

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 3 August 2018

Public Authority: London Borough of Hackney
Address: Hackney Service Centre
1 Hillman Street
London E8 1DY

Decision (including any steps ordered)

1. The complainant requested information relating to the provision of Education Health Care Plans (EHCP) to children with special educational needs. The London Borough of Hackney (the Council) provided information in response, but the complainant said it was not the information he had requested. The complainant submitted a clarified request (request 2) and the Council refused this as repeated under section 14(2) of the FOIA.
2. The Commissioner's decision is that the Council was not entitled to rely on section 14(2) in respect of request 2. The Commissioner also finds that the Council has failed to comply with section 1(1)(a), section 1(1)(b) and section 10(1) in that the information it has disclosed is not the information that was actually requested by the complainant in request 2.
3. The Commissioner requires that the Council provide the following information to the complainant:
 - i. The number of children with special educational needs in the local authority area who had an Education Health Care Plan (or statement of SEN) in place when transitioning into primary school (either from home or nursery) in September 2017.
 - ii. In respect of the cases falling within the scope of question 1, the number of statements/care plans that were reviewed, in a manner that met the specific requirements set out at sections 9.166 and 9.167 of the SEND Code of Practice, by the 15 February 2017 deadline.

4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

Requests and responses

Request 1: 11 August 2017

5. The complainant requested the following information from the Council on 11 August 2017:

Q1. How many children with special educational needs in your local authority area required an Education Health Care Plan or statement of SEN for transitioning from primary to secondary school in September 2017?

Q2. How many of these children received their final transition Education Health Care Plan or statement by the 15 February 2017 deadline?

Q3. How many children with special educational needs in your local authority area required an Education Health Care Plan or statement of SEN for transitioning into primary school (either from home or nursery) in September 2017?

Q4. How many of these children received their final transition Education Health Care Plan or statement by the 15 February 2017 deadline?

Q5. How many children with special educational needs in your local authority area were awarded an Education Health Care Plan in 2016?

Q6. How many of these children received their final transition Education Health Care Plan within the 20 week deadline (timed from when HLT were first made aware of the child, or from when a request for an assessment was made)?

Q7. Of the EHCPs which were not finalised within the 20 week deadline, what was the average time, in weeks, that actually was taken?

Q8. Of the EHCPs which were not finalised within the 20 week deadline, what was the longest time, in weeks, that actually was taken?

6. The Council responded on 4 September 2017, answering each question. The complainant disputed the accuracy of some of the information provided, but the Council maintained that it had provided accurate

information. On 4 September 2017 the complainant requested clarification of the information provided in response to questions 3, 4 and 8. Specifically, he asked the Council to explain how it calculated the figures provided. The Council said that it did not wish to comment on the basis that the Local Government Ombudsman (LGO) was at that time investigating a separate complaint submitted by the complainant. However an internal review was subsequently conducted which upheld the Council's original response.

7. The complainant contacted the Commissioner on 17 January 2018 to complain that the Council had misinterpreted his request. On receipt of the complaint it appeared to the Commissioner that the Council had interpreted the requests in a different way than the complainant had intended.
8. The complainant told the Commissioner that his request referred to "final" assessments being issued by 15 February, and he interpreted this as assessments that had been reviewed in compliance with section 9.166 and section 9.167 of the "Special educational needs and disability code of practice"¹ (the SEND Code of Practice). The relevant sections of the SEND Code of Practice are set out in Annex 1 at the end of this decision notice.
9. The complainant clarified to the Commissioner that he wanted to know how many of these purported statements/care plans had not been reviewed in compliance with the SEND Code of Practice, but had just had administrative details updated. The complainant expressed concern that in some cases the Council had issued an amended statement/care plan by the 15 February deadline, but had not actually reviewed the statement/care plan in compliance with the SEND Code of Practice.
10. In the Commissioner's opinion the Council did not accept the complainant's view that it had failed to meet statutory requirements, and had not interpreted the request in line with the complainant's intention. Therefore the Commissioner advised the complainant to submit a fresh request to the Council, clearly setting out the specific information he sought.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/398815/SEND Code of Practice January 2015.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/398815/SEND_Code_of_Practice_January_2015.pdf)

Request 2: 25 May 2018

11. On 25 May 2018 the complainant submitted request 2 to the Council:

Q1- How many children with special educational needs in your local authority area had an Education Health Care Plan (or statement of SEN) in place when transitioning into primary school (either from home or nursery) in September 2017?

Q2 – How many of these children had their Education Health Care Plan (or statement) reviewed, amended, finalised and issued by 15 February 2017, as required by 9.179 of the SEND Code and in which the review, amendment and finalisation process was conducted as specified by the SEND Code?

12. The Council responded on 1 June 2018, refusing the request as repeated within the meaning of section 14(2) of the FOIA.

Scope of the case

13. The complainant contacted the Commissioner again on 7 June 2018. The complainant asked the Commissioner to issue a decision notice requiring the Council to provide him with the requested information.
14. The Commissioner is aware that the complainant has a wider dispute with the Council. He has alleged that the Council is failing to comply with section 9.179 of the SEND Code of Practice, in particular to meet the 15 February deadline for amending statements/care plans in transition years to primary school. However the Commissioner has stressed to the complainant that she cannot comment on his allegations. She can only consider whether the Council as a public authority has dealt with a request for information in accordance with the requirements of the FOIA. The Commissioner has further explained that the Council is only obliged to consider information that it actually holds, it is not required to produce information in order to respond to a request.
15. Therefore, the Commissioner considers the scope of the case to be whether the Council has properly interpreted the complainant's request of 25 May 2018 (request 2), and whether the Council was entitled to refuse request 2 as a repeated request under section 14(2) of the FOIA.

Reasons for decision

Section 14(2): repeated requests

16. Section 14(2) says that a public authority is not obliged to comply with a request if it has previously complied with an identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.
17. The Council's refusal notice of 1 June 2018 cited section 14(2) on the basis that

"...the relevant records remain as they were on the date of your initial request, and your concerns have been addressed at the internal review stage".
18. However, the Commissioner disagrees with the Council's statement. The complainant did explain to the Council why he felt request 1 had been misinterpreted, but the Council did not address the issue of how the request had been interpreted. Rather, the Council upheld its original response.
19. The Commissioner's published guidance² on section 14(2) states that a public authority can only rely on section 14(2) where it has either already provided the requested information, or previously confirmed that the requested information is not held, in response to an earlier FOIA request from the same requester. If neither of these criteria applies, then the request is not repeated and the authority must process it in the usual manner.
20. In this case the Commissioner finds that question 1 of request 2 was a new request, rather than a resubmission of part of request 1. It is similar to question 3 of request 1, but asks how many children had an Education Health Care Plan or statement, whereas question 3 of request 1 asked how many children required this. It is possible that both questions have the same answer, and the Commissioner notes that the complainant did not dispute the figure of 46 provided to him. However Commissioner is of the opinion that the Council ought to have

² <https://ico.org.uk/media/for-organisations/documents/1195/dealing-with-repeat-requests.pdf>

recognised the difference between the two requests and addressed this in its response.

21. Notwithstanding the Commissioner's finding in respect of question 1, the Commissioner also finds that the Council has not previously provided the specific requested information in response to question 2 of request 2. Nor has it confirmed that the requested information is not held. The Commissioner has addressed the Council's interpretation of the request below. In any event the Commissioner is satisfied that request 2 was not a repeated request and the Council was not entitled to rely on section 14(2).

Interpretation of the request

22. The Commissioner has also published guidance³ on interpreting requests. The guidance emphasises that public authorities are required to interpret requests objectively, and should clarify unclear or ambiguous requests with the complainant.
23. As set out above, the Commissioner notes that the complainant submitted request 2 in order to clarify request 1:

"Q1- How many children with special educational needs in your local authority area had an Education Health Care Plan (or statement of SEN) in place when transitioning into primary school (either from home or nursery) in September 2017?"

Q2 – How many of these children had their Education Health Care Plan (or statement) reviewed, amended, finalised and issued by 15 February 2017, as required by 9.179 of the SEND Code and in which the review, amendment and finalisation process was conducted as specified by the SEND Code?"

24. The Council says it had provided the requested information to the complainant in its previous response dated 4 September 2017. The complainant did not dispute the information provided in response to question 1 (46 children), but was of the view that the information provided in response to question 2 (43 children) was not the information he had actually requested.

³ <https://ico.org.uk/media/for-organisations/documents/1162/interpreting-and-clarifying-a-request-foia-eir-guidance.pdf>

25. In this case the Council has interpreted the complainant's request as relating to the number of statements/care plans issued by 15 February (43 out of 46 children). However the complainant has advised the Council, and the Commissioner, that he is specifically asking how many of these purported statements/care plans had been actively reviewed and amended in line with the requirements of the SEND Code of Practice, rather than just having administrative details updated.

26. The complainant has set out to the Commissioner that part 9.166 and part 9.167 of the SEND Code of Practice set out a number of steps that authorities should take when reviewing statements/care plans. Part 9.179 of the SEND Code of Practice sets out that:

*"The review and any amendments **must** be completed by 15 February in the calendar year of the transfer at the latest for transfers into or between schools."*

27. The complainant maintains that the Council has not reviewed the statements/care plans, in line with the requirements of parts 9.166 and 9.167 of the SEND Code of Practice, in all 43 cases as the Council has claimed. The complainant's view is that, since the Council has failed to conduct adequate reviews by the 15 February deadline in some cases, the Council has failed to comply with part 9.179 of the SEND Code of Practice. The Council strongly disputes this.

28. The Commissioner is mindful that, as set out above, the complainant is in dispute with the Council. The complainant and the Council clearly disagree as to whether or not the Council has met the statutory requirements regarding compliance with part 9.179 of the SEND Code of Practice. The Commissioner has stressed to both parties that she cannot comment on whether or not the Council has complied, since this falls outside the scope of section 50 of the FOIA.

29. The Commissioner also observes that the complainant has been less than courteous in some of his correspondence with the Council. He has made allegations regarding Council staff and his language has been arguably intemperate on occasion. However, this in itself should not affect the Council's response to the request. In the Commissioner's opinion it is clear that the Council has maintained a subjective interpretation of the complainant's request in the context of the dispute over the Council's compliance with the SEND Code of Practice.

30. The Commissioner's guidance specifically addresses how a public authority should handle a request containing contentious criticisms or allegations:

*"However, the authority must not allow its own views about the validity of any criticisms or allegations to influence how it reads the request; its sole focus must be on the information that is being requested."*⁴

31. In this case the Commissioner considers that the Council ought to have set aside its rejection of the complainant's allegations when responding to the request. The requested information is essentially how many of the 46 statement/care plans contain information relating to the criteria set out at parts 9.166 and 9.167 of the SEND Code of Practice, over and above updating administrative details. The Commissioner believes that the Council ought to be able to extract this information from the records it holds. She also notes that the Council confirmed to the complainant in its internal review that the requested information was not considered exempt under the FOIA.

Statutory requirements

32. Section 1(1)(a) of the FOIA requires a public authority to confirm or deny (subject to exclusions) that it holds information of the description specified in the request. Section 1(1)(b) further requires the authority to disclose the information that it holds (subject to exemptions). If the authority considers that the request is unclear, section 1(1) of the FOIA provides that it may seek clarification from the applicant. In any event section 16 sets out a general duty to provide advice and assistance to applicants. Section 10(1) of the FOIA states that, subject to exemptions, the authority is required to comply with section 1 within 20 working days.
33. The Commissioner wrote to the Council on 21 June 2018 to set out her view that the Council had failed to respond to the request in accordance with the requirements of the FOIA. The Commissioner asked that the Council reconsider the request and issue a revised response.
34. The Council informed the Commissioner on 16 July 2018 that it did not accept that it had misinterpreted the complainant's request. The Council said that the only way the requests could be interpreted according to the complainant's clarification was if the Council accepted that it had failed to comply with section 9.179 of the code of practice. Since the Council did not accept this, it could not revise its response.

⁴ Page 10

35. In the Commissioner's opinion the Council has allowed its views about the validity of the complainant's allegations to influence its interpretation of the request. Rather than engage with the complainant to explain its interpretation, and check that it was correct, the Council focused on the complainant's allegations. The Commissioner understands that the dispute between the complainant and the Council has made communication more difficult. However the Commissioner is disappointed that the Council failed to remedy this error even after she set out her view to it.

Right of appeal

36. 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

37. 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.
38. 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

Sarah O’Cathain
Senior Case Officer
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex 1

Extracts from "Special educational needs and disability code of practice: 0 to 25 years"⁵

Reviewing an EHC plan

Relevant legislation: Section 44 of the Children and Families Act 2014 and Regulations 2, 18, 19, 20, and 21 of the SEND Regulations 2014

9.166 EHC plans should be used to actively monitor children and young people's progress towards their outcomes and longer term aspirations. They **must** be reviewed by the local authority as a minimum every 12 months. Reviews **must** focus on the child or young person's progress towards achieving the outcomes specified in the EHC plan. The review **must** also consider whether these outcomes and supporting targets remain appropriate.

9.167 Reviews should also:

- gather and assess information so that it can be used by early years settings, schools or colleges to support the child or young person's progress and their access to teaching and learning
- review the special educational provision made for the child or young person to ensure it is being effective in ensuring access to teaching and learning and good progress
- review the health and social care provision made for the child or young person and its effectiveness in ensuring good progress towards outcomes
- consider the continuing appropriateness of the EHC plan in the light of the child or young person's progress during the previous year or changed circumstances and whether changes are required including any changes to outcomes, enhanced provision, change of educational establishment or whether the EHC plan should be discontinued

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/398815/SEND Code of Practice January 2015.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/398815/SEND_Code_of_Practice_January_2015.pdf)

- set new interim targets for the coming year and where appropriate, agree new outcomes
- review any interim targets set by the early years provider, school or college or other education provider

Transfer between phases of education

9.179 An EHC plan **must** be reviewed and amended in sufficient time prior to a child or young person moving between key phases of education, to allow for planning for and, where necessary, commissioning of support and provision at the new institution.

The review and any amendments **must** be completed by 15 February in the calendar year of the transfer at the latest for transfers into or between schools. The key transfers are:

- early years provider to school
- infant school to junior school
- primary school to middle school
- primary school to secondary school, and
- middle school to secondary school