Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **19 December 2011**

Public Authority: Department of Education, Northern Ireland
Address: Rathgael House
43 Balloo Road
Bangor
County Down
BT19 7PR

Decision (including any steps ordered)

1. The complainant has requested:

> 'I request copies of all paper correspondence, notes and e-mails sent by the Department of Education (NI) or ESAIT to Dromore Central Primary School, Western Education & Library Board, C2k, Southern Education & Library Board, CCEA and CEM, University of Durham on the subject of InCAS for the period 01/11/09 until today 05/5/10. I also request copies of all paper correspondence, notes and e-mails received by the Department of Education (NI) or ESAIT from Dromore Central Primary School, Western Education & Library Board, C2K, Southern Education & Library Board, CCEA and CEM, University of Durham on the subject of InCAS for the period 01/11/09 until today 05/5/10. I request copies of all paper correspondence, notes and e-mails sent by the Department of Education (NI) or ESAIT to the Department of Education (NI) or ESAIT on the subject of InCAS for the period 01/11/09 until today 05/5/10.
>
> I also request a copy of the follow up measures instructed by DE to be put in place at CEM, University of Durham and the findings of the audit of CEM's systems as mentioned in the attached minutes of CCEA Council meeting 26/11/09.'

2. The Commissioner's decision is that the Department of Education Northern Ireland (DENI) was correct to consider this request to be vexatious in line with the provisions of section 14(1) of the Freedom of Information Act 2000.

3. The Commissioner requires the public authority to take no further steps to ensure compliance with the legislation.

Request and response

4. On 5 May 2010, the complainant wrote to DENI and requested information in the following terms:

> 'I request copies of all paper correspondence, notes and e-mails sent by the Department of Education (NI) or ESAIT to Dromore Central Primary School, Western Education & Library Board, C2k, Southern Education & Library Board, CCEA and CEM, University of Durham on the subject of InCAS for the period 01/11/09 until today 05/5/10. I also request copies of all paper correspondence, notes and e-mails received by the Department of Education (NI) or ESAIT from Dromore Central Primary School, Western Education & Library Board, C2K, Southern Education & Library Board, CCEA and CEM, University of Durham on the subject of InCAS for the period 01/11/09 until today 05/5/10. I request copies of all paper correspondence, notes and e-mails sent by the Department of Education (NI) or ESAIT to the Department of Education (NI) or ESAIT on the subject of InCAS for the period 01/11/09 until today 05/5/10.
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> I also request a copy of the follow up measures instructed by DE to be put in place at CEM, University of Durham and the findings of the audit of CEM's systems as mentioned in the attached minutes of CCEA Council meeting 26/11/09.'

5. DENI responded on 15 June 2010. It stated that that it would not be responding to the complainant's request as it was considered vexatious.

6. Following an internal review DENI wrote to the complainant on 19 June 2010. The internal review upheld the initial decision, stating that the request was vexatious.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way her request for information had been handled. She did not believe her request to be vexatious and in particular considered her request to have a serious purpose.

8. The Commissioner's role in respect of this matter is to consider whether or not DENI was right to consider the complainant's request vexatious.

Reasons for decision

9. Section 14(1) of 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. Previous Information Tribunal (Tribunal) decisions have aided the Commissioner when coming to a decision as to whether or not a request is vexatious. In determining whether a request is vexatious or not, the Commissioner will consider the context and history of the request as well as the strengths and weaknesses of both parties' arguments in relation to some or all of the following five factors:

- Would complying with the request impose a significant burden in terms of expense and distraction?
- Could the request fairly be seen as obsessive?
- Does the request have the effect of harassing the authority or causing distress to its staff?
- Is the request designed to cause disruption or annoyance?
- Does the request lack any serious purpose or value?

11. 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).

12. DENI has stated that the complainant's request is vexatious as it is: obsessive, harassing or causing distress to DENI or its staff and has caused a significant burden in terms of time and expense.

Obsessive

13. DENI has stated that the volume and frequency of the correspondence received by it from the complainant on the subject matter of InCAS[1] and other data protection, data security and data sharing issues displays the complainant's obsession with this subject matter.

14. DENI has pointed out that between 29 October 2009 and 6 May 2010 (the date that the current request was received by DENI) the complainant has submitted 15 FOI requests to it. It further pointed out that it had performed a quantitative analysis of the papers relating to FOIA requests, subsequent internal reviews and complaints, and the total number of documents was 383 with 195 attachments, some of which were hundreds of pages long.

[1] InCAS is a diagnostic, computer adaptive assessment tool for schools that can be administered at any time to inform personal learning.

15. In addition, from 26 October 2007 up until the date of the request being considered here, the complainant has submitted 14 enquiries on the same subject matter to the Northern Ireland Education Committee (NIEC). DENI has a duty to respond to enquiries to the NIEC within seven working days. Further to this, ministerial correspondence has been received by DENI on the same subject matter from 23 July 2008 up until the date of this request, in response to representations made by the complainant. This correspondence also requires response from DENI within a statutory deadline of seven working days.

16. Having reviewed the summary provided to the Commissioner by DENI of all of the correspondence referred to above, he accepts that it all relates to the same subject matter: InCAS and other data protection, data security and data sharing issues. Having reviewed the synopsis of requests provided by DENI, the Commissioner has no reason to disbelieve that it has fully answered all requests and enquiries in a comprehensive and detailed manner. It has also explained that the complainant requests information which is similar to or indeed is a repeat of previous requests.

17. The Commissioner considers it important to note that, at the time this request was made, he was performing a detailed enquiry into the issues that the complainant has, regarding the subject matter of this request, in his capacity as regulator of the Data Protection Act 1998. The issues in this data protection enquiry were brought to the Commissioner's attention by the complainant and its focus was to provide an answer, under the legislation, to her issues and the validity of them. At the time the complainant made the request being considered in this notice, this enquiry had not been concluded.

18. A strong indicator of a request being obsessive, in the Commissioner's opinion, is where a complainant continues to make requests despite being in possession of other independent and contrary evidence on the same issue. This shows that an unbiased perspective has been taken on the situation and concluded on. If a complainant persists with requests regarding the same subject matter following an independent decision which confirms that the underlying issue has been resolved, then the request can more easily be categorised as obsessive, rather than mere persistence.

19. The Commissioner would accept his own detailed enquiry, into the complainant's issues, to be an independent investigation of those issues. In concluding this enquiry, the Commissioner would consider the issue to be resolved and an unbiased answer to have been provided. To continue to pursue the matter by way of further FOIA requests and correspondence to the public authority, after it had been concluded, would therefore be an indicator of obsession. However, in this case, the

enquiry had not been concluded by the Commissioner and therefore no independent evidence had been provided to the complainant.

20. Therefore, the Commissioner must consider whether it was reasonable for the complainant to make her request, in spite of whether or not the Commissioner's investigation had been concluded. The Commissioner considers it clear that the complainant had a genuine purpose in making her request. The request is for information which a person with concerns about a certain issue, and who wanted to find out more about that issue, may wish to make.

21. The complainant's request is clear, logical and it seeks information that would help her to understand more fully the issue of concern to her. The Commissioner considers that it would have been more prudent for the complainant to wait for the conclusion of his detailed enquiry before pursuing this matter. However, he does not accept that the complainant's action, in making a further request, is obsessive purely on this basis.

22. However, a request can be viewed as obsessive if other evidence clearly points to this. The Commissioner accepts that 15 FOI requests on the same subject matter over a seven month period could be seen as a large amount and potentially supportive of this request being obsessive. This evidence is bolstered when the voluminous nature of the requests is taken into account and combined with the responses DENI necessarily has to supply to the NIEC and ministerial enquiries, which flowed from those which the complainant has made on the same subject matter.

23. The Commissioner considers that the volume and frequency of the requests can be taken into account, in this instance, as a strong indicator of obsession. DENI's submissions make it clear that the complainant's requests - and her subsequent interaction with DENI following on from its responses - has often been voluminous and supported by voluminous attachments. The Commissioner accepts that the complainant's requests could be made in a far more concise manner. Therefore the volume of the complainant's correspondence with DENI could be supportive evidence of this request being obsessive, when taking into account the complainant's previous interaction with DENI.

24. The Commissioner would be willing to accept this request as obsessive, if he were able to combine the volume of requests and correspondence on the same subject matter with evidence of an independent investigation confirming that the complainant's issue had no basis or had been resolved. However, given that there is no evidence of an independent investigation having been concluded in this case at the time of the request (i.e. the Commissioner's detailed enquiry), he cannot accept that this request can ultimately be categorised as crossing the threshold of obsessive purely on the basis of the volume of

correspondence, as DENI attests. The Commissioner would more correctly categorise the behaviour demonstrated by the complainant's volume of requests and correspondence as persistent, rather than obsessive.

Harassing the authority or causing distress to staff

25. DENI has stated that the volume and frequency of correspondence received from the complainant, when viewed in light of the number of staff whose duty it is to respond to these requests and correspondence, as well as the strict timescales in which responses are required, has had the cumulative effect of harassing DENI or causing distress to its staff.

26. DENI has explained that it has fallen to six of its staff to respond to requests and correspondence relating to the complainant's subject matter. This therefore means that six staff replied to 15 FOI requests within 20 working days, at least 14 enquiries to the NIEC (which is referred to DENI and requires reply) within seven working days and the same timescale in relation to ministerial correspondence.

27. DENI has also pointed to the fact that it held concerns about its staff's welfare, and in particular to one employee, having to deal with the complainant's correspondence. DENI explained that these concerns were raised in a meeting which it had with the Commissioner's Assistant Commissioner for Scotland and Northern Ireland in July 2010.

28. The Commissioner is willing to accept that dealing with 15 FOI requests regarding the same subject matter can be seen as an onerous task. When combined with dealing with the other correspondence, the evidence for this request having been harassing or causing distress to staff could be increased. However, the Commissioner has difficulty in accepting the request having harassed DENI or caused distress to staff purely on the basis of the volume and frequency of requests and correspondence.

29. In concluding on 'harassing', the Commissioner often looks at the tone of a complainant's requests and correspondence to a public authority and whether it can be viewed as tendentious or would reasonably be seen as provocative or hostile. DENI has pointed to phone calls made by the complainant to it, in which they say she has used a negative or critical tone and has been aggressive or argumentative towards officials.

30. The Commissioner considers it not unlikely that a complainant may adopt a negative or critical tone with a public authority if they feel their issues have not been resolved by it. The Commissioner does not condone this type of behaviour by complainants, particularly if a complainant is aggressive to staff. The Commissioner would accept that if she has behaved in this manner, the complainant could have conducted herself differently. However the Commissioner finds it difficult

to accept that adopting a negative or critical tone (and perhaps even being aggressive) during telephone calls, is enough to suggest that the complainant, in this instance, is harassing DENI.

31. The Commissioner has therefore considered the tone used in the correspondence by the complainant, relating to this case. The Commissioner considers that the language used in the request and subsequent correspondence are probing, in that they ask searching questions and query the conclusions of DENI, but there is no indication of tendentious or aggressive language having been used by the complainant. The Commissioner considers this to be further evidence of the complainant's persistence and dissatisfaction, rather than an attempt to be harassing to DENI.

32. The Commissioner accepts that DENI responding to all of the previous requests and correspondence regarding the same subject matter has been a large task and he has sympathy with DENI having to undertake this, especially given the concerns it has raised regarding the welfare of members of its staff. However, the Commissioner does not accept that the supporting evidence provided by DENI or the tone and content of the complainant's correspondence regarding this request, goes far enough to suggest that this request is harassing DENI. The Commissioner, in relation to 'harassing', would suggest that it is onerous to DENI rather than vexatious.

Significant burden

33. DENI has stated that the volume and frequency of correspondence to it, and the deadlines which it is obliged to comply with, has had the cumulative effect of imposing a significant burden on it. As already acknowledged above, the Commissioner accepts that dealing with all of the correspondence DENI has received on this subject matter is an onerous task.

34. The Commissioner considers that having to comply with the imposed statutory deadlines regarding requests and other correspondence, will have been difficult, when the number of staff involved in doing this and the voluminous nature of the requests and attachments is also taken into account. Going through all of the correspondence to identify the pertinent points within documents which are so large, will have the effect of DENI staff spending a disproportionate amount of time dealing with the complainant's issue and will have distracted them from their other duties.

35. The Commissioner considers that it is the disproportionate amount of time taken in dealing with the complainant's request(s), in combination with the surrounding context and history of the complainant with DENI,

which imposes a significant burden. Although the Commissioner has concluded that there is not quite enough evidence to suggest obsession or harassment, the Commissioner would state that these were borderline conclusions. Moreover, he would accept that the evidence DENI provided under 'obsession' and 'harassing' is pertinent and relevant to the imposition of a significant burden and sufficiently supportive of DENI's application of 'significant burden'.

36. The Commissioner therefore considers the request to have imposed a significant burden on DENI.

Serious purpose

37. DENI has explained that it has not considered whether the complainant's request has a serious purpose as it is unclear from the complainant's request what her purpose is. The subject matter of the complainant's request(s) stem from the sharing of school children's personal data in relation to their test scores from InCAS testing, with a third party, without consent. The Commissioner considers that concerns about this can be seen as legitimate.

38. The Commissioner would accept that the complainant may be more persistent in pursuing these concerns than others may be; nevertheless, they can still be considered as legitimate and to have a serious purpose. Furthermore, without any independent investigation having been performed as to whether or not the overriding concern of the complainant has been resolved, the Commissioner considers the complainant's enquiries to be valid and made with a serious purpose.

Conclusion

39. The Commissioner accepts that the complainant made the request with a serious purpose, and although the supporting evidence shows that dealing with the requests and correspondence has been onerous, it has not been enough to support the request being obsessive or having harassed DENI or its staff.

40. However, the Commissioner considers that the evidence provided by DENI regarding the surrounding context of its dealings with the complainant is relevant to considerations under 'significant burden'. This evidence, when combined with the voluminous nature of the requests and surrounding correspondence, has imposed a significant burden on DENI and has mitigated any serious purpose of this particular request. Taking all the circumstances of this case into account, the Commissioner considers the 'significant burden' criterion to be sufficient to render the request vexatious. Therefore, while the Commissioner disagrees with some of the ways in which DENI has assessed this request, as set out above, he accepts that, ultimately, section 14(1) of the Act has been correctly applied.

Right of appeal

41. 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,
    Arnhem House,
    31, Waterloo Way,
    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

42. 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.

43. 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 ……

Alexander Ganotis
Group Manager – Complaints Resolution
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Water Lane
Wilmslow
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