham v Information Commissioner*, Judge Jacobs observed that:

"I accept that there is never a guarantee that public authorities will be able to retrieve every piece of information that they hold within the scope of a request. That may be because it was wrongly stored: a document may be put into the wrong file or a name may be misspelt in an email. Or it may be because of a mistake in the search, whether human or electronic. But just because a search may fail to discover all the relevant information does not mean that it will always do so. Nor is it an excuse for relieving the authority of its legal responsibility if (i) the information is not stored in a way that can be retrieved when a request is made or (ii) the search is inadequate to find that information. I do not accept that it is permissible to interpret FOIA in a way that is guaranteed not to allow a public authority the chance to comply with its duty. Success may not be guaranteed, but failure cannot under the terms of the legislation be the only option."

56. Furthermore, the Commissioner notes that the complainant has not limited the scope of the second part of his "revised" request – which sought any correspondence sent by staff and students.
57. Asking for a "representative sample" is not a valid request – as it requires the public authority to make a subjective judgement about the information that does and does not fall within the scope of the request. Therefore this part of the request still seeks **any** email sent by **any** student or **any** staff member concerning the module. The public authority must therefore search for all such correspondence in order to satisfy the request.
58. The public authority indicated that it would need only five hours to carry out searches. Given the matters outlined in paragraphs 40 to 58 of this notice, the Commissioner considers that this is likely to be a significant under-estimate.
59. It is of course open to the complainant to make a revised request for information, perhaps by restricting the search to just the mailboxes of

the named individuals. However, the Commissioner is required to deal with the request that was made and the request that was made would exceed the appropriate limit if the public authority were to comply with it.

60. The public authority was therefore entitled to rely on section 12 of FOIA to refuse all fourteen elements of the request.

Procedural matters

61. Section 16 of FOIA places a duty upon public authorities to provide reasonable advice and assistance to those making (or wishing to make) requests for information. The Code of Practice, issued under section 45 of FOIA, requires advice and assistance to be provided by public authority wishing to rely on section 12 to help the requestor to refine their request so that it falls within the appropriate limit.
62. In this case, the Commissioner has not identified any advice and assistance that the University offered the complainant to help him to refine his request. He therefore finds a breach of section 16.
63. In this particular case, the Commissioner has decided that it would not be proportionate to order steps. The analysis he has laid out above gives a strong indication of those parts of the request which are likely to be the most costly to comply with – such analysis is likely to represent the advice and assistance that the public authority would be most likely to offer. The Commissioner therefore considers that the complainant now has sufficient information on which to base a refined request.
64. Section 17(5) of FOIA requires a public authority, relying on section 12 of FOIA to refuse a request, to issue a refusal notice within 20 working days. Whilst the public authority did issue a refusal notice within 20 working days, the refusal notice did not apply section 12 of FOIA to the entirety of the request – apposition the public authority only reached on 26 September 2022. The Commissioner therefor finds that the public authority breached section 17(5) of FOIA in responding to the request.

Right of appeal

65. 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

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

66. 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.
67. 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

Roger Cawthorne
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