

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 August 2014

Public Authority: Wirral Metropolitan Borough Council

Address: Wallasey Town Hall
Brighton Street
Wallasey
Wirral
CH44 8ED

Decision (including any steps ordered)

1. The complainant has requested figures for assessments and appeals of special educational needs in Wirral Local Authority. The Council provided exact figures where the numbers exceeded five but aggregated figures less than five on the basis that individuals could be identified and section 40(2) was therefore engaged. The Commissioner's decision is that the Council has correctly applied section 40(2) to withhold figures less than five.

Request and response

2. On 19 April 2014, the complainant wrote to Wirral Metropolitan Borough Council ("the Council") and requested information in the following terms:

"Please provide the following information for the year 2013.

(1) How many appeals were made to SENDIST against Wirral Local Authority for

a) refusal to assess a child's needs

b) refusal to make a statement of Educational needs

- c) amendments to parts 2/3/4 of a statement of educational needs*
- (2) How many appeals did the authority concede? (no hearing necessary)*
- (3) How many appeals did parents concede? (no hearing necessary)*
- (4) How many appeals to SENDIST were heard at tribunal by a panel?*
- (5) How many appeals in question 4 were found in favour of the Local Authority?*
- (6) How many of the appeals in question 4 were found in favour of the parents/school and assessment/statement/amendments to parts 2/3/4 were made?*
- (7) How many appeals were made to SENDIST by a school?*
- (8) How many appeals were made to SENDIST by parents?*
- (9) How many appeals were lodged with SENDIST on behalf of the same child?*
- (10) How many appeals were made to SENDIST by the same family (family being persons who reside at the same address regardless of surname) regardless of which child they were appealing for?*
- (11) How many families (children who are related or reside at the same address will count as one family for such purposes) in total lodged appeals with SENDIST during the year 2013?"*
3. The Council responded on 9 May 2014. It stated it could answer the questions but where the numbers were less than five the exact figure would not be provided as it may identify specific individuals. For questions 1-8 the Council provided numbers of appeals based on cases where the hearing was scheduled to take place in 2013. For questions 9-11 the Council recorded the number of appeals lodged in 2013 even where the hearing was scheduled for 2014.
4. The complainant wrote to the Council again on 9 May 2014. In this she queried the decision of the Council not to provide figures less than five. She also stated that for question 4 the Council should have provided the total number of appeals made during 2013 even if the hearing was held in 2014.
5. The Council responded on 12 May 2014. It provided the total number of appeals from question 4 as set out by the complainant. The Council

reiterated that it considered disclosure of exact figures less than five would identify individuals and may breach the Data Protection Act 1998 ("DPA").

Scope of the case

6. The complainant contacted the Commissioner on 6 June 2014 to complain about the way her request for information had been handled.
7. The Commissioner wrote to the complainant to clarify the scope of the request. The complainant had made a second, overlapping request and the Commissioner therefore wrote to the complainant to ensure this investigation focused on the relevant information.
8. Following this, the Commissioner confirmed the scope of his investigation to be to determine if the Council has correctly applied section 40(2) to not provide figures of less than five when responding to the request.

Reasons for decision

9. The Council has argued that it believes section 40(2) applies as providing any information where the figures are less than five could lead to the identification of individuals.
10. Section 40(2) of the FOIA states that information is exempt if it constitutes the personal data of a third party (other than the applicant) and one of the conditions listed in section 40(3) or 40(4) are satisfied.
11. During the investigation the Commissioner asked the Council to clarify its reliance on section 40(2) particularly with regard to why the information would be considered personal data. The Council did provide some further explanations beyond simply stating the information could not be disclosed when there were fewer than five appeals so as not to identify individuals. The Commissioner has therefore proceeded on the basis that the Council is relying on section 40(3)(a)(i) to engage the exemption i.e. that the information is that of a third party and disclosure would contravene any of the principles of the DPA.
12. In order to establish whether section 40 has been correctly applied the Commissioner has first considered whether disclosing the requested information would constitute the personal data of third parties.

13. Section 1 of the DPA defines personal data as data which relate to a living individual, who can be identified from that data, or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
14. The information held by the Council relates to children's special educational needs, statements and/or tribunals. The Council has aggregated figures where the number of appeals or statements for children with special education needs was less than five in any of the categories requested. The Council has argued that the Local Authority of Wirral has a small community of children with special educational needs so where the numbers are very low, identification of specific individuals would be possible.
15. The Commissioner has considered the information and the number of individuals involved and has concluded that if the Council were to disclose the exact number in each category, particularly if the numbers for any were one, it could be possible to identify the individuals concerned. By aggregating the information the Council has minimised the possibility of identification.
16. The Commissioner does however note that the chances of any member of the public being able to cross-reference this information to identify specific individuals is not high but given the low numbers involved there is a risk that specific individuals could be identified by a person with knowledge of special educational needs and appeals in the area. The Council has stated that the complainant in this case is an individual who has knowledge of this. In addition, the Commissioner recognises that other individuals, such as parents at schools or Council employees may be able to identify individuals. Therefore, on the balance of probabilities, the Commissioner accepts the information is personal data.
17. The Commissioner has gone on to consider whether the disclosure of this information would be in breach of the first data protection principle. The first principle requires that the processing of personal data is fair and lawful and he first considered whether disclosure of the information would be fair.
18. In considering whether disclosure would be fair the Commissioner takes into account the following factors:
 - whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned;
 - the individual's reasonable expectations of what would happen to their information; and

- balancing the rights and freedoms of the data subject with legitimate interests.
19. In order to reach a view on whether the disclosure of this information would be fair, the Commissioner has placed specific emphasis on the nature of the information itself. The requested information if disclosed would reveal information about a child's educational needs and subsequent appeals. The Commissioner does not accept that releasing this information would be fair and considers it may cause distress to the parents and children involved.
 20. The individuals who could be identified are children who would not have any expectation of this information being disclosed. The parents of these children would not have expected that any information about their child's special educational needs, statements or appeals about this would be disclosed to a third party outside of the appeal process. The Commissioner considers there is likely to be an implied level of confidentiality in the appeal system for this sort of issue and therefore there would be no expectation of disclosure.
 21. In relation to the final factor, the Commissioner notes there is a legitimate public interest in the release of information which increases transparency and accountability about the way in which public authorities operate. However, the Council has already provided exact figures over the value of five and aggregated figures for those values less than five. The Commissioner does not consider that disclosure of the information broken down any further so as to potentially identify individuals would provide greater understanding and it would prejudice the rights and freedoms of those individuals. The Commissioner therefore accepts that the rights and freedoms of the data subjects outweigh the public's legitimate interest in disclosure of this information.
 22. The Commissioner has concluded that disclosure of this information would be unfair and in breach of the first data protection principle. As such section 40(2) is engaged and the further information relating to the exact figures should be withheld.

Right of appeal

23. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

24. 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.
25. 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

**Pam Clements
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SK9 5AF**