

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

Date: 29 November 2012

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

Decision (including any steps ordered)

1. The complainant requested information relating to the council's road and footpath renewal programme. After initially responding under the FOI Act the Commissioner issued a decision notice requiring the council to consider the request under the Regulations. Merton Council responded stating that section 12(4)(b) was applicable (that the request was manifestly unreasonable). It did provide some information in response to the request and stated that other information was not held.
2. The complainant narrowed his request the council then provided further information but maintained that some information was not held and that other information was exempt under Regulation 12(4)(b). The complainant argues that the council must hold further information which should be disclosed to him.
3. The Commissioner's decision is that Merton Council was correct to apply Regulation 12(4)(b) in response to part 4 of the request.
4. The council considered part 1 of the request to have been narrowed by the complainant when finding that no further information is held. The Commissioner's decision is that council was correct to consider that the complainant had narrowed his request.
5. The Commissioner is satisfied that, other than for part 4 of the request, on a balance of probability the council does not hold further information falling within the scope of this request.

Request and response

6. In a previous decision notice (FER0417414) the Commissioner required the council to reconsider the complainant's request under the Regulations rather than the Act. The council therefore did so
7. The Complainant's request was for the following;

Wider request

"Question 1: I understand also from the Commissioner that the Council has implemented a review of the process used for prioritising carriageway and footway planned maintenance. I request all documentation relating to this review under the provisions of the FOI Act.

Question 2: ...the difference between the planned outcomes, in terms of both financial expenditures and highways and footway coverage in square metres, and the actual outcomes in terms of expenditures and coverage of the Council's 2009/10 Highways and Footways accelerated schemes programme and the actual expenditures and coverage realised on this programme.

Question 3: How was the decision that the planned work on Stanley Avenue was not to take place communicated to the contractor, and did this decision result in the Council making penalty payments to the contractor or incur any other contractual penalty? Please consider this a request made under the provisions of the FOI Act.

Question 4: Identify and list all Traffic and Highways programmes during the period from the beginning of the financial year 2001/2001 up to and including the financial year 2010/2011;

Question 5: for each individual programme, list the planned outcomes, in terms of both financial expenditures and coverage in square metres by material used, and the actual outcomes in terms of expenditures and coverage clearly indicating the proportion of actual expenditures against planned expenditures realised, and what form these differences, if any, took in terms of absolute expenditures and coverage;

Question 6: I further request that I be informed if any meetings were held to decide to drop work from each programme and/or add work to that programme or to change the materials used, and who was present when these decisions were taken and if minutes were taken recording these decisions.

He subsequently narrowed his request down to:

"Question 1: I specifically request "all documentation relating to this review" and the Council has chosen to provide me with a "summary of the criteria used in this prioritisation model" without any further information concerning the practical issues of how it might be implemented on the ground, including, amongst other things, full supporting documentation, details of any necessary training requirements, and the determination and application of benchmarks."

"Question 2: (i) I specifically request information concerning "...the difference between the planned outcomes, in terms of both financial expenditures and highways and footway coverage in square metres, and the actual outcomes in terms of expenditures and coverage of the Council's 2009/10 Highways and Footways accelerated schemes programme and the actual expenditures and coverage realised on this programme."

Question 3: The complainant did not raise an issue with the council's response to question 3 and so it is not considered further within this decision notice.

Question 4: The complainant initially asked for

"Identify and list all Traffic and Highways programmes during the period from the beginning of the financial year 2001/2002 up to and including the financial year 2010/2011; and, for each individual programme, list the planned outcomes, in terms of both financial expenditures and coverage in square metres by material used, and the actual outcomes in terms of expenditures and coverage clearly indicating the proportion of actual expenditures against planned expenditures realised, and what form these differences, if any, took in terms of absolute expenditures and coverage;"

The complainant however changed this part of his request when asking the council to review its decision. He stated that:

Question 4 concerns the balance in a long term contractual relationship between the extent of the confidentiality of a private contractor's purely selfish interest in maintaining the secrecy of the rates which are paid and the public interest in the scrutiny of public expenditure on the renewal, maintenance and sustainability of public footpaths and roadways and you choose to completely ignore this question in your refusal notice although, intuitively, there would appear to be a close relation between a contractor's rate and the quality, kind and quantity of materials used on a project.

8. The council's response to this was that the initial request did not specifically request details of the contractor's rates and so it would not respond to that. During the previous investigation under the Act the council had responded to the initial request basing its refusal on the fact that providing the information would exceed the appropriate limit under the Act, and would include details which were subject to the exemption in section 43 of the Act (that the information included commercially sensitive information).
9. The Commissioner considers that the above is not a new request for information but a description of the sort of information which the complainant was hoping to receive in response to his initial request. He has therefore made a decision based upon the initial request for information and the councils refusal under Regulation 12(4)(b).

Question 5: I further request that I be informed if any meetings were held to decide to drop work from each programme and/or add work to that programme or to change the materials used, and who was present when these decisions were taken and if minutes were taken recording these decisions."

10. The council responded to the original notice on 2 December 2011 finding that Regulation 12(4)(b) applied to part 2 and 4 of the complainant's request. Regulation 12(4)(b) states that an authority is not required to respond to a request which is manifestly unreasonable. The council argued that part 2 of the request is a subset of the information required in part 4, and it had applied Regulation 12(4)(b) to that information.
11. On 6 December 2011 the complainant wrote to the authority and referred it to the fact that he had narrowed some parts of his request in a letter requesting an internal review dated 19 August 2011. This was when it was initially being considered by the council under the Freedom of Information Act. He argued that the council's refusal notice under the Regulations had considered the initial, wider request. He therefore highlighted this and amended or clarified his request further.
12. In response to question 1 the council stated that it did not hold any further information in relation to the review. However although it had not formed part of the original request it provided raw data which it used to apply some parts of the model.
13. The council also maintained its reliance upon Regulation 12(4)(b) to the information falling within the scope of parts 2 and 4 of the narrowed request. The complainant however disputed that information within question 2 falls within the scope of question 4.
14. As regards question 5 the council confirmed that no information is held.

Scope of the case

15. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He argues that not all of the information has been provided to him and that the council was wrong to apply section 12(4)(b) to the relevant parts of the request.

Reasons for decision

16. Regulation 12(4)(b) states that an authority is exempted from responding to a request where the request is manifestly unreasonable.
17. Regulation 12(4)(a) applies where an authority does not hold the information which the complainant has requested.
18. There is a long history of correspondence between the parties in this case, over which time the authority has provided some information, claimed that other information is not held, and also stated that answering some parts of the request would be manifestly unreasonable. The Commissioner has also issued 2 decision notices previously on related matters. These are FER0417414 and FER0296764.
19. The council also provided information to the complainant during the course of the Commissioner's investigation.

Question 1

20. In response to Question 1 the council provided some information to the complainant and stated that it had provided him with all of the information which it held in response to his request. However it made clear to the Commissioner that when stating this it was responding to the narrowed request provided by the complainant.
21. The phrase used by the complainant is held in 2 paragraphs in his letter to the council dated 16 December 2011:

"As is clear from my request of 19 August 2011 for an internal review of your initial decision in this matter, I fully accepted the point you made in your decision of 16 August 2011 concerning the time and cost implications of my initial request. It is for this reason that I narrowed down my request to four specific issues at this point. To quote:

Question 1: I specifically request "all documentation relating to this review" and the Council has chosen to provide me with a "summary of the criteria used in this prioritisation model"

without any further information concerning the practical issues of how it might be implemented on the ground, including, amongst other things, full supporting documentation, details of any necessary training requirements, and the determination and application of benchmarks."

22. The council stated that it had therefore only considered whether it held information on the 'practical issues of how it might be implemented'.
23. The Commissioner asked the council to consider whether this part of the request had been narrowed or not. The council argues that the request was narrowed as it was in a letter which responded to the council agreeing that the previous request was too wide. The Commissioner also notes that in later correspondence the complainant referred back to the letter of 16 December 2011 stating that he had narrowed his request in that letter.
24. In response to question 1 the council disclosed a copy of a report to cabinet revealing the need for a new system in 2005, together with a summary of the meetings held in the development stage from February 2011. The complainant has however asked the Commissioner to consider whether documents are held prior to the new model being provided to a councillor for consideration in February 2011. There were no records of meetings or of email correspondence showing how the new model was suggested or showing its development prior to this time.
25. The Commissioner asked the council to consider whether it held such information. The council stated that it believed that this was a new request rather than falling within the scope of question 1 as narrowed by the complainant. However it agreed to disclose the information in question to the complainant and did so on 11 October 2012. The Commissioner has not therefore considered this further.
26. The council also only provided a summary of the meetings which had occurred between the councillor and the officer during this part of the development of the model. The Commissioner asked the council why it disclosed a summary rather than simply providing a copy of those documents or of the information held within those documents. The council responded stating that it provided it in this way in order to respond to the Commissioner's questions rather than the complainant's request. It therefore agreed to disclose the information, subject to one redaction which was a councillor's comment relating to ward matters and therefore did not fall within the scope of the request. Again therefore it then disclosed this information to the complainant on 12 October 2012. The Commissioner has therefore not considered this issue further.

27. The Commissioner is satisfied that using an objective reading of the request, the council was correct to consider that the complainants letter of 16 December 2011 narrowed the request to information on the practical issues of how the new model might be implemented on the ground, *"including full supporting documentation, details of any necessary training requirements, and the determination and application of benchmarks."*
28. Having considered this narrowed request the Commissioner is satisfied that the council has now complied with its obligations by disclosing the information it holds to the complainant. He has not therefore considered this further.

Question 5

29. The council stated to the complainant that it held no information in respect records held on formal meetings where minutes were taken regarding decisions to include or exclude schemes, or where a decision was taken to change the material used. The council said that the process which the council uses to manage these changes is informal as this is a more efficient and quicker way of achieving results.
30. The complainant argued that records must be held. He said that lower level officers making decisions in conjunction with the contractor must report their decisions to their managers. He said that if that is not the case then this leaves open the possibility of corruption.
31. The Commissioner asked the council to clarify this point. He asked how the council could verify what the agreed course of action had been with the contractor if no record of these informal decisions was made.
32. The council responded pointing out that the Commissioner had previously considered a very similar request in his decision notice in case FER0296764. In that decision notice the Commissioner decided that no further information was held.
33. The council further explained that decisions are not taken by officers at a local level to add or drop works programmes from the scheme.

It explained that a provisional programme is developed using the Prioritisation Model in preparation for any new financial year, based on the budget allocation granted by Cabinet for footway and carriageway maintenance. This provisional programme is passed to the contractor to programme and commences once the programme has been agreed with Officers from Traffic and Highway Services. There are a number of factors which can affect the programme which are outside the council's control and as such the planned maintenance programme is fairly fluid. The decision to add or remove schemes from the programme during the course of the financial year is taken by council officers as outlined in

decision notice [FER0296764](#). The contractor plays no actual part in deciding which schemes are included or removed from the programme.

34. In order to manage the footway and carriageway programme and budget, regular meetings are held between council officers and the contractor to monitor progress. It said that these are informal meetings to discuss the programme and advise the contractor of any changes the council wishes to make to the provisional works programme. No records are taken of those meetings.
35. During the course of the financial year as estimated costs become final, the programme is refined to ensure that the works does not exceed the available budget. The contractor will not undertake any work without an official works order that has been authorised in accordance with the council's scheme of delegation and is only paid on completion of the works as specified on the works order.
36. The only record of agreed changes to the programme is the programme itself, which is continuously updated, as changes are agreed.
37. Decision notice FER0296764 goes into greater detail about the process followed by the council in respect of these decisions.
38. The council has made clear assertions that no information is held because that is not how it conducts these meetings. The Commissioner therefore finds no value in asking the council to search for information it has states clearly that it does not collect in the first instance. The council is either correct in its assertion or it is not. The Commissioner is only therefore able to check that the council's assertion has not been made in error. Once he has confirmed this with the council he must find that on a balance of probabilities no information is held, unless he has reason to disbelieve the council's explanation.
39. His decision in this case is therefore that on a balance of probabilities no information is held.

Regulation 12(4)(b)

Question 2

40. The council applied Regulation 12(4)(b) to part 2 and 4 of the request.
41. In relation to question 2 the complainants request was narrower than in question 4 as it relates to information dating from 2009/10. The Commissioner questioned its response with the council and it stated it was able to provide this information without causing a significant burden on its resources. It therefore disclosed the information it held in respect of these dates to the complainant, albeit that a small amount of

information which it stated could not be found, and a small amount of information which was redacted as it was commercially sensitive.

42. The complainant received this information and did not raise further issues with the redaction. Therefore the Commissioner has not considered this further within this decision notice.

Question 4

43. As regards question 4 the council has continued to rely upon the application of Regulation 12(4)(b). It explained to the complainant that it does not hold records prior to 2005. It further explained its difficulty in obtaining the information which would be required to respond to this request. It stated that it would take in excess of 48 hours to respond to the request.
44. The council stated that the information is held on re-measurement sheets. To extract the information the council would need to search through, and extract the details from approximately 12 000 sheets dating from September 2005 to March 2011. These are filed by date paid and not by programme so all of the sheets would need to be searched to locate the sheets that relate to planned surfacing and footway works.
45. The council has estimated that 1 person could go through 10 lever arch files per normal working day – in total there are 40 files holding the 12 000 sheets. Therefore it estimated that the initial search of the files would take 4 days work to extract the relevant sheets.
46. Further to this it stated that once the relevant sheet had been located each sheet would need to be reviewed to work out the original estimated square meterage and the final paid square meterage. It stated that there would be approximately 50 schemes per year, over a 5 year period, totalling in approximately 250 schemes. This it considered would take an additional 2 days to complete. In total it therefore considered that responding to the request for this specific information would take 6 days to complete.
47. It argues that the work to provide the information would seriously disrupt the work of the Network Maintenance Manager, and the Planned Maintenance team. This team is responsible for Arboriculture/Grounds Maintenance, Bridges/Structures, Drainage, Antiskid, Lining, Contract Management, Asset Management and Street Lighting as well as Planned Carriageway and Footway Maintenance. It said that there are 8 individuals working on the team, 3 of which were agency staff at the time of the request. It argues therefore that responding to the request would seriously disrupt the work of this team and would place a significant burden on the team to complete this work.

48. It also argued that working on the basis of £25 per hour, the cost of carrying out the searches would have been approximately £1200. It highlighted the current FOI appropriate limit is £450 for local authorities, and argues that providing this information would significantly exceed this limit.
49. When making his decision the Commissioner has borne in mind that the council could have drawn together the time it would have taken it to answer all of the parts of the complainant's requests in order to engage Regulation 12(4)(b). Instead it sought to provide the complainant with as much information as it could in relation to the other parts of the requests, albeit that this sometimes occurred during the course of the Commissioner's investigation rather than within the appropriate time limits. The council considered this part of the request in isolation from the others and argued that it would be manifestly unreasonable to search, prepare and disclose the information for this particular part of the request.
50. Bearing the above arguments in mind the Commissioner is satisfied that the councils application of Regulation 12(4)(b) was correct.

The Public Interest

51. Where information engages an exception Regulation 12(1)(b) requires the authority to carry out a public interest test to ascertain whether the information should be disclosed in spite of the exception being engaged. The test is whether the public interest in maintaining the exception outweighs that of disclosing the information.
52. When carrying out this test the Commissioner must bear in mind Regulation 12(2) which provides a specific presumption towards disclosure.

The public interest in maintaining the exception

53. The council argues that the public interest in maintaining the exception includes ensuring that the Planned Maintenance Team can continue to fulfil their main duties. The amount of work involved in providing the information would cause a significant disruption to the work of the team.
54. It argued that diverting such significant resources away from their everyday work is not considered to be in the public interest because it would divert significant resources away from providing core functions. Furthermore, it considered that it would not be in the public interest for the council to spend the estimated costs providing this information.
55. The Commissioner recognises that the council has other priorities from such a small team. A significant reduction of its available resources

would occur for a period of over a week. Clearly if other work was not being carried out decisions on other projects could be delayed.

The public interest in the information being disclosed

56. The central public interest in the information being disclosed lies in creating greater transparency and accountability for the decisions of public authorities and in how public money is spent.
57. Pavement and footpath renewals are an important element of public safety. The records of work carried out over his period would provide an overall view of the levels of work carried out per year. It would also indicate the levels at which work was dropped or amended. This would allow individuals to see whether footpath renewal and maintenance had been badly affected by financial or service cuts when compared to other departments.
58. Showing the differences between planned and actual coverage could promote public understanding of why changes to the planned maintenance programme are needed. However, the council argues that this benefit has been partially met by the previous disclosure of planned and actual expenditure information for 2006/07 to 2010/11.

Balance of the public interest

59. The Commissioner has considered the above arguments. In essence he considers that the main arguments in favour of maintaining the exemption rest in preventing a significant drain of resources on the council team, thereby preventing it from carrying out its core functions.
60. The Commissioner has additionally taken into consideration the significant difference between the appropriate limit and the time and cost estimated to respond to this part of the request. Although the Regulations are clearly not intended to be the same as section 12 of the Freedom of Information Act 2000 as regards the appropriate limit, he considers the figure of £450 does provide a rough guide for what would be considered 'reasonable'. In this case the council has estimated costs which are close to three times higher than this level.
61. Nevertheless it is clear that the Regulations envisaged that requests would potentially include amounts of time and work to complete which would exceed the appropriate limit set under the Act. Regulation 7(1) provides additional time for public authorities to respond to requests where the amount of information is voluminous or the decisions to be taken are particularly complex.
62. The Commissioner has also considered the nature of the information in question. A disclosure of the information would aid in building a picture of the pavement and footpath renewal programme, how estimates had

changed over time and highlight any differences on the work carried out under the old model and the new prioritisation model. However the council has clarified that information previously disclosed relating to 2006/7 and 2010/11 (noted above) would already provide some insight into this.

63. The Commissioner also recognises that the council's overall priorities may have changed over time. A disclosure of the information following this period would therefore show the extent to which this department was affected by government funding cuts. Again however details of this may already be apparent from the overall funding details which the council has provided.
64. The council has not claimed that the requests from the complainant are vexatious. Clearly he has been persistent in his pursuit of information relevant to this issue and the Commissioner recognises the value of the information he is seeking. The council has clearly expressed its view that disclosing the information requested by question 4 would cause a significant burden without considering the other requests and time which it has spent responding to the complainant's requests previously.
65. The Commissioner would expect the council to consider what information it could provide within a reasonable limit in any event, and in effect that is what it has done in this instance. Its arguments as regards the application of 12(4)(b) did not however specifically take into account this additional work which it has carried out.
66. The Commissioner must recognise however that the complainant's request was not simply for this information alone, but for numerous other sets of information relating to pavement and footpath renewals. Considering the complainant's request in total substantially increases the overall cost and effect which the complainant's requests have had on the council and the drain on its resources overall. In actuality the total cost in terms of resources expended responding to the requests has been far greater than the council has estimated purely to respond to question 4. There has been a significant amount of correspondence between the complainant and the council over this issue over a number of years. Added together the Commissioner considers that would have amounted to an additional and significant burden on the council in responding to the correspondence.
67. Given the above Commissioner's decision is that the public interest in maintaining the exemption outweighs the public interest in the information being disclosed in this instance.

Right of appeal

68. 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: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

69. 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.
70. 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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