

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 March 2025

Public Authority: Medway Council
Address: Gun Wharf
Dock Road
Chatham
Kent
ME4 4TR

Decision (including any steps ordered)

1. The complainant requested information relating to funding provided for Education, Health and Care Plans (EHCPs) to educational institutes. Medway Council (the Council) provided some information and stated that other information was exempt under sections 21 (information accessible to the applicant by other means) of the FOIA and section 43 (commercial interests). During the course of the Commissioner's investigation the Council withdrew its reliance on section 43 and provided additional information. It maintained its reliance on section 21 of the FOIA but also stated that it considered section 12 (appropriate limit) of the FOIA to also apply to the information.
2. The Commissioner's decision is that the Council has failed to comply with section 1 of the FOIA as it has not identified the information falling within the scope of the request. The Commissioner also finds the Council incorrectly applied section 21 of the FOIA to information relating to the local authority area for each educational institution and section 12 of the FOIA is not engaged in respect of that information.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Conduct fresh targeted searches in order to correctly identify the recorded information held relevant to the request and either

disclose the information or issue a valid refusal notice. In relation to the local authority area in which each school is based, any fresh response cannot rely on sections 12 or 21 of the FOIA in respect of any information held relevant to that part of the request.

4. The public authority must take these steps within 30 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 Act and may be dealt with as a contempt of court.

Request and response

5. Prior to 19 June 2024 the complainant completed an online request form on the Council's website and requested information in the following terms:

"For each of the following institutions having pupils with EHCPs funded by Medway Council: 1.) registered Private Schools in Medway; 2.) Registered Private Schools outside Medway; 3.) registered State and 4.) Private Alternative Provision inside and outside Medway separately;

For each of these institutions separately, I request the number of such pupils on roll and, in the case of private institutions, the total cost of such pupils for each school. Where such schools are situated outside Medway, the Local Authority area in which they are to be found".

6. The Council responded on 19 June 2024 and provided some information and stated other information was exempt under section 21 of the FOIA.
7. On 19 June 2024 the complainant wrote back to the Council and pointed out that it had failed to fully address the request as it had not provided "in the case of private institutions, the total cost of such pupils for each school. Where such schools are situated outside Medway, the Local Authority".
8. The Council responded on 25 June 2024 and provided the total cost of all placements at independent provisions. The Council also stated that the total cost of pupils at each school was exempt under section 21 of the FOIA and provided a link containing payments made to providers, including private independent provisions. The Council also reiterated that it considered section 21 of the FOIA applied to the local authority area for each school. Finally the Council confirmed that it held "the costs for each independent provision", but that information was considered exempt under section 43(2) of the FOIA.

9. On 2 July 2024 the complainant requested an internal review of the handling of their request.
10. The Council provided the outcome of its internal review on 9 August 2024. It stated that information about the local authority area for each school was exempt under section 21 and provided relevant links. In respect of the total costs of such pupils to each school, the Council maintained that the information was exempt under section 43(2) of the FOIA.

Scope of the case

11. The complainant contacted the Commissioner on 27 August 2024 to complain about the way their request for information had been handled.
12. During the course of the Commissioner's investigation the Council withdrew reliance on section 43 of the FOIA and disclosed the cost of funding to each school. In relation to the local authority area of each school the Council maintained reliance on section 21 and also stated that in the alternative it considered section 12 of the FOIA to apply to the information.
13. Following the additional disclosure, the complainant contacted the Commissioner and raised concerns that the Council had not identified the correct information requested as some schools appeared to be 'missing' and other schools were on the list when they should not be.
14. The scope of the Commissioner's investigation is to establish whether the Council has complied with section 1 of the FOIA in identifying the information requested. He will also consider the Council's application of section 12 and 21 of the FOIA to the local authority area for each school.

Reasons for decision

Section 1 – general right of access

15. Section 1 (1) 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."
16. Section 1(1) requires that a public authority must inform a requestor, in writing, whether it holds information falling within the scope of the

request. If the public authority does hold relevant information, FOIA also requires that it communicates that information to the requestor, subject to any exclusions or exemptions applying.

17. The complainant has raised concerns that the list of schools receiving funding for EHCPs is incomplete and/or accurate. In support of this assertion the complainant provided the Commissioner with correspondence they had received from one particular school in the Council's area who confirmed that they had a number of students with EHCPs and were receiving funding. The school in question is not shown on the list which the Council disclosed.
18. In addition, the complainant stated that some of the institutions included on the list disclosed by the Council do not appear to fit into any of the categories referenced in their request, when taking the legal definition of 'alternative Provision' referred to in part (4) of the request. For example, the complainant considers it unlikely that any pupils at independent nursery schools or childcare centres have EHCPs. In the case of one nursery school, its website does not indicate that it receives an funding for ECHPs. Another example provided by the complainant refers to a particular teacher recruitment agency shown on the list disclosed by the Council. Again the complainant considers it highly unlikely that such an institute would qualify for funding for ECHPs.
19. The complainant is of the opinion that the information disclosed by the Council also includes other institutions receiving funding, but not funding which is specifically for EHCPs, which is what they requested.
20. The Commissioner is unable to consider the accuracy of any information which is disclosed in response to any information request. A public authority will have complied with its obligations under the FOIA where it has provided the recorded information that it holds in relation to a request irrespective of whether this information is accurate or not. However, the Commissioner does have a role in assessing whether a public authority has identified all the recorded information held relevant to a request.
21. Based on the representations provided by the complainant, the Commissioner considers that there is sufficient evidence to suggest that the Council has not actually identified the recorded information held which falls within the scope of the request. As such, the Commissioner finds that the Council has breached section 1 of the FOIA in its handling of the request.
22. The Commissioner therefore requires the Council to conduct a fresh search to determine the information falling within the scope of the request and either disclose the information or issue a valid refusal notice which complies with section 17 of the FOIA.

Section 21 – information accessible to the applicant by other means

23. Section 21 of the FOIA provides that information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information. There is no public interest to consider as the exemption is absolute.
24. In its responses to the complainant, the Council stated that the local authority area for each educational institute was exempt under section 21 of the FOIA as the information could be obtained online via various links.
25. The Commissioner undertook some simple searches using the weblinks provided by the Council. In his initial letter to the Council he advised that his preliminary view was that section 21 was not applicable because the steps required to locate and retrieve the information in question means that the information cannot be considered to be “reasonably accessible” to the applicant. The Commissioner provided the Council with a number of examples, where he had been unable to use the links provided to identify the local authority area of the school. For example, some institutions listed on the webpage were not an exact match to the name on the information the Council has disclosed, and others did not appear to be listed at all.
26. In addition, the Commissioner pointed out to the Council that, from the information it had disclosed in response to the request, there was no way of identifying which of the institutions were pre-schools or nurseries. As such, without any other identifying information other than the name, it would be extremely difficult to use the link it had provided in respect of this class of school to identify the local authority area for each institution.
27. In response to the Commissioner’s enquiries, the Council maintained that it considered section 21 to apply to the information. However, other than reiterating that the link it had provided to the complainant could be used to ascertain the information requested, it did not provide any further information in support of its application of section 21. In addition, the Council advised the Commissioner that:

“...if the information remains not ‘reasonably accessible’ after following the above steps the Council will apply section 12 – exceeding the cost of compliance to the request”.
28. The Council also stated that it does “not record and store the requested information comparable to the request”.
29. In order for section 21 to apply to information, a public authority must first establish whether it holds the information requested. An authority is

unable to rely on section 21 based on theoretical considerations about whether or not it holds the requested information or information of the same type.

30. In this case, given the Council's response referred to above, it is not clear to the Commissioner whether the Council holds the information requested. If the Council does not hold the local authority area for each school, then section 21 cannot apply.
31. In the absence of any further representations from the Council in support of its application of section 21, the Commissioner has had no option but to find that the Council incorrectly applied section 21 of the FOIA to the local authority area for each school.
32. In light of the fact that the Council also considers that section 12 applies to this information, the Commissioner has gone on to consider the Council's application of section 12 to the information.

Section 12 – cost of compliance

33. Section 12(1) of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the "appropriate limit" as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations").
34. The appropriate limit is set in the Fees Regulations at £600 for central government, legislative bodies and the armed forces and at £450 for all other public authorities. The appropriate limit for the Council is £450.
35. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 18 hours for the Council.
36. 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 decision in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency* EA/20017/00041, the Commissioner considers that any estimate must be "sensible, realistic and supported by cogent evidence".
37. 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 Council's position

38. In its response to the Commissioner, the only representations that the Council has submitted in relation to its application of section 12 to the part of the request for the local authority area for each school are reproduced below:

"We do not record and store the requested information comparable to the request, therefore, the process of locating, retrieving, and collating the information would exceed the cost of compliance. There are 465 schools for the period requested i.e. 2022/23 and 23/24. The process requires conducting searches for individual schools by name in order to obtain information on their location. A search for one school took approximately 9 minutes. If each search were to take an average of 9 minutes to complete, knowing that some searches may take longer, this would result in over 70 hours of total search time. This significantly exceeds the 18-hour threshold, thus triggering the provisions of section 12 of the FOIA".

The Commissioner's position

39. The Council's representations in support of its application of section 12 of the FOIA are extremely limited, as set out above. The Council has not provided any detail regarding the steps or processes which would be necessary in order to obtain the information requested.
40. In addition, based on its response, it is not clear to the Commissioner whether the Council actually holds the requested information. The Council has not explained whether its estimate of 9 minutes per school is based on a search of its own records of whether it relates to searching for the local authority area via the external weblinks which it previously provided to the complainant.
41. In the absence of any further representations in support of its application of section 12 of the FOIA, again the Commissioner has no option other than to find that section 12 is not engaged in this case.

Other matters

42. Although not forming part of the formal decision notice the Commissioner uses 'Others Matters' to address issues that have become apparent as a result of a complaint or his investigation of that complaint and which are causes for concern.

43. The Commissioner would like to highlight that the onus of demonstrating the valid application of an exemption (FOIA) lies with the public authority. In the circumstances of this case, the Commissioner notes that the Council provided limited arguments to support its application of section 21 and section 12 during his investigation. As a result, the Commissioner has had no option but to determine that, based on the evidence available to him, the Council has incorrectly applied sections 21 and 12 of the FOIA.
44. The Commissioner has published comprehensive guidance for public authorities, dealing with requests under the FOIA and the EIR, including guidance on each exception/exemption and the public interest test. This guidance can be accessed at: <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/>
45. The Commissioner trusts that the Council will be more thorough in its future responses to his investigation letters in the future.

Right of appeal

46. 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

47. 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.
48. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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