

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 13 September 2018

Public Authority: London Borough of Barnet
Address: Hendon Town Hall
The Burroughs
Hendon
London
NW4 4BG

Decision (including any steps ordered)

1. The complainant has requested the identity of the individual who gave authorisation for speed bumps on a particular street to be lowered.
2. The Commissioner's decision is that the London Borough of Barnet ("the London Borough") does not hold the requested information and has therefore complied with its Regulation 5(1) duty. However, it failed to issue an adequate refusal notice and failed to carry out an internal review within 40 working days and thus breached Regulation 14 and Regulation 11(4) of the EIR respectively.
3. The Commissioner does not require any further steps.

Request and response

4. On 8 November 2017, the complainant wrote to the London Borough and requested information in the following terms:

"Two or three years ago Princes Park Avenue was resurfaced and the speed bumps which were on that road were initially removed and replaced. However, the replaced bumps are lower than the original ones the result of which is that vehicles are not restricted to 20mph but are quite capable of doing 30mph notwithstanding the bumps.

"I want to know who gave authority to lower those bumps."

5. The London Borough responded on 12 December 2017. It stated that:

"A site investigation study of the speed humps and VAS in Princes Park Avenue was undertaken last year. The peak height of six speed humps were measured showing an average height range between 60.5 mm and 74.5 mm except, that one speed hump height were outside the measurement range. The average measured height of the speed humps comply with legislation 'The Highways (Road Humps) Regulations 1990' permitted height variance between 50 mm and 100 mm. (Except one to be rechecked)."

6. Following an internal review the London Borough wrote to the complainant on 14 February 2018. It stated that it did not hold the requested information.

Scope of the case

7. The complainant contacted the Commissioner on 30 March 2018 to complain about the way his request for information had been handled.
8. The scope of the Commissioner's investigation has been to look at whether the London Borough did, in fact, hold the requested information as well as examining compliance with the procedural aspects of the EIR.

Reasons for decision

Procedural Matters

Is the requested information environmental?

9. Regulation 2(1) of the EIR defines environmental information as being information 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)...as well as measures or activities designed to protect those elements;*
 - (d) reports on the implementation of environmental legislation;*
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*
10. In cases where it is the existence of information which is in dispute, the Commissioner has to consider whether the requested information, if it existed, would be environmental.
11. The London Borough initially stated to the complainant that it had considered the request under the Freedom of Information Act – although it subsequently informed the Commissioner it considered that the EIR applied.
12. In this case, the information relates to the installation of speed humps along a road. Her view is that it would constitute information on “measures” affecting the elements of the environment. Whilst this does not affect whether information is held, for procedural reasons, the Commissioner has therefore assessed this case under the EIR.

Reconsideration (Internal Review)

13. Regulation 11 of the Regulations states that:
- (1) Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.*

- (2) *Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.*
 - (3) *The public authority shall on receipt of the representations and free of charge—*
 - (a) *consider them and any supporting evidence produced by the applicant; and*
 - (b) *decide if it has complied with the requirement.*
 - (4) *A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations.*
14. The complainant requested an internal review on 12 December 2017. The outcome of that review was not provided until 14 February 2018 – the 42nd working day. From the evidence provided to the Commissioner in this case, it is clear that the London Borough has therefore breached Regulation 11(4) of the EIR.

Regulation 12(4)(a) – information not held

15. Regulation 5(1) states that: *"a public authority that holds environmental information shall make it available on request."*
16. Regulation 12 states that:
- (1) *Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—*
 - (a) *an exception to disclosure applies under paragraphs (4) or (5); and*
 - (b) *in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*
 - (4) *For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—*
 - (a) *it does not hold that information when an applicant's request is received;*
17. Whilst the London Borough has not stated to the complainant, in any of the correspondence which the Commissioner has seen, that it was applying the exception at Regulation 12(4)(a), it did inform the

Commissioner that *"we feel that the decision to use Regulation 12(4)(a) to refuse the applicant's request was correctly taken at the time, and this remains the case now."* The Commissioner agrees that this would have been the most appropriate exception to cite, given the London Borough's contention that it did not hold the information.

The complainant's position

18. The complainant is of the view that the London Borough is trying to avoid accountability by refusing to identify the individual responsible for adjusting the height of the speed humps. His view is that this could only have been done with the London Borough's authorisation and therefore an audit trail should exist which documents how such a decision was taken.
19. The complainant believes that the London Borough is being "economical with the truth" when responding to his enquiries

The London Borough's position

20. The London Borough's view is that the complainant's notion of the chain of events does not match the reality of what is likely to have occurred. Whilst, given the passage of time and the departure of some of the staff members involved, it cannot be 100% certain that the specific authorisation given above was neither sought nor offered, it considers this to be unlikely.
21. The London Borough has explained to the Commissioner that when it engages a contractor to carry out resurfacing work such as that which occurred on the road in question, it does not usually instruct the contractor as to the precise height of any replacement speed humps. The contractor is only instructed to replace the existing humps with humps that conform with the Highways (Road Humps) Regulations 1990 ("the 1990 Regulations"). As such there would be no authorisation to "lower" the speed humps – only authorisation to replace them with new humps compliant with the 1990 Regulations – regardless of whether the new humps were higher or lower than those they replaced.
22. Whilst the London Borough cannot say categorically that a specific height hump was not specified in this particular case, it would be unusual for such a specification to be made. Although he is under no obligation to do so, the complainant has not made the Commissioner aware of any reason to suggest that this did in fact happen.
23. Notwithstanding the points made above, the London Borough carried out searches to establish whether any such information was held. These included both searches of its paper files and electronic resources for

keywords such as "speed hump", "traffic calming" and "Princes Park Avenue" and variants of those terms.

24. The London Borough has also noted that the officers who were involved with the original works have now moved on which has restricted its ability to access contemporaneous information.

The Commissioner's view

25. The Commissioner's view is that the London Borough does not hold the requested information.
26. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, she will consider any reason why it is inherently likely or unlikely that information is not held.
27. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
28. The Commissioner considers that the searches which the London Borough has carried out were relevant, accurate and thorough. She considers that such searches should have located all information that was held within the scope of the request.
29. Furthermore, she accepts as credible, the London Borough's explanation as to why the requested information is unlikely ever to have existed.
30. Clearly it would strengthen the London Borough's position if the officers who handled the original works were able to provide a definitive account of the chain of events, but if those officers no longer work for the London Borough, it has no obligation, under the EIR, to contact them.
31. The Commissioner therefore concludes that that the London Borough has complied with its Regulation 5(1) duty and is entitled to rely on the exception at Regulation 12(4)(a).

Balance of Public Interest

32. Regulation 12(1) of the EIR requires that the public authority consider the balance of the public interest before refusing a request under any of the exceptions at 12(4) or 12(5).
33. Strictly speaking the London Borough should have considered the public interest in deciding whether to maintain the exception, however whether information is or is not held is a matter of fact and unaffected by public interest considerations. Accordingly the Commissioner has not considered and does not expect the London Borough to consider, the balance of public interest in maintaining the exception.

Refusal Notice

34. Regulation 14 of the EIR states that:

- (1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.*
- (2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.*
- (3) The refusal shall specify the reasons not to disclose the information requested, including—*
 - (a) any exception relied on under regulations 12(4), 12(5) or 13; and*
 - (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).*

35. The content of the London Borough's initial response to the request is set out at paragraph 5. Whilst the Commissioner considers that the response was an attempt, by the London Borough, to be helpful to the complainant, it did not comply with the provisions of Regulation 14.

36. Specifically, the response should either have stated that the London Borough did not hold the requested information or, more correctly, it should have refused the request and cited Regulation 12(4)(a).

37. The Commissioner also notes that, whilst the London Borough confirmed it did not hold the requested information in its internal review, it did not apply Regulation 12(4)(a) until after it had been contacted by her office

– although, for the reasons given above, it was entitled to rely on that exception.

38. The Commissioner therefore concludes that the London Borough has breached Regulation 14 of the EIR.

Other matters

39. In this case, the Commissioner takes the view that the complaint might well have been avoided had the request been better handled.

40. As well as the technical breaches outlined above, the initial response did not make clear to the complainant why the information he was seeking was unlikely to exist. In particular, it failed to explain what instructions were given to contractors and why they were different to the ones the complainant clearly supposed were given. A better internal review might also have addressed this deficiency.

41. Had the request been handled in this manner, the Commissioner is of the view that a reasonable requestor would not have found it necessary to make a complaint.

Right of appeal

- 2) 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

- 3) 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.
- 4) 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

Andrew White
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