

Environmental Information Regulations 2004 (the EIR)

Decision notice

Date: 30 July 2012

Public Authority: London Borough of Barnet
Address: North London Business Park
Oakleigh Road South
London
N11 1NP

Decision (including any steps ordered)

1. The complainant has requested

All information regarding any dialogue between the council and Veolia Water (Three Valleys Water) on the reconstruction of West Hendon Broadway.

2. The London Borough of Barnet disclosed some information to the complainant but stated that no further information was held. The Commissioner has decided that the London Borough of Barnet has failed to satisfy him, based on a balance of probabilities, that it has disclosed all the recorded information it holds falling within the scope of the complainant's request. The Commissioner has also decided that the London Borough of Barnet has breached Regulation 5(2) of the EIR by failing to respond to the complainant's request as soon as possible and in any event within 20 working days of receipt but does not require it to take any steps in respect of this breach.

3. The Commissioner therefore requires London Borough of Barnet to take the following steps to ensure compliance with the legislation.

- Carry out further searches and enquiries (including contacting its Corporate Governance Department) to see whether it holds any additional recorded information falling within the scope of the complainant's request with particular reference to communications relating to its legal action against Veolia Water. If further recorded information is found this should be disclosed to the complainant or a new refusal notice issued.

4. The London Borough of Barnet must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. This Decision Notice is linked to and should be read in conjunction with the Commissioner's Decision in case bearing the reference FER0417504 where the same complainant expanded his original request to include 'any and all documents, internal or external, relating to the reconstruction of West Hendon Broadway'.
6. From mid 2005 to the end of 2007 West Hendon Broadway was subject to a series of water leaks. During this period Three Valleys Water (now Veolia Water) inspected the road and carried out numerous repairs to the water services under it. The council believed that these water leaks caused or contributed to damage to West Hendon Broadway. This was disputed by Three Valleys Water. During the latter part of 2007 the council instructed its agent to repair and reconstruct West Hendon Broadway which cost £128,124.71.
7. The damage to and reinstatement of West Hendon Broadway is a matter of direct interest and relevance to the complainant as it is the road on which he lives.
8. The complainant believes that the water leaks under West Hendon Broadway and the consequential damage to the road was also responsible for cracks to his boundary wall. He therefore commenced legal action against both the council and Three Valleys Water in 2007 for the cost of repairing the damage to his wall but subsequently withdrew his claim.^{1, 2}
9. In or about 2010 the council issued proceedings against Veolia Water (previously Three Valleys Water) in the Central London County Court for the cost of reinstating West Hendon Broadway which it alleged was due to its failure to maintain the water pipes under the road. The council also joined Virgin Media to the court proceedings by alleging that the

¹ <http://www.times-series.co.uk/news/topstories/4994422.print/>

² <http://www.times-series.co.uk/news/topstories/9124204.print/>

damage to West Hendon Broadway was contributed to by the laying of ductwork (to carry cable television cabling) under the road at the incorrect depth.

10. In or about April 2011 the council concluded its legal claims against Veolia Water and Virgin Media.
11. On 2 April 2011 the complainant made a subject access request and some of the information disclosed to him in relation to this was also covered by the scope of his information requests which are dealt with by this Decision Notice and the related one FER0417504.

Request and response

12. On 2 April 2011 the complainant wrote to the London Borough of Barnet (the council) and requested information in the following terms:

'As a FOIA request, please provide me with all documents, letters, memos, phone notes, minutes of meetings and all records of any kind, on any media and of any description, regarding any dialogue between the council and Veolia Water (Three Valleys Water) on the reconstruction of West Hendon Broadway'.

13. The council responded on 17 May 2011 (following an acknowledgement on 7 April) and disclosed 10 email documents relating to its communications with Three Valleys Water from which it redacted some personal information.
14. On 10 June 2011 the complainant requested an internal review as he was unhappy with the council's response. This was acknowledged on 16 June.
15. On 5 August 2011 the council wrote to the complainant with the outcome of its internal review which it said it had processed under the EIR. It stated that it had just disclosed information in relation to a linked request³ some of which would be relevant to the current one. With regard to the redactions made to the information disclosed with its response dated 17 May 2011 the council clarified that these were for the names of individuals (excluding council officers) and were made under Regulation 13 of the EIR.

³ This is dealt with by the Commissioner in his Decision Notice: FER0417504

Scope of the case

16. On 18 August 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular, he said that he was not convinced that the council had disclosed all the recorded information it held falling within the scope of his request.
17. On 23 September 2011 the complainant confirmed to the Commissioner in a telephone call that he did not intend to take issue with the redactions made by the council for third party personal data under Regulation 13 of the EIR.
18. The Commissioner has therefore limited the scope of his investigation to whether the council has disclosed all the recorded information it holds within the ambit of the complainant's request.

Chronology

19. On 30 September 2011 the Commissioner wrote to the council, reiterated the complainant's belief that it had not identified and disclosed all the recorded information and invited it to carry out further searches and enquiries. In particular, he asked the council to look for any information relating to a court case concerning Three Valley Water and any minutes or notes of a meeting referred to in one of the emails disclosed to the complainant on 17 May 2011.
20. The council responded on 27 October 2011. It stated that all the information located as a result of its logical and comprehensive searches was disclosed to the complainant and considered it highly unlikely that any information within the scope of his request had been mislaid, wilfully destroyed or in any way withheld.
21. The Commissioner wrote to the council again on 27 October and 2 November 2011. He made specific reference to the existence to two emails which he considered should have been disclosed to the complaint on 17 May or 5 August and requested details of the various internal departments that had been contacted with a view to locating any information falling within the scope of the request.
22. The council responded on 3 November 2011. It stated that it has located the two missing emails and confirmed that copies could be passed to the complainant with the individuals' names and email addresses redacted.

23. The Commissioner replied on 3 November 2011 and invited the council agree to the disclosure of redacted versions of the missing emails to the complainant as he had already indicated that he had no objection with the removal of any personal data. The Commissioner also requested copies of the photographs attached to one of the emails previously disclosed to the complainant.
24. The council responded on 4 November 2011 with redacted copies of the missing emails and the requested photographs which the Commissioner passed to the complainant on 8 November 2011 as he had not previously seen them.
25. The Commissioner wrote to the council again on 8 November 2011 and suggested that it make further enquiries with four named council officers in relation to any minutes or notes that might exist in relation to a meeting referred to in one of the emails disclosed to the complainant on 17 May 2011. He also asked the council to check whether there were any additional photographs.
26. The council responded on 15 November 2011 stating that only one of the four named officers still worked for the council who having re-checked his files could find no recorded information relating to the particular meeting. Furthermore, the council said that all the information relating to the work undertaken to West Hendon Broadway has been passed to the FOI Link Officer within the Environment and Operation department. This individual together with the Governance Officer had reviewed all the electronic and manual files but could find no further information relating to meeting. The council also confirmed that to the best of its knowledge there were no additional photographs.
27. On 16 November 2011 the Commissioner reminded the council that he was still waiting to hear from it in relation to any further information that might be held in relation to the court case concerning Three Valleys Water.
28. On 21 November 2011 the Commissioner wrote to the council again in relation to any recorded information that may be held within the scope of the complainant's request.
29. On 7 December 2011 the council responded and stated that all the information it held in relation to the reconstruction of West Hendon Broadway had been centralised in one area of its shared network drive. The council also confirmed that information (which would include correspondence, reports, photos and emails) had already been provided to the complainant.

30. With regard to any information held in connection with the court action concerning Three Valleys Water the council said that this would have involved its external solicitors and therefore would not be held by the council for the purposes of the Act.
31. However, on 14 June 2012 the council confirmed to the Commissioner that it actually represented itself (through its Corporate Governance Department) in its legal action against Veolia Water issued out of the Central London County Court in or about 2010.

Reasons for decision

Environmental Information

Regulation 2 of the EIR

32. The first question for the Commissioner to consider is whether the information requested by the complainant is environmental information as defined by the EIR.

33. Regulation 2(1) of the EIR states that "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;

34. The information requested in this case, some of which has already been disclosed to the complainant, relates to discussions between the council and Three Valleys Water concerning the repair and reinstatement of

damage caused to West Hendon Broadway as a result of water leaks below its surface.

35. The Commissioner considers that this information falls within Regulation 2(1)(c) of the EIR in that it information on "measures (including administrative measure), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements referred to in Regulation 2(1)(a) namely land and landscape as well as measures or activities designed to protect these elements".
36. The council agrees that the information requested in environmental and has accordingly dealt with the request under the EIR.

Regulation 5 of the EIR

37. Regulation 5(1) provides that environmental information shall be made available upon request. Regulation 5(2) provides that this information should be made available within 20 working days following receipt of the request. Under regulation 7, a public authority is permitted to extend this period to 40 working days if it considers that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so.
38. The Commissioner finds that the council breached Regulation 5(2) of the EIR by failing to respond to the complainant's request as soon as possible and in any event within 20 working days of receipt.

Information held

39. The next question for the Commissioner to consider is whether the council has correctly located and identified all of the recorded information it holds falling within the scope of the complainant's request.
40. It is important to note the standard of proof that the Commissioner uses to determine whether relevant recorded information is held. In *Linda Bromley & Others v Information Commissioner and Environment Agency* [EA/2006/0072] ('Bromley'), the Information Tribunal confirmed that the test for establishing whether information was held by a public authority was not one of certainty, but rather the balance of probabilities. The standard of proof has been recently confirmed by the Tribunal decisions of *Innes v Information Commissioner* [EA/2009/0046], *Thompson v Information Commissioner* [EA/2011/0144] and *Oates v Information Commissioner* [EA/2011/0138].

41. The Commissioner has also been assisted by the Tribunal's explanation of the application of the 'balance of probabilities' test in the *Bromley* decision. In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority as well as considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held. The Commissioner will also consider any evidence that further information *is* held, including whether it is inherently unlikely that the information so far located represents the total information held.
42. In the decision of *Oates v Information Commissioner* [EA/2011/0138] the Tribunal stated that: 'As a general principle, the (Commissioner) was, in the Tribunal's view, entitled to accept the word of the public authority and not to investigate further in circumstances, where there was no evidence as to an inadequate search, any reluctance to carry out a proper search or as to a motive to withhold information actually in its possession. Were this to be otherwise the (Commissioner) with its limited resources and its national remit, would be required to carry out a full scale investigation, possibly onsite, in every case in which a public authority is simply not believed by a requester'.
43. The Commissioner has applied the test in the *Bromley* and the principal referred to in the *Oates* to this case and has also considered the arguments of both sides.
44. The council has stated that the only recorded information it holds is that which it has disclosed to the complainant directly on 17 May and 5 August and via the Commissioner's Office on 8 November 2011.
45. The complainant does not accept that the council has identified and disclosed all the information it holds. Specifically, he believes that further information should exist in relation to a meeting which took place between the council and Three Valleys Water on 19 July 2007 (such as an agenda, notes, minutes and correspondence). Also, he is surprised that the council has not identified any information in relation to the legal action it took against Veolia Water (formally, Three Valleys Water) for the recovery of the cost of repairing and reinstating West Hendon Broadway. For example, correspondence between the council and Veolia Water indicating the grounds and value of its claim together with its intention to take legal action.
46. The council has stated that whatever information it holds in relation the complainant's request (for example, correspondence, reports, photos, emails etcetera) by its various members staff (both past and present) is held in one area of the shared network drive. According to the council this information is considerable and has been disclosed to the

complainant in relation to his various requests both under the EIR and the Data Protection Act 1998. So far as the relevant information in the physical files is concerned the council has stated that this is held in seven separate large A4 lever files spanning a period of eight years.

47. The council has advised the Commissioner on a number of occasions that it has searched the various divisions and departments concerned in a logical and comprehensive manner and disclosed all the information it holds within the scope of the complainant's request. It has therefore concluded it is highly unlikely that any relevant information has been mislaid, wilfully destroyed or in any way withheld from the complainant within the scope of this request save for the information excepted under Regulation 12(5)(b) of the EIR. The latter information is dealt with in the Commissioner's related Decision Notice FER0041704.
48. The Commissioner has considered the following specific examples cited by the complainant in relation to which he believes further recorded information should be held by the council.

Meeting between the council and Three Valleys Water on 19 July 2007

49. This meeting is referenced in an email written by the council's Principal Engineer dated 24 July 2007 a copy of which was disclosed to the complainant on 17 May 2011. The meeting concerned discussions between the council and Three Valleys Water regarding a claim for the substantial remedial costs to West Hendon Broadway.
50. Although the council does not dispute that this meeting took place it has stated on a number of occasions that its various searches of the electronic and manual files and enquiries had not revealed any recorded information regarding it. The council has informed the Commissioner that as its Principal Engineer had left its employ it was unable to ask him whether any note or minute was taken of the meeting or indeed if one was made whether it had been subsequently lost or destroyed. Having considered the relevant correspondence around the date of the meeting and taking into account the impression that the Principal Engineer was fastidious in his record keeping, the council has concluded that it was more likely that no notes were ever recorded. With regard to four other council officers who may have been aware of the meeting only one was still employed. When this person was contacted by the council he stated that he did not attend the meeting and had no recollection of being informed of its outcome.
51. The complainant believes that the council should hold some information regarding the meeting as it was an important one where Three Valleys

Water made a percentage offer in respect of the costs of rectifying the damage to West Hendon Broadway.

52. The Commissioner has taken into account the enquiries and searches which the council states it has carried out and is satisfied that these were relevant and adequate. While he can understand why the complainant is sceptical that no recorded information is held regarding the meeting in 1997, he has no reason to disregard what the council has stated without any firm evidence to the contrary. The Commissioner has therefore concluded on a balance of probabilities that no recorded information is held by the council in relation to this meeting.

Legal action against Veolia Water (formally, Three Valleys Water)

53. In or about 2010 the council issued proceedings against Veolia Water (previously Three Valleys Water) in the Central London County Court for the cost of reinstating West Hendon Broadway which it alleged was due to its failure to maintain the water pipes under the road. The council also joined Virgin Media to the court proceedings by alleging that the damage to West Hendon Broadway was contributed to by the laying of ductwork (to carry cable television cabling) under the road at the incorrect depth.
54. In or about April 2011 the council discontinued its legal claims against Veolia Water and Virgin Media.
55. The council has confirmed to the Commissioner that it actually represented itself (through its Corporate Governance Department) in its legal action against Veolia Water.
56. The complainant therefore believes that there must be some recorded information held by the council in relation to this court action in the form a dialogue with Three Valleys Water. For example, correspondence intimating, valuing and submitting a legal claim.
57. This information is also dealt with in the Commissioner's related Decision Notice under the reference FER0417504.
58. The council has not disputed that this information would be within the scope of the complainant's request but it has confirmed that it is not held in a recorded format.
59. The Commissioner has seen evidence (including the claim form and Particulars of Claim) which would support the council's recent statement that it represented itself (through its Corporate Governance Directorate) in relation to its legal action against Veolia Water and Virgin Media.

60. The council has stated that any correspondence in relation to a claim for the reinstatement costs of West Hendon Broadway would have been conducted on its behalf by its external solicitors (Barlow Lyde and Gilbert). However, this statement appears to be based on an erroneous premise as it clear to the Commissioner from his enquiries that the council actually represented itself through its Corporate Governance Directorate. The Commissioner has not been provided with any express evidence that this particular Directorate of the council has been specifically approached in relation to the this request to determine if any information is held. As part of his investigation the Commissioner has been able to clarify that the external solicitors Barlow Clyde and Gilbert actually represented the council in the defence of the claim by the complainant and not its own claim against Veolia Water and Virgin Media. The Commissioner believes that the council may not have specifically approached its Corporate Governance Directorate to search for this information due to its erroneous belief that this claim was being handled by the external solicitors.
61. The Commissioner has therefore concluded, based on a balance of probabilities that the council does hold further recorded information in relation to its legal claim against Veolia Water and Virgin Media which would fall within the scope of the complainant's request for information on repair/reinstatement of West Hendon Broadway.

Right of appeal

62. 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

63. 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.
64. 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

Rachael Cragg
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