

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

Date: 19 August 2014

Public Authority: London Borough of Newham
Address: Newham Dockside
1000 Dockside Road
London
E16 2QU

Decision (including any steps ordered)

1. The complainant requested information about a public road following her fall at a crossing. The London Borough of Newham (the 'Council') provided some of the information and withheld the remainder under section 12 and section 40(2) of the FOIA.
2. The Commissioner's decision is that the Council has, on the balance of probabilities, disclosed all the information it holds in relation to part (a) of the request and has correctly applied sections 12 and 40(2) of the FOIA to the remainder. He also finds that some of the information requested constitutes environmental information and therefore should have been considered under the Environmental Information Regulations 2004 (EIR).
3. He does not require the Council to take any remedial steps to ensure compliance with the legislation.

Background

4. The complainant told the Commissioner that she had fallen on a crossing on 9 July 2013 which she said was due to a pothole in the road.
5. The request was contained within the body of an insurance claim for damages which the complainant made following a fall. The Council's

Insurance Team referred the request to the Information Governance Team towards the end of July 2013 (the exact date is unknown and the complainant does not have a copy of the request).

6. The Council advised that the complainant had also been in correspondence with its CCTV Strategy and Security Manager, who had informed her that a check of the three CCTV cameras in the area had identified that there was no CCTV footage of a person tripping or falling.

Request and response

7. On or around 31 July 2013 the complainant wrote to the Council and requested information in the following terms:

"Please provide all the records listed below for [named location];

a) highways maintenance records

b) complaints/accident records for year Jan 2013 to date

c) and CCTV footage of incident date of accident [claim number redacted]."

8. The Council responded on 20 August 2013. It provided the information it held in response to part (a) of the request with minor redactions under section 40(2) for personal information. It refused to provide the information requested in (b) on the basis of the cost exclusion (section 12(1) of FOIA). For part (c) the Council said that the information was exempt by virtue of section 40(2) of FOIA (personal information) on the basis that the CCTV footage contains "*substantial third party data*". It suggested, however, that the complainant could pay for the footage from the three cameras to be sent to a specialist video editing company to pixelate personal data at an estimated minimum cost of £2400.
9. Following an internal review the Council wrote to the complainant on 24 October 2013. Unfortunately the complainant did not receive the written outcome which only became apparent during the Commissioner's investigation. A further copy of the review outcome was sent to the complainant on 31 March 2014. The Council said that its original decision was partly correct, but that the advice about the CCTV footage was incorrect in that the complainant should instead have been advised that a request for personal information, (ie CCTV footage of herself), should have been requested under the Data Protection Act 1998 (the 'DPA'). It reiterated that the footage had not captured the complainant's fall.

Scope of the case

10. The complainant contacted the Commissioner on 7 February 2014 to complain about the way her request for information had been handled. Although the Commissioner initially considered part (c) of her request under the Data Protection Act (see 'Other Matters'), the complainant asked him to also consider whether the information could be released under FOIA.
11. The Commissioner has considered whether, on the balance of probabilities, the Council has provided all the information it holds in responding to part (a). He has also considered whether the Council correctly applied the cost exclusion contained in section 12 of FOIA to part (b) and whether it was correct to engage section 40(2) in relation to part (c) of the request (once it had been established that there was no footage of anyone falling).
12. Given the wording of the request, the Commissioner has also considered whether any of the requested information is environmental.
13. On 10 June 2014, the Commissioner wrote to the complainant setting out his preliminary view that the Council had complied with the FOIA in its handling of parts (b) and (c) of her request. He also informed her that the Council had offered, outside of the FOIA, to allow the complainant to view the CCTV footage for herself. At this stage, he confirmed that he had not considered part (a) as the complainant had not specified any grounds of complaint about this part of her request. He asked the complainant to consider withdrawing her complaint so that it could be resolved informally.
14. On 30 June 2014, the complainant declined and said she did wish to complain about part (a). However, there was a delay in the complainant setting out the grounds of her complaint about this part of her request on medical grounds. The Commissioner suggested alternative means; however the complainant did not submit her views until 28 July 2014.

Reasons for decision

15. The Commissioner has first considered whether the requested information is environmental.

Is any of the requested information environmental? Information is "environmental" if it meets the definition set out in regulation 2 of the EIR. Environmental information must be considered for disclosure under

the terms of the EIR rather than the Freedom of Information Act. Under regulation 2(1)(f), any information on the state of human health and safety, including the conditions of built structures, will be environmental information. As part (a) of the request relates to the maintenance of the highway, the Commissioner considers that it should have been dealt with under the EIR.

16. As part (b) of the request is for information held about complaints and accidents on that road, although relating to the defects in the road, the records constitute data held on complaints and accidents as opposed to records of the defects themselves. The Commissioner's view is that the Council was correct to deal with this part of the request under the FOIA.
17. Part (c) of the request for the CCTV footage was considered under both the Data Protection Act and the FOIA. The Commissioner considers that footage of vehicles and individuals on the road does not constitute environmental information and has been correctly considered under the FOIA.

Part (a)

18. The Council told the Commissioner that it had provided the complainant with a copy of all the information it held in relation to part (a); it also sent the Commissioner a copy of this information.
19. The Commissioner has therefore considered whether, on the balance of probabilities, any further relevant information is held by the Council beyond that originally identified in its response to the complainant's request. For the reasons covered below, the Commissioner believes that some of the information requested fell to be considered under the EIR. The issue as to whether any further information is held is dealt with in the same way under the EIR as under the FOIA.

Section 1 / Regulation 5(1) – What recorded information was held?

20. Section 1 of FOIA states 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 information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

21. Regulation 5(1) provides a general right of access to environmental information held by public authorities. Regulation 12(4) states that:

"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."

22. Irrespective of the legislative regime, the task for the Commissioner here is to determine whether, on the balance of probabilities, the Council holds any further information relevant to the request to than it has already identified. Applying the civil test of the balance of probabilities is in line with the approach taken by the Tribunal when it has considered the issue of whether information is held in past cases.

Information disclosed

23. The Commissioner asked the Council to explain what searches it had undertaken in order to respond to part (a) of the request. It said that the information was drawn from the Council's database, called Mayrise, and that all inspections are entered on this system by the inspectors and information is drawn out simply by adding the location and the period for the search. It confirmed that the information provided to the complainant was the same information that was provided to the Council's insurers.
24. The Council confirmed that the information is held electronically and said it had searched by location and date. It said that Mayrise had been set up as a live system in 2010 and that all the information from that date is still available and has not been deleted or destroyed. The Council also provided a copy of its Retention Policy for information. It did not consider that the questions about whether the requested information is held for business purposes or statutory requirements to be applicable.
25. Although the investigation in this case has been protracted, the view of the Commissioner is that the Council, on the balance of probabilities, does not hold any further information.

Part (b)

26. The Council relied on section 12(1) of the FOIA in refusing to provide the information requested at part (b) of the request, which states that:

"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."

27. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Regulations") sets the appropriate limit at £450 for the public authority in question. Under the Regulations, a public authority may charge a maximum of £25 per hour for work undertaken to comply with a request. This equates to 18 hours work in accordance with the appropriate limit set out above.
28. A public authority is only required to provide a reasonable estimate or breakdown of costs and in putting together its estimate it can take the following processes into consideration:
 - determining whether it holds the information;
 - locating the information, or a document which may contain the information;
 - retrieving the information, or a document which may contain the information; and
 - extracting the information from a document containing it.

Would the cost of compliance exceed the appropriate limit?

29. As is the practice in a case such as this, the Commissioner asked the Council for a detailed estimate of the time/cost taken in relation to dealing with the request.
30. The Council explained that information about complaints/accident records for year January 2013 to date, as requested by the complainant, was not recorded in a suitable format. It said that the computer system used for recording complaints about the highway did not index complaint 'items' by geographic location and subject matter, and that it was not possible to undertake detailed searches with the level of analysis needed to satisfy the request.
31. In addition, the Council said that complaints and reports, which can be construed as a complaint, can be brought to the Council's attention in a number of ways which would include constituents approaching the Council's Mayor, councillors and MPs with initial complaints, which could include a specific complaint about the area the complainant is interested in. The Council advised that during the seven month period in question, it had dealt with 2136 enquiries and said an officer would need to look at each individual enquiry to determine whether any of them related to the specified location.
32. Likewise, during the same period, the Council reported that it had dealt with 882 complaints at various levels and while it conceded that it would be possible to filter and manipulate the database to perhaps isolate complaints about potholes and the state of roads, it would still require

an officer to manually trawl through the records to determine what the complaint was about and whether it related to that particular location.

33. The Council told the Commissioner that it also has a system where its constituents can report service issues directly, either through the Council's Contact Centre, through the Council's website or through an app. Again, this would require an officer to manually go through all records to see whether there was a specific reference to the location specified. The Council commented:

"At the time, no sampling was undertaken to determine how long such an exercise would take, but it was clear from the numbers involved, and the need for different officers who have access to the various systems, significant time over and above 2.5 days."

34. In view of the large amount of information concerned and the way in which it is held by the Council, the Commissioner is satisfied that it has correctly estimated that to comply with the request would readily exceed the appropriate limit.

Section 16(1) – The duty to provide advice and assistance

35. Section 16(1) of FOIA provides that a public authority should give advice and assistance to any person making an information request.
36. In this case, whilst the Council's refusal notice explained why the information could not be provided within the appropriate limit, it failed to suggest how the complainant could narrow her request to potentially bring it under the cost limit.
37. The Council told the Commissioner it fully accepted that it had not offered the complainant advice and assistance in refining her request in line with section 16, but commented that:

"It is difficult to determine how her request could have been refined to enable us to provide meaningful information as clearly she was looking for an overall picture with regards to issues within the specific area. If an offer was made to provide information from one database, presuming that this would have been possible within the time limits, the information would not have been complete. Having said that, the information provided in respect of highways maintenance records for the area would have given [the complainant] a good overview of activity in respect of maintenance at [the location]. In accepting that it is not for the Council to determine and interpret why a requester has asked for information, the fact that the request came as part of an

insurance claim for a trip, officers at the time made assumptions as to what would be helpful to [the complainant] in support of her claim."

38. In this case, the Council breached section 16(1) of FOIA; however the Commissioner is satisfied that this failure does not invalidate the original cost estimate.

Part (c)

39. The Council confirmed it had previously advised the complainant that, of the three CCTV cameras in the area, one was focussed further along the street and did not at any time cover the crossing, and that the other two were at the time extensively used by the Council's traffic enforcement team and for most of the time were not covering the crossing.
40. The Commissioner has viewed the CCTV footage for himself and did not see any images of a person falling or tripping. He is therefore satisfied that the complainant's fall is not captured by the CCTV footage. He has gone on to consider whether the CCTV footage should be disclosed under the FOIA.
41. Section 40(2) of FOIA provides that third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the DPA.

Is the withheld information personal data?

42. Personal data is defined by the DPA as any information relating to a living and identifiable individual. The Council explained to the Commissioner that the footage captures images of people who can be identified, and car registration plates. Having viewed the footage, the Commissioner accepts that the images represent the personal data of the individuals shown on the film.

Would disclosure breach the Data Protection Principles?

43. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle, and the most relevant in this case, states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

Reasonable expectations

44. The people recorded on the film appear not to have been aware that they were being recorded and, even if they had been aware, the Commissioner agrees with the Council's view that there would not have been any reasonable expectation that their images would be disclosed to the public in a permanent form under the FOIA.

Consequences of disclosure

45. The Council said that release of the footage under the FOIA would not only breach the first data protection principle, but would breach the second, which states that personal data should only be obtained for one or more specified and lawful purposes, and shall not be further processed in any matter incompatible with that purpose or those purposes. It stated that providing images to the complainant for purposes other than her wishing to satisfy herself that there are no images of her fall is not considered to be a legitimate use of the images.
46. In this case, disclosure of the requested footage (whether to the complainant or the general public) would be an unnecessary and disproportionate interference by a public authority in individuals' private lives. Further, in the Commissioner's view, were the public allowed access to CCTV footage on demand by virtue of the FOIA, this would erode personal privacy and undermine public confidence in the acceptable and responsible use of CCTV technology and the benefits such technology brings.

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

47. The Commissioner has no difficulty in determining that on this occasion, the rights and freedoms of the data subjects outweigh the legitimate interests in disclosure. The Commissioner is therefore satisfied that the disclosure would not be fair in the circumstances and that section 40(2) was therefore engaged.

Other matters

48. The Commissioner considered part (c) of the request initially in line with the DPA in that the request was for CCTV footage of the complainant herself and her accident.
49. In terms of compliance with the DPA, the Commissioner concluded that, as the Council had responded within the requisite 40 days and as it had confirmed it did not hold any CCTV images of anyone falling, it was likely that the Council had complied with the requirements of the DPA.

50. In this case the Council, outside of FOIA and with a view to resolving the complaint informally, offered to allow the complainant to view the CCTV footage for herself, which she has indicated she intends to do. Arrangements for the viewing will be made directly between the two parties. The Commissioner notes the Council's efforts to resolve this case informally.

Right of appeal

51. 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

52. 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.
53. 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

Jon Manners
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