

Freedom of Information Act 2000 (Section 50)
Environmental Information Regulations 2004

Decision Notice

Date: 27 June 2011

Public Authority: London Borough of Merton
Address: Civic Centre
London Road
Morden
SM4 5DX

Summary

The complainant submitted a request to the London Borough of Merton ('the council') for information about the council's pavement renewal and maintenance scheme. The council provided some information to the complainant. The complainant disputed that the council had fully responded to his request. The Commissioner has investigated and found that the council does not hold any further information within the scope of the complainant's request. The Commissioner does not require the council to take any further action.

The Commissioner's Role

1. The Environmental Information Regulations ('the EIR') were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner ('the Commissioner'). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the 'Act') are imported into the EIR.

The Request

2. On 16 August 2009, the complainant submitted a request to the PA for the following information:

"...details of the Borough's roads and pathways maintenance protocols governing the inspection of pathways, the prioritisation and the benchmarking of renewal proposals, and their specific application, with full supporting documentation, to the current pavement renewal programme in West Barnes covering Blakes Terrace, Stanley Avenue, Cobham Avenue, Byron Avenue, Claremont Avenue, Cavendish Avenue and Belmont Avenue... all information about all decisions concerning the pavement renewal programme in the area of West Barnes referred to above made by the London Borough of Merton Council and any body to which and any person to whom the Council delegated these decisions"

3. The council responded on 10 September 2009. This response explained how roads in the borough are prioritised for renewal work, and disclosed the "list for the West Barnes ward including all the roads in the vicinity of Blakes Terrace" and the Engineer's Report regarding the area. The council explained that it did not have "a documented procedure or method for the undertaking of condition inspections", but advised that such a procedure was under development. The council provided a hyperlink to guidance issued by the Roads Liaison Group and stated that condition inspections were undertaken in line with this.
4. On 8 October 2009 the complainant chased up a further response to this request, noting in particular that the council had not responded to his request for "specific application, with full supporting documentation, to the current pavement renewal programme in West Barnes". The complainant also reiterated that his request included "all information about all decisions concerning the pavement renewal programme".
5. The council responded on 26 October 2009. This response stated that no further information was held in relation to the complainant's request for details of the application of the pavement renewal programme. It also stated that no information was held regarding how decisions about roads and footpath resurfacing were made. Finally, the council said that decisions to undertake footpath and carriageway maintenance were undertaken by individual officers. However the reports and minutes of the meeting of the Cabinet that endorsed the Traffic and Highways Services programme were provided.
6. On 18 January 2010 the complainant made a complaint about this response. He raised two particular issues:
 - i. The council's response of 10 September 2009 stated that "at no stage has Stanley Avenue or Blakes Terrace formed part of our footway maintenance programme". However, this

was contradicted by documents on the council's website which indicated that Stanley Avenue had originally featured in the planning works for 2009/10

- ii. The council's email of 26 October 2009 stated that no documentation relevant to the pavement renewal programme in West Barnes was held. However, a response to a subsequent FOI request stated that "documentation relating to the majority of capital schemes carried out by Traffic and Highways is held in electronic format".
7. The council conducted an internal review and provided the outcome to the complainant on 15 February 2010. This acknowledged that Stanley Avenue was in fact mentioned in the Cabinet Report as forming part of the Accelerated 2009/10 footway programme. The council apologised for not disclosing this information in response to the complainant's original request but explained that the road no longer formed part of the footway programme at this point. The council reiterated that it did not have a documented procedure for undertaking condition inspections.

The Investigation

Scope of the case

8. On 16 February 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular, the complainant does not accept that the council has disclosed all of the information that it holds within the scope of his requests.

Chronology

9. The Commissioner wrote to the council with some queries about the way it handled the complainant's request on 2 March 2011. The council responded on 11 April 2011. During April, May and June 2011 the Commissioner and council exchanged further correspondence about the complaint.

Analysis

Substantive Procedural Matters

Regulation 2

10. The Commissioner has considered whether the information requested by the complainant is environmental information as defined by the EIR.
11. The Commissioner considers that the information requested falls within regulation 2(1)(c): "measures (including administrative measure), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect these elements". The complainant has requested information about planned maintenance works to pavements. The Commissioner's view is that these plans constitute a 'measure' which would affect the elements of the environment set out in regulation 2(1)(a). The Commissioner therefore considers the information requested by the complainant to be environmental information under regulation 2(1)(c).

Regulation 5

Regulation 5(1)

12. Regulation 5(1) provides that a public authority that holds environmental information shall make it available on request. Where there is a dispute about whether a public authority holds information within the scope of a request, the Commissioner will make a decision based on the civil standard of the balance of probabilities test.
13. The complainant argues that the council has not fully complied with his request for information about decisions relating to the pavement renewal programme. The complainant raised two particular issues regarding this part of his complaint and the Commissioner has addressed these before going on to consider more generally whether any information is held within the scope of the complainant's request.

Information held by Traffic and Highway Services

14. In his early correspondence to the Commissioner, the complainant noted that the council had stated that "Traffic and Highway Services does hold information on planned maintenance schemes that have been undertaken by the Council", but had then gone on to state that this did not fall within the scope of his request. The Commissioner

invited the council to explain why this information was not within the scope of the complainant's request. The council explained that this information comprised records of works that have been completed, rather than information relating to a decision about pavement renewal. It provided a sample of this information for the Commissioner's inspection and stated that it was in any case prepared to provide this information to the complainant in an attempt to informally resolve the complaint.

15. The Commissioner has reviewed this sample and concluded that it did not fall within the scope of the request, because no information is given about how the council arrived at the decision to undertake maintenance. The information only relates to activities undertaken during the scheme. With the council's consent, the Commissioner forwarded the information to the complainant, who also accepted that the information did not fall within the scope of his request.

Information created as a result of condition inspections

16. The complainant accepts that the council does not have a "documented" procedure or policy for undertaking condition inspections. However, he argues that the activities of inspectors will generate records which are used to inform decisions about the pavement renewal programme. The Commissioner has pursued this point with the council, which explained that Highway Safety Inspectors undertake routine general inspections of roads. As a result of these inspections, individual jobs are input into the works management system in order to address specific repairs such as potholes. However, the council does not use the records of these inspections to inform decisions about the pavement renewal programme. Decisions about pavement renewal are solely taken on the basis of the Planned Maintenance Team's 'Engineer Assessments'. A 'score sheet' is created as a result of these inspections of the road and pavement. The score sheets for the West Barnes Area have been disclosed to the complainant.
17. The council has explained to the Commissioner that decisions regarding the pavement renewal programme are informed solely by the scores arising from Engineer Assessments rather than condition inspections. The Commissioner is therefore satisfied that any information created as a result of condition inspections does not fall within the scope of the complainant's request.
18. More generally, the complainant does not accept that there is no information held in relation to his request for information about "all decisions concerning the pavement renewal programme". In particular,

the complainant has advised that his request was motivated by his wish to establish:

- i. "why Blakes Avenue was not included in the Council's 2009/10 Highways and Footways Accelerated scheme programme...and what decision process at what levels based on what evidence or advice resulted in this decision"
- ii. "why Stanley Avenue was included in the programme, and why the work on Stanley Avenue ...did not take place, and what decision process based on what evidence or advice resulted in this decision".

19. The council has explained to the complainant and Commissioner that although Stanley Avenue was initially included in the 2009/10 programme, it was not taken forward because other schemes were considered to be of higher priority. It states that progress and expenditure is continually monitored, and that the scheme is fairly "fluid" and subject to change. The council states that changes to the scheme are made due to "unexpected site conditions leading to increased costs, severe weather leading to greater investment in reactive repairs, ongoing assessments, changes to priorities by elected members and scheme work proposed and undertaken by other Council teams". The complainant, however, believes that the council should disclose "the decision-points and the evidential basis and / or arguments relied on and the level at which each of these decisions were made preferably with supporting documentation".
20. The Commissioner agrees that information of this nature would, if held, fall within the scope of the complainant's request. However, the council has explained to the Commissioner that decisions about the pavement renewal programme are taken on what appears to be a fairly ad-hoc basis and it does not hold information regarding how it made these decisions. The council's Network Maintenance and Asset Systems Manager, Traffic and Highways Services Manager and Head of Street Scene and Waste have all confirmed that it does not have any policy, or even internal staff guidance, about the way that decisions regarding the pavement renewal programme are taken.
21. The council has explained that no formal meetings were held to discuss either the roads that were included in the scheme, or the decision not to pursue the proposed works on Stanley Avenue. As detailed above, decisions about which roads are to be included in the scheme are taken solely on the basis of the Engineer's Assessments. The Assessment regarding Blakes Avenue has already been disclosed to the complainant.

22. The council has explained that changes to the footway and carriageway programme, and decisions not to pursue certain schemes, are taken by the Network Maintenance Manager in discussion with the Head of Traffic and Highway Services. However, these discussions are not minuted. The Commissioner accepts the complainant's contention that the council must take into account some sort of evidence when deciding not to pursue a particular scheme. However, he also accepts the council's submission that it does not hold any records of what these factors might be, as decisions are not made as a result of any formal process or procedure but instead as a result of discussions. The council confirms that no briefings or written advice were created in order to support this decision.
23. The Commissioner acknowledges that the complainant wishes to receive evidence that would detail exactly how and why the council made particular decisions regarding the footpath scheme. However, the EIR only gives a right of access to information that is held in a recorded format. The council has explained to the Commissioner that decisions regarding inclusion on the footpath scheme are based on the Engineer's Assessments. The score sheets from these assessments have been disclosed to the complainant. The council also explains that no information is held relating to how decisions to make changes to certain aspects of the scheme. It explains that there is no protocol or procedure for making these decisions. The council has informed the Commissioner that it has now implemented a review of the process used for prioritising carriageway and footway planned maintenance. This review will be presented to committee and it is anticipated that it will change the way decisions about renewal are made. However, in relation to this request, the Commissioner has seen no evidence to suggest that the council does hold any further information within the scope of the complainant's requests. He accepts that the council has complied with regulation 5(1) and disclosed all of the information that it holds in relation to the request.

The Decision

24. The Commissioner is satisfied that the council does not hold any further information within the scope of the complainant's request and consequently considers that it has complied with regulation 5(1).

Steps Required

25. The Commissioner does not require the council to take any further action.

Right of Appeal

26. 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: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

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

Dated the 27th day of June 2011

Signed

**Andrew White
Group Manager**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Regulation 2 - Interpretation

Regulation 2(1)

In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

Regulation 5 - Duty to make available environmental information on request

Regulation 5(1)

Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.