

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 January 2022

Public Authority: Trafford Metropolitan Borough Council
Address: Trafford Town Hall
Talbot Road
Stretford
M32 0TH

Decision (including any steps ordered)

1. The complainant has requested from Trafford Metropolitan Borough Council (TMBC) a breakdown of how over £66,000 had been spent on repairs to a specific road in 2020. TMBC said that the figure, obtained via a previous request for information, was incorrect and that it had not spent £66,000 on maintaining the road. It said that as its maintenance contract operated on a 'fixed sum' basis, it did not hold granular information on costs 'per-repair' or 'per-road'.
2. The Commissioner's decision is that on the balance of probabilities, TMBC does not hold the requested information and that its handling of the request complied with the requirements of section 1(1) of the FOIA. However, by failing to respond to the request within the statutory 20 working day time for compliance, TMBC breached sections 1(1) and 10(1) of the FOIA.
3. The Commissioner requires no steps as a result of this decision.

Background

4. On 13 December 2020, the complainant submitted an earlier request to TMBC for information on work carried out on a named road, and the associated costs, during the preceding 20 years.
5. In responding to that request, the Council disclosed a spreadsheet of jobs carried out and associated costs. Under the heading "Carriageway Depression/Uneven" it stated an associated cost figure of £66,232 for 2020. Under the heading "Road Marking New" it stated an associated cost figure of £557.69 for 2020.

Request and response

6. On 6 February 2021, the complainant wrote to the Council and requested information in the following terms:

"After looking at this report more closely, I would like to understand what repairs on [redacted] Road last year resulted in a spend of over £66,000, yet the road is in just as an appalling condition as it always has been, so we (the residents) would like to see a break down of those repairs and how the council can justify the cost when the road is in such terrible condition.

I have lived on this road for over 20 years and I certainly never saw any major work (just occasional pot holes filled), so would like to see exactly how the £66,000 was spent and how this can be justified."

7. On 24 February 2021, he additionally asked:

"Further to this request which is still outstanding I have notice that a sum of money £500+ has been spent on new road markings on [redacted] Road this year, but I can confirm absolutely that there have been no new road markings, and that none of the road markings that should exist have been updated, infect [sic] they are pretty well none existent on this road, which has been brought eh the [sic] TBC attention many times before but simply ignored.

Please advice which road markings have been either added or improved on [redacted] Road as a matter of urgency please, as I simply don't believe the TBC are being open and honest."

8. On 16 March 2021 the Council responded as follows:

"Highways maintenance activity completed by Amey under the One Trafford Partnership is undertaken under a fixed lump sum; this is a

fixed payment for all maintenance activities including gully's [sic] and potholes. In answering your freedom of information request 10065, we asked our supplier to provide an indicative cost estimate based upon the works activity that has been undertaken. Amey undertook this assessment, however did so with limited information due to the IT security incident which is in the public domain.

In regards to the £500+ for new road markings, we can confirm that this was an error. Whilst copy and pasting the data this was put in the wrong cell on the spreadsheet. This should have been in the cell for 'Kerbs Other' for 2021 along with the associated cost.

Amey is happy to undertake a review of the financial estimates provided once the complex IT security incident is resolved; as the access to information will enable a more accurate cost estimate to be calculated. We must note that given the fixed lumpsum nature of maintenance activity, this is not an actual level of cost but will provide a more detailed estimate of the potential cost of works undertaken on [redacted] Road from 2015."

9. The complainant requested an internal review on 16 March 2021, reiterating that he had asked for a breakdown of how the £66,000 had been spent on the named road in 2020.
10. The Council provided the outcome of the internal review on 23 April 2021. It reiterated that it pays a fixed sum to its contractor, Amey, for all maintenance activity. As the contract is structured in this way, no cost information about specific works completed on individual roads is held.
11. TMBC said that the estimate of £66,000 cited in the request was an *indicative* cost estimate for the work undertaken on the named road, and it did not represent how much the Council *actually* paid.
12. TMBC said that the indicative cost estimate had been based on limited information available at the time of the request, due to the impact of an IT security incident which restricted access to certain files held by Amey. Access had since been restored and further information could now be provided:

"Please find attached the nine jobs referred under 'Carriageway Depression / Uneven'. Unfortunately it has not been possible to provide an estimated cost for each job in the attached list as this is not held. As noted we originally had limited information upon which to provide a [sic] estimation of costs; in hindsight our original estimate of £66,232 was overestimated. Now that we have more system access, we are able to advise that each of the jobs would cost in the region of between £200 and £3,200 each. We apologise for our overestimate and at the time should have made it clear that we were

estimating and that the contract operates a fixed lump sum for all maintenance activity."

Scope of the case

13. The complainant contacted the Commissioner on 24 April 2021 to complain about the way his request for information had been handled. He considered that TMBC had not disclosed the specific, itemised breakdown that he asked for which he believed it held.
14. He also noted that TMBC exceeded the permitted 20 working days for responding to his request.
15. TMBC's position is that it does not hold the requested information. Its response therefore falls to be considered under section 1 of the FOIA.
16. The Commissioner has also considered TMBC's compliance with section 10 of the FOIA.

Reasons for decision

Section 1 – General right of access

17. Section 1(1) of the FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds that information and, if so, to have that information communicated to him.
18. In this case, TMBC said that it did not hold the information the complainant had requested. The complainant maintained that it must do.
19. In cases where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner – following the lead of a number of First-tier Tribunal decisions – applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely or unlikely that the public authority holds information relevant to the complainant's request.
20. The Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the public authority to check whether the information is held and any other reasons offered by the public authority to explain why the information is not held. He will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not

expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.

Complainant's position

21. The complainant is a local resident and he has concerns about the state of repair of the road in question. Having received the response to his previous request, he was at a loss to understand how in excess of £66,000 could have been spent on the road in 2020, as he was not aware of any significant works likely to cost that amount. He told the Commissioner:

"My concern is that if accounting for 2020 submitted was for £66,000 which they tried to imply was the spend initially, yet have now admitted there were 9 jobs on this road with a range of between £200 and £3200, a worst case scenario would put the spend at £28,800. This would mean either a spend for £66,000 or £28,800 was put through their accounts. If they put through £66,000 where did they difference between submitted and actual spend go?"

TMBC's position

22. TMBC maintained that due to the structure of its maintenance contract, it did not hold the requested information. It explained that TMBC contracts with Amey on a 'fixed fee' basis for all highway maintenance work. It said that TMBC publishes the monthly fixed fee value on its website¹.
23. TMBC said that it does not hold any cost information about each individual maintenance task delivered under this fixed fee arrangement, only the total cost of delivering all maintenance activity across the Borough against that fixed fee.
24. However, TMBC said that it does hold information about the number and type of maintenance jobs completed at particular locations. This information was not available at the time of the original response, as Amey was experiencing a complex IT security incident which restricted its access to some files. After access had been re-instated, more information was available, and information on nine jobs carried out on the road in question was provided to the complainant at the time of the internal review.

¹ <https://www.trafford.gov.uk/about-your-council/open-data/supplier-spend.aspx>

25. As to how the figure of around £66,000 had been calculated in the previous request, TMBC said that as costs information is not held on a 'per job' or 'per road' basis, an attempt had been made to provide an indicative cost estimate based upon the limited information of the works type and number available at the time.
26. TMBC accepted that the original valuation of around £66,000 was overstated, but said this was due to the aforementioned IT problems. Once these had been resolved, and more information was available, the complainant was provided with an updated cost estimate of between £200 - £3,200 per individual maintenance task. TMBC clarified that this later cost estimate still did not reflect the actual costs to it (due to the fixed fee nature of the contract) but it was a more accurate cost estimate. It likened the arrangement to the operation of a theme park:

"A single ticket is purchased to enter the theme park (comparable in this example to the fixed fee) and there is no cost for each ride experienced. You may go on more than twenty rides. [the complainant]'s request is similar to asking the price paid to go on a particular ride. The cost of the particular ride can be estimated; however, the actual price paid was the single entry ticket i.e. the fixed fee."

27. TMBC said:

"In hindsight, as the information was not available, it may have been more suitable to refer [the complainant] to the Fixed Fee, as this is the actual financial cost to the Council for the maintenance works. This fixed financial cost would be across the Borough and not for an individual road".

28. Although it was satisfied that it did not hold the requested information because of the nature of its fixed fee contract with Amey, TMBC said that it had nevertheless conducted a series of searches in business areas likely to hold highway maintenance information, and it had instructed Amey to do the same. It provided the Commissioner with details of the searches undertaken and the keywords used. The searches had not identified any information falling within scope of the request which had not been provided.
29. TMBC also said that there was no statutory requirement for it to hold the cost of each individual maintenance job nor was there any business purpose for which that information should be held.

Commissioner's decision

30. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with

absolute certainty that it holds no relevant information. However, as set out in paragraphs 19 and 20, above, the Commissioner is required to make a finding on the balance of probabilities.

31. The Commissioner would also wish to make it clear that when dealing with a complaint of this nature, it is not his role to make a ruling on how a public authority deploys its resources, on how it chooses to hold its information, or the strength of its business reasons for holding, or not holding, certain information. His remit concerns only the disclosure of recorded information, not what a public authority chooses to record for its own business purposes.
32. Having considered TMBC's response, and on the evidence provided to him, including TMBC's knowledge of its contractual arrangements, the Commissioner is satisfied that, on the balance of probabilities, TMBC does not hold information on the actual costs of each maintenance job that Amey carries out.
33. The complainant is focussed on the figure of £66,000 and appears to believe that if the actual costs are less than this, money is being misappropriated. However, TMBC has repeatedly explained that the figure of around £66,000 was not an accurate figure for work carried out on the road, and that even as an indicative estimate, it was overstated. At the internal review it provided what it considers to be a more realistic estimate and there is no evidence that it has declared anywhere in its accounts £66,000 or thereabouts as being actual costs.
34. TMBC is not under a statutory obligation to hold its information in the way the complainant has specified. The nature of a fixed fee contract means that there may be periods when the average price per job does not meet the fixed fee, and periods when it exceeds it. TMBC is not precluded from entering into such an arrangement with a contractor, and it has presumably determined that it offers best value for money in the long run.
35. The complainant's concerns about the state of the repair of the road in question may, or may not, be well founded, but that is not what this request is about. This request only seeks information on the costs of individual jobs, which is information the Commissioner is satisfied is not held by TMBC.
36. Since the Commissioner has decided that, on the balance of probabilities, TMBC does not hold the requested information, he is satisfied that it complied with the requirements of section 1(1) of the FOIA.

Section 1 – general right of access

Section 10 - time for compliance

37. Section 1(1) of the FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them.
38. Section 10(1) of the FOIA states that on receipt of a request for information a public authority should respond to the applicant within 20 working days.
39. The complainant submitted his request on 6 February 2021 and TMBC responded on 16 March 2021, 27 working days later. TMBC therefore breached sections 1(1) and 10(1) by failing to respond to the request within 20 working days.
40. TMBC explained that the delay was largely caused by the IT incident referenced above, which had delayed its ability to respond to some FOIA requests in a timely fashion.
41. The Commissioner uses intelligence gathered from individual cases to inform his insight and compliance function. This aligns with the goal in his draft "Openness by design"² strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting systemic non-compliance, consistent with the approaches set out in his "Regulatory Action Policy"³.

² <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

³ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

42. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

43. 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.
44. 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

Samantha Bracegirdle
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