Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 10 August 2011

Public Authority: **East Sussex County Council**
Address: **County Hall**
St Anne's Crescent
Lewes
BN7 1SG

Summary

The complainants made a five part request to East Sussex County Council ("the Council") for information about complaints about potholes on a specified road, the action it had taken to fix them and its policies in this area.

They referred three of those requests to the Information Commissioner ("the Commissioner") explaining that the Council had not provided all relevant recorded information. During the course of his investigation, some further relevant recorded information was located and given to the complainants. The Commissioner finds that on the balance of probabilities, no further relevant recorded information is held.

He has however found that the Council breached sections 1(1)(b) and 10(1) of the Act because it failed to provide the information that was subsequently located within the relevant timescales. He requires no remedial steps to be taken because the complainants have now received the information they are entitled to.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. The complainants have explained that a pothole damaged their car and made a request to the Council to understand its liability to them.

The Request

3. On 19 April 2010 the complainants requested the following:

[1] Full details of every complaint received by your Office and Highways Department regarding potholes on the B2095 from 1 January 2010 up to and including 6 February 2010;

[2] Full details of all of your responses to any incidents from 1 January 2010 up to and including 6 February 2010;

[3] Full details of all repairs carried out (giving exact locations) on B2905 from 1 January 2010 up to and including 6 February 2010;

[4] Full copy of the Council's Policy and Procedures regarding road maintenance;

[5] Full copy of the Highway's Inspection and Maintenance Regime and the Council's Liability towards the public in this regard.'

4. On 19 May 2010 the Council issued its response:

- For elements **[1]**, **[2]** and **[3]**, it explained that the Customer Care Team had received no such complaints.
- However, its highways division had received one complaint – on 22 January 2010. That pothole was repaired on 26 January 2010 (reference 7606).
- It provided a copy of the reports from the inspections it conducted on the B2095 in 2007, 2008 and 2009.
- It also provided the information from its case management system that referred to the B2095 and the work that was done over 2008 and 2009.
- It also provided written records of the number of potholes located between 25 January 2010 and 29 January 2010. These showed that the work was completed on 29 January 2010.

- It fully answered requests **[4]** and **[5]** providing the appropriate policies and procedures that it held and explaining the legal situation about pothole liability.

5. The complainants approached the Commissioner directly on a number of occasions and it was decided in all the circumstances to consider this case without an internal review being conducted.

The Investigation

Scope of the case

6. On 18 July 2010 the complainants contacted the Commissioner to complain about how the Council had handled their claim for compensation.

7. The Commissioner confirmed his remit and asked for more information, .

8. On 22 October 2010 the complainants explained that they were concerned with the accuracy and intelligibility of the information the Council had sent them.

9. On 30 March 2011 the Commissioner outlined his remit. On 4 April 2011 it was agreed that the scope of his case would be to determine:

   1. Whether there is further relevant recorded information held by the Council on 19 April 2010 for any of elements **[1]**, **[2]** and **[3]**; and

   2. Any issues about timeliness.

10. The complainants also confirmed that they did not seek the names and addresses of other individuals that had made complaints about potholes. The Commissioner has not therefore considered this information.

11. The complainants also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. For the avoidance of doubt, the Commissioner cannot consider claims for damages from potholes or consider how related complaints are handled.

Chronology

12. On 2 November 2010 the Commissioner asked the Council to explain its position to him.

13. On the same day, the Council explained its position and provided a copy of the information it had disclosed to the complainants.

14. On 30 March 2011 the Commissioner spoke to the complainants to explain his remit and to ask what information they believed was outstanding. He followed up with a detailed email explaining what he was able to look at and asked the complainants to confirm that they understood and agreed the scope of his investigation.

15. Further correspondence ensued and on 4 April 2011 the complainants confirmed that they understood the Commissioner's remit and what the scope of his investigation would be.

16. On 14 April 2011 the Commissioner made detailed enquiries of the Council. He asked it to explain how it was sure it had located all the relevant recorded information in this case.

17. On 18 May 2011 the Council described in detail the systems it had and the searches it carried out. It also confirmed that it had located further relevant information for request **[1]** that had been misfiled.

18. On 19 May 2011 the Commissioner asked the Council to disclose this additional information to the complainants. This was done on 2 June 2011.

19. On the same day the Commissioner wrote to the complainants. He asked them to confirm that they had received the further information whether they wanted his investigation to continue.

20. On 5 and 7 June 2011 the complainants confirmed that they had received the information, but wanted the Commissioner to issue a Decision Notice in this case.

Analysis

Substantive Procedural Matters

*Is further relevant recorded information held for elements **[1]** to **[3]** of the request?*

21. Section 1[1] of the Act provides 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 recorded information of the description specified in the request and (b) if that is the case to have that information communicated to him. It follows that it is necessary for

[1] All sections of the Act that are cited in this Notice can be found in full in an attached legal annex.

information to be held in recorded form by the Council at the date of the request for it to be subject to the Act. The date of the request in this case is agreed to be 19 April 2010.

22. The standard of proof the Commissioner uses to determine whether relevant recorded information is held was confirmed by the Information Tribunal ("the Tribunal") in *Linda Bromley & Others v Information Commissioner and Environment Agency* [EA/2006/0072] ("*Bromley*"). It said that the test for establishing whether information was held by a public authority was not one of certainty, but rather the balance of probabilities.

23. He has also been assisted by the Tribunal's explanation of the application of the 'balance of probabilities' test in *Bromley*. It explained that to determine whether information is held requires a consideration of a number of factors, including the quality of the public authority's final analysis of the request, the scope of the search it made on the basis of that analysis and the rigour and efficiency with which the search was then conducted. It also requires considering, where appropriate, any other reasons offered by the public authority to explain why further recorded information is not held.

24. The Commissioner has considered the arguments of both sides and the factors specified in *Bromley*.

25. He has structured his analysis in the order **[1]**, **[3]** and **[2].** This is because the information held for request **[3]** would also be held for request **[2]** and it is more logical to consider request **[3]** first in this case.

Request **[1]**

26. The first request is clear. The complaints received by the Council about potholes on a specified road between two dates.

27. During the course of the Commissioner's investigation the Council found three further 'complaints' that had been misfiled. It released anonymised versions of them to the complainants who did not challenge the redactions. The Commissioner wants to note that the Council breached section 1(1)(b) because it failed to provide this information until the Commissioner's intervention. However, he requires no remedial steps to be taken because the information has now been released. The remainder of his analysis considers whether the Council held any further relevant recorded information that was relevant to this request.

28. The complainants explained that they were suspicious of the Council's original response that they had only received one relevant complaint, because they understood that other individuals were also dissatisfied

with potholes on that road. Three further 'complaints' were subsequently located. The complainants did not offer any further arguments about why further relevant recorded information was held.

29. The Commissioner has interpreted the request as relating to any expression of dissatisfaction about potholes on the road, whether it was recorded as a formal complaint or not. This is because it is reasonable for complainants not to know how Councils classify expressions of dissatisfaction and the request should be given its natural meaning.

30. The Council accepted this interpretation and undertook the following searches:

    1. It sent the full request to the three departments that may hold relevant recorded information,

        i. its Economy, Transport and Environment department;

        ii. its Reactive Maintenance Team; and

        iii. its Highways Contact Centre Team.

    2. It interrogated the two sources where it held information about highways – 'SAP' (which was active up to 1 October 2009) and 'EXOR' (which took over from then).

    3. The Council conducted a manual search of EXOR, looking for an exact match of characters. However, during the course of the Commissioner's investigation, bespoke report functions were created that enabled searches on expanded terms. The expanded search considered all permutations of the search term – so that it included incomplete entries (such as noting the road as the 2095, rather than the B2095) and typographical errors (such as getting the numbers the wrong way round). This expanded search found the three extra complaints that were disclosed during the course of this investigation.

    4. The staff that undertook the searches were experienced in using the systems and their reporting functions and their experience was enhanced between the two sets of searches.

    5. The Council explained that it normally processed 'complaints' about potholes as 'service requests', as it was important that the pothole was fixed as quickly as possible. However, it clarified that it had also checked its formal complaints system that was

managed by its Customer Care Team. It confirmed there were no formal complaints about potholes on that road over those dates.

31. The Council explained that the information it gathered for service requests was the minimum it needed to fix the road. This was the reason it gathered the information. It provided the Commissioner and the complainant with a copy of a spreadsheet that was generated when interrogating its database of service level requests which contained only the following fields:

    1. Location

    2. Date/time of incident

    3. Customer details.

    4. Action taken.

32. The Commissioner has considered the business reasons the Council has for gathering the information, the systems it has and the searches it carried out and is satisfied that the Council located all the 'complaints' it received about potholes on the road in question between the dates specified and that the relevant information has been provided (save for the contact details of other complainants that is outside the scope of this investigation).

33. He is satisfied that on the balance of probabilities there was no further relevant recorded information held that is relevant to request **[1]** on 19 April 2010.

Request **[3]**

34. The third request is also clear in its scope. It is for all the recorded information about the repairs the Council carried out on a specified road between two dates.

35. The Council explained that its normal approach to potholes was:

    1. To take the call about the pothole.

    2. To send someone out to inspect it to see if it met the criteria where it needed to be fixed.

    3. If so, to send someone out to fix it (this would usually be done by its contractor's General Maintenance teams).

36. Information would be generated at each point of the process.

37. However, between December 2009 and January 2010 the weather was very bad. Roads deteriorated badly and there were a lot of potholes on its road network. The snow that fell prevented the inspectors from doing their job as it covered the defects and prevented safe access to the roads. The inspectors were therefore asked to help with the emergency response to the snow instead and a backlog of inspections built up.

38. The Council decided to suspend its normal policy (summarised in paragraph 35) on 29 January 2010 (reviewing its decision on 22 February and 22 March 2010) in order to deal with the potholes as quickly as possible. It employed special 'seek and fix gangs' who fixed potholes whether or not they met the normal criteria where they needed to be fixed and who made a record of the total number of potholes fixed on each road. This meant that the potholes at issue were not inspected in the usual way and there was no direct record of which potholes were fixed on the road. The Council did however provide the 'seek and fix records' to the complainants. These documents consisted of two manually generated sheets that contained the location of the road, the date and the number of potholes fixed. The Commissioner has received a copy of the disclosure and can confirm that this information was disclosed to the complainants.

39. The Council explained that at the time of the request, it recorded information about repairs in three distinct locations:

    1. EXOR – used to record work orders and defects as it contained a detailed plan of the roads.

    2. Public enquiries system – used to note requests for repairs.

    3. Inspection records – The Council maintained a paper and a computerised system of inspection records. The computerised system was a recent introduction and the Council wanted to ensure that staff were comfortable with it and using it properly.

40. It explained the searches it had made of these locations, provided screen shots of the electronic systems and evidenced a methodological approach searching under the correct terms. It showed that all the systems had been checked and if further relevant information was held, it would have been located. The Commissioner is satisfied that the searches that it undertook were comprehensive.

41. It explained that it had provided all the relevant information from these sources to the complainants. It also sent the Commissioner a copy of the information disclosed and evidence of the searches done.

42. The Commissioner appreciates the comprehensive submissions the Council has provided and is satisfied that it has evidenced why no further relevant recorded information was held in relation to request **[3]** on 19 April 2010. He finds the Council's submissions convincing and he has been offered no arguments from the complainants that cast any doubt on them.

43. It follows that he is satisfied that on the balance of probabilities there was no further relevant recorded information held on 19 April 2010 that was relevant to request **[3]**.

Request **[2]**

44. The second request is also clear in its scope - any responses the Council gave to the complaints it received about a road between two dates.

45. The complainants explained that they expected more information to be held than that they were provided.

46. The Commissioner explained to the Council that he would also expect further relevant recorded information to be held in relation to the processing of formal complaints.

47. As noted above, the Council has explained that it does not treat complaints about potholes as formal complaints. Instead it treats them as service requests – the service being the work required to fix the road.

48. It explained that it only records the information it requires to identify and fix the problem – the problem, its location, a summary of the action taken to fix it and the name and address of the individual who reported it. It provided the Commissioner with a copy of this information as discussed in paragraph 31 above. The Commissioner considers this to be an accurate statement of the Council's approach to these matters.

49. It also explained that it would fix a pothole as quickly as it could. The information about the repairs that it undertook are covered by request **[3].** For the same reasons as advanced for request **[3]**, the Council does not hold further information about the work undertaken to resolve the issue.

50. The Commissioner is satisfied that the explanation provided by the Council is credible and accurate. He is satisfied that on the balance of probabilities no further relevant recorded information was held on 19 April 2010 for request **[2]**.

Procedural Requirements

51. Section 10(1) requires that a public authority complies with section 1(1) of the Act within 20 working days of receiving the request.

52. The Council failed to provide the information that it disclosed on 2 June 2011 to the complainants in 20 working days and therefore breached section 10(1).

The Decision

53. The Commissioner's decision is that the Council dealt with the following elements of the request in accordance with the requirements of the Act:

- It provided all the relevant recorded information that it held for requests **[2]** and **[3]** prior to the Commissioner's investigation; and

- It provided all the relevant recorded information that is held for request **[1]** during the Commissioner's investigation.

54. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- It breached section 1(1)(b) because it failed to provide all the relevant recorded information for request **[1]** prior to the Commissioner's investigation; and

- It breached section 10(1) because it failed to comply with section 1(1)(b) in 20 working days.

Steps Required

55. The Commissioner requires no remedial steps to be taken in this case. This is because the complainants received the information they were entitled to for request **[1]** during the course of the Commissioner's investigation.

Right of Appeal

56. 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

57. 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.

58. 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 10th day of August 2011

Signed ……

Faye Spencer
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

Section 1 - General Right of Access

Section 1 of the Act provides that:

(1) 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.

(2) Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

(3) Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information."

(4) The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request."

(5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b)."

(6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as "the duty to confirm or deny"."

Section 10 - Time for Compliance

Section 10 of the Act provides that:

(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

(2) Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt."

(3) If, and to the extent that –

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given."

(4) The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations."

(5) Regulations under subsection (4) may –

(a) prescribe different days in relation to different cases, and

(b) confer a discretion on the Commissioner."

(6) In this section –

"the date of receipt" means –

(a) the day on which the public authority receives the request for information, or

(b) if later, the day on which it receives the information referred to in section 1(3);

"working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom."