Freedom of Information Act 2000 (FOIA)

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 1 March 2016

Public Authority: Greater London Authority
Address: City Hall
London
SE1 2AA

Decision (including any steps ordered)

1. The complainant has requested information relating to the compensation paid to companies affected by the Olympics Compulsory Purchase Order (CPO). Initially the request was considered under the FOIA, and the GLA refused to disclose some information under sections 12 and 43 of the FOIA.

2. During the Commissioner's investigation it was agreed that the request should have been considered under the EIR and the GLA informed the Commissioner that it now wished to rely on regulations 12(4)(a), 12(4)(b) and 12(5)(e) of the EIR.

3. In relation to the application of regulation 12(5)(e) of the EIR, the Commissioner has decided that this exception is not engaged. However, in relation to the application of regulation 12(4)(a) and 12(4)(b) of the EIR, the Commissioner's decision is that these exceptions have been correctly applied by the GLA.

4. The Commissioner requires the GLA to take the following steps to ensure compliance with the legislation:

    - The GLA should disclose the information previously withheld under regulation 12(5)(e) of the EIR to the complainant.

5. The GLA 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.

Request and response

6. On 22 December 2014, the complainant wrote to the GLA and requested information in the following terms:

"1. The details and terms of the compensation paid to the administrators of Celsius 1st under the CPO. What was the underlying basis for the calculation of the reward?

2. As above for H. Forman/Formans LPP/Lance Forman for the building and relocation to Forman's Fish Island.

3. As above for Wanis Limited.

4. A list of business that were extinguished under the CPO for the delivery of the infrastructure for the 2012 Olympics. For all settled claims, provide the details and terms of compensation agreed and the underlying basis of calculation."

7. The GLA responded on 18 February 2015. In relation to question one, the GLA released the requested information with some personal data redacted. With regards to question two, the GLA informed the complainant that it holds the requested information but considers that it is exempt from disclosure under section 43 of the FOIA. In respect of question three, it confirmed that it does not hold the requested information and in relation to question four the GLA advised that it is unlikely to be able to provide this information due to the nature of the question being too broad and hard to define.

8. The complainant requested an internal review on 19 April 2015. In relation to question one, the complainant stated that the GLA had not provided a detailed calculation. With regards to question two, he wished to dispute that the requested information was exempt from disclosure under section 43 of the FOIA. Regarding question three, the complainant disagreed that the GLA did not hold the requested information and in relation to question four the complainant provided further clarification to assist the GLA in providing the information falling within the scope of this element of his request.

9. As the complainant received no response, he contacted the Commissioner on 5 July 2015. The Commissioner contacted the GLA on 4 August 2015 and requested that the internal review is completed as a matter of urgency.

10. The GLA carried out an internal review and notified the complainant of its findings on 13 August 2015. In relation to question one, the GLA confirmed that it does not hold any further recorded information falling

within the scope of this element of the request. In respect of question two, it confirmed that it remained of the opinion that the requested information is exempt from disclosure under section 43 of the FOIA. In respect of question three, it confirmed again that it does not hold the requested information and this is because no settlement had been agreed and negotiations were still ongoing. With regards to question four, the GLA advised that it now considered the cost to comply with this element of the request would exceed the cost limit and so section 12 of the FOIA applied.

Scope of the case

11. The complainant first contacted the Commissioner on 5 July 2015 to complain about the way his request for information had been handled. At this time his complaint was that he had not received the GLA's internal review response. This was soon resolved and the complainant then raised concerns about the GLA's response to questions two, three and four and asked the Commissioner to investigate further.

12. The complainant informed the Commissioner during the early stages of the investigation that he was now satisfied with the information the GLA had supplied in relation to question one.

13. During the Commissioner's investigation it was agreed that the complainant's request should have been considered under the Environmental Information Regulations (EIR) rather than the FOIA. The request relates to the compensation paid to a number of companies affected by the CPO put in place to deliver the infrastructure for the 2012 Olympic Games. A CPO is a measure which will affect the elements of the environment and so the request falls within the definition of environmental information under regulations 2(1)(a) and (c) of the EIR.

14. In relation to question two of the request, the GLA confirmed that it now wished to rely on regulation 12(5)(e) of the EIR. For question three, it wished to rely on regulation 12(4)(a) and for question four, regulation 12(4)(b) of the EIR.

15. The Commissioner will now address each of the remaining questions in turn and the exceptions applied by the GLA.

Reasons for decision

Question two

16. Regulation 12(5)(e) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.

17. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of regulation 12(5)(e) of the EIR, the council must demonstrate that:

- the information is commercial or industrial in nature;
- the information is subject to confidentiality provided by law;
- the confidentiality provided is required to protect a legitimate economic interest; and
- that the confidentiality would be adversely affected by disclosure.

18. This exception is also subject to the public interest test. In addition to demonstrating that this exception is engaged, the council must also explain how it considered the public interest for and against disclosure and how it reached the view that the public interest in favour of disclosure is outweighed by the public interest in maintaining this exception.

19. In relation to the first bullet point, the GLA stated that the requested information relates to the London Development Agency (Lower Lea Valley, Olympic and Legacy) Compulsory Purchase Order 2005 (“CPO”), which authorised the London Development Agency to compulsorily acquire land including an industrial estate known as High Meads Temple Mills Lane Stratford London. The estate comprised of depots, warehouses, cold stores, offices, buildings, yards, car parks, road and access ways ("Coldstores").

20. The Coldstores was in the freehold ownership of the Secretary of State for Communities and Local Government. Celsius First Limited ("Celsius First") had the benefit of a lease in the Coldstores. Celsius First sub-let various parts of the Coldstores to a number of companies; the complainants, those referred to in the wording of the request itself and others.

21. The GLA confirmed that the compulsory acquisition of land and the payment of compensation to those businesses affected is a commercial transaction between the GLA and the businesses concerned and so the first element of this exception is met.

22. The Commissioner agrees that the requested information is commercial in nature. As the GLA has stated the information relates to the settlement agreed between Formans LLP and the GLA for the premises it occupied at the time of the CPO. The agreement to vacate the premises so the GLA can acquire the estate and the terms of the settlement agreed is a commercial transaction between the GLA and Formans LLP.

23. Turning now to bullet point two, the GLA advised that it considers the requested information is protected by a common law duty of confidence. It explained that the information itself is not trivial and not otherwise more widely known and has only ever been accessed by those members of staff that dealt with the claim. It believes the information contains sensitive financial information and was supplied at the time purely for the purposes of determining the settlement.

24. The Commissioner accepts that the information is not trivial in nature and not otherwise publically available. He also accepts that it was supplied in confidence for the sole purpose of determining the settlement for Formans LLP. Both the GLA and Formans LLP consider the requested information contains sensitive financial information and so it has the necessary quality of confidence.

25. Referring to bullet points three and four, the GLA argued that disclosure would adversely affect the legitimate economic interests of the GLA itself and Formans LLP.

26. Dealing with the GLA's own interests first, the GLA explained that it is still in negotiation with a number of companies affected by the CPO. It considers disclosure would adversely affect these ongoing negotiations and the GLA's ability to resolve the outstanding cases, achieve the best possible terms and value for money for the public.

27. It stated that disclosure of this information before the outstanding cases are resolved could lead to the outstanding claimants drawing comparisons from the requested information and their own case and trying to increase their settlement over and above what otherwise may have been sought. The GLA believes disclosure could lead to unnecessarily and unjustifiably inflated claims in a process where the GLA has to represent the best interests of London tax payers and balance them against those who have a legitimate claim to make.

28. The Commissioner accepts that the GLA is still in negotiation with a number of claimants over the effects of the London Olympics CPO. However, he considers any negotiations that are ongoing are on a case by case basis and are being considered individually based on the specifics of a particular claim and its own merits. Although each claimant has been affected by the CPO (as they have valid grounds on which to claim compensation) each case will be different and based on a unique set of circumstances relevant to that claimant and the business they had or still have.

29. The Commissioner considers that the details of one claim would not be as comparable to another or at least not to the extent the GLA has claimed. And in any event there is a due and unbiased process in place for the claims to be considered and for a fair and considered settlement to be agreed. Such processes should reveal any inflated and unjustified levels of claims and be able to address these.

30. The Commissioner also notes that a number of businesses affected by the CPO took their case to the Land Tribunal for adjudication. The decisions of the Land Tribunal are public record and go into some detail of the merits of each case, the compensation being claimed by the claimant and why and what level of compensation is justified based on the specific circumstances of each case. The Commissioner does not consider the requested information being considered here is noticeably different to the information revealed in these decisions. If outstanding claimants wished to make the comparisons alleged by the GLA, they could do this anyway from the cases the Land Tribunal has already considered.

31. The Commissioner also considers that if this sort of information could adversely affect the GLA's ability to settle the outstanding claims with the most favourable terms to the extent claimed, the Land Tribunal would not see fit to release it in its decisions for the public.

32. For the above reasons, the Commissioner is not satisfied that disclosure would adversely affect the commercial interests of the GLA.

33. Turning now to the commercial interests of Formans LLP, Formans LLP has expressed itself the concerns it has with the potential disclosure of this information. It stated that the information was supplied during negotiations to assist with the settlement that was ultimately agreed and was supplied in confidence. Formans LLP advised that it had understood that the information would remain confidential due to the sensitive financial information contained in it.

34. Formans LLP described the history of their company and the period in which it was subjected to the CPO and events leading up to it. It

believes this information could still be beneficial to its competitors if it were disclosed. Formans LLP advised that it is of the view that this information, together with other information already available to the public, could be used by its competitors to harm its market position.

35. The GLA confirmed that despite the high profile nature of this particular claim and the various publicity it received at the time and in more recent years (2011), the details of the settlement reached have not been made public. It argued that disclosure of this information could result in a loss of revenue and income for the company by damaging the reputation of the business in the eyes of its suppliers and customers.

36. The Commissioner has reviewed the withheld information and he remains unconvinced from the submissions he has received how disclosure would adversely affect the commercial interests of Formans LLP some eight or nine years after it was first supplied in conjunction with its claim for compensation. The financial information is dated and the business itself and market conditions have changed significantly since. The Commissioner fails to see how this information would be useful to competitors some eight or nine years on, could be used at this current time to damage Formans LLP's market position or damage its reputation.

37. As the GLA has stated this particular claim was very high profile at the time and received a lot of media interest. The GLA has supplied links to media coverage from 2011 (some five or so years after the claim was settled) in which Formans LLP are still publicising the effects of the CPO and overall how it has now benefited. The Commissioner does not consider these are the actions of a company which wishes to keep the matter quiet or as confidential as they suggest and if the Commissioner is to agree that the exception applies such actions carry significant weight in the public interest test in favour of disclosure.

38. The Commissioner considers the withheld information is very similar to the sort of information disclosed in the Land Tribunal decisions discussed above for other claimants affected by the same CPO. Although he accepts that Formans LLP did not wish to raise their claim with the Land Tribunal and therefore did not have the expectation that the details of the agreed settlement would be made public, considering the fact that the information here is of a similar nature to the sort of information contained in the decisions the Tribunal published, the Commissioner cannot see how disclosure of this information would have the effects described. It raises the obvious question that, if the information is so commercially sensitive and would adversely affect the legitimate economic interests of the business concerned, why does the Tribunal see fit to disclose it?

39. For the above reasons, the Commissioner remains unconvinced that disclosure would adversely affect the legitimate economic interests of Formans LLP some eight or nine years on and so he has concluded that regulation 12(5)(e) of the EIR is not engaged.

Question three

40. The complainant requested the details of compensation paid to Wanis Ltd. The GLA has always maintained in its responses to the complainant that the information is not held. Under the EIR regulation 12(4)(a) states that a public authority may refuse to disclose information to the extent that it does not hold the requested information when the applicant's request is received.

41. The GLA has confirmed that negotiations with Wanis Ltd were still ongoing at the time of the request and therefore no settlement had been reached and no compensation 'paid' to the company.

42. The Commissioner is satisfied that the GLA did not hold the requested information at the time of the request. The complainant specifically asked for the details of compensation 'paid' to Wanis Ltd. No compensation had been paid to the company at this time because no settlement had been reached. Negotiations were still ongoing at the time of the request and the Commissioner understands that the position remains the same as at the date of this notice. He is therefore satisfied that regulation 12(4)(a) of the EIR applies to this element of the request.

43. The exception is technically subject to the public interest test. But as no recorded information falling within the scope of this element of the request was held at the time of the request and this remained the case at the internal review stage, the Commissioner considers this would be a fruitless exercise.

Question four

44. This element of the request relates to the complainant's request to know of all businesses extinguished as a result of the CPO and to receive the details of all compensation or settlements agreed for these businesses. To this element of the request the GLA applied regulation 12(4)(b) of the EIR, as it considers it is manifestly unreasonable in terms of cost.

45. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose environmental information if the request is 'manifestly unreasonable'. There is no definition of manifestly unreasonable under the EIR, but the Commissioner's view is that 'manifestly' implies that a request should be obviously or clearly unreasonable.

46. This exception is also subject to the public interest test. So in addition to demonstrating that the request is manifestly unreasonable, the GLA must demonstrate that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exception.

47. A request can be manifestly unreasonable for two reasons; firstly, if it is vexatious and secondly where it would incur unreasonable costs for a public authority or an unreasonable diversion of resources to provide the information. This is not a charge to the requestor, but a consideration of the cost to the authority in searching for and providing the information.

48. In this case, the GLA argued that it would have to individually review approximately 430 case files in order to locate and extract the requested information. Initially, it stated that it estimated that it would take it between 15 and 30 minutes to review each case file, which equates to a total of 105 to 210 hours to comply fully with this element of the request. On further investigation, the GLA identified that each of the 430 case files contain a number of individual files that could contain anywhere between several hundred and several thousand pages. It therefore revised its estimate to an hour per case file and an overall total of 430 hours.

49. The EIR does not provide a definition of what constitutes an unreasonable cost. This is in contrast to section 12 of the FOIA. Under section 12 of the FOIA a public authority can refuse to comply with a request if it estimates that the costs of compliance would exceed the 'appropriate limit'. This limit is defined in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Regulations) as £600.00 for central government and £450.00 for all other public authorities, such as the school in this case.

50. The Act allows a public authority to consider the above amount by charging for the following activities at a flat rate of £25.00 per hour of staff time:

    - Determining whether the information is held;
    - 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.

51. Although the Act is not directly analogous to the EIR, in the Commissioner's view it can provide a useful starting point for public authorities wishing to argue that complying with a particular request

would cause a disproportionate diversion of its resources and is therefore subject to regulation 12(4)(b) of the EIR.

Is this element of the request manifestly unreasonable?

52. The GLA explained that from the outset it has tried to explain to the complainant the difficulties it would experience in attempting to provide an answer to this part of his request. Firstly, it argued that the complainant has not provided the GLA with a suitable definition or workable interpretation of the term "extinguished" that it could use to commence collating the necessary information to answer this question. For example, it explained that it would have difficulties establishing whether "extinguished" came about directly because of the CPO or in conjunction with other circumstances that the GLA may not even be aware of, and over what period of time following the CPO would it be reasonable to assume that the CPO was the cause or at least a contributing factor behind the company being "extinguished".

53. Secondly, the GLA said that it does not hold a central list, database or spreadsheet that includes the details necessary to provide an answer to this question or that could be easily interrogated to provide an answer. It does not and has not in the past categorised the claims in the manner required. As a result it would have to retrieve, individually review and extract the requested information from each case file or claim on the Olympic site. The GLA has estimated that it holds information on 430 cases or claims, each with their own case file. Each case file contains a number of individual files within it containing anywhere between several hundred to several thousand pages. Some claims, because of their size, fill three to four archive boxes approximately 30cm by 40 cm in size.

54. It explained further that the case files are unstructured and do not follow a consistent pattern as a result of the individual nature of each case or claim. The format and layout of the files therefore inevitably differs and each case file would have to be reviewed manually page by page to locate and extract the information that might be relevant to this part of the request. Each case file does not contain a sheet of paper or contents page that simply summarises or states whether or not the company has been "extinguished" and what the circumstances were that brought that about. An officer would have to review each case file and read through the various papers to understand the specifics of the claim in order to ascertain whether or not the company was in fact "extinguished" and to then determine whether or not that occurred directly as a result of the CPO or because of other factors whether related to the CPO or not. For example, it said that a company may have relocated following the CPO but then ceased trading shortly after, not necessarily directly because of the CPO, but arguably in connection with the CPO and other factors.

55. Initially, at the internal review stage it estimated that it would take 15 to 30 minutes per case and so between 105 and 210 hours to comply fully with this element of the request. It has now identified that this initial estimate was extremely conservative and in fact it is more realistic and accurate to say that it would take at least one hour per case file to review and extract the requested information, which in total would take the GLA 430 hours to comply in full. Either estimate is clearly manifestly unreasonable in terms of cost and the diversion of resources away from its statutory obligations.

56. To help evidence the size of the task involved, the GLA asked its Operational Transport Team to review a sample of the case files in question. Over a three hour period the manager of the team was able to fully review the case files for two claims. One case was significantly larger than the other and took almost two hours to review. The files contained internal and external correspondence, hearing papers and a large number of reports pertinent to the claim and circumstances of the company. The files for the largest case file sampled filled two archive boxes and the papers were not filed in a structured manner within these boxes. The GLA said that it was particularly notable from this particular case file that it was not immediately apparent from the case file alone whether or not the company was still trading, so it had to conduct additional research to review the company's more recent history to discover that it was, in fact, still trading albeit under a different name.

57. The second case file was considerably shorter and took less than one hour to review. In that case it was apparent from the case file and from the knowledge of the team that the company was also still in business without having to conduct any additional research.

58. The Commissioner is satisfied that this element of the complainant's request is manifestly unreasonable based on cost and so regulation 12(4)(b) of the EIR applies. He will now explain why.

59. The GLA has confirmed that it holds approximately 430 individual case files, each with a number of subfolders containing numerous documents and pieces of information relevant to the consideration of that claim. He accepts that the GLA does not and has not in the past categorised these claims in the manner required by the complainant and therefore does not hold the requested information in one central location from which the information can be easily and reasonably extracted in terms of time and cost. The GLA has conducted a small exercise to establish how burdensome compliance with this element of the request would be and it has noted that the case files are unstructured and are filed in a manner which would not make extraction a reasonable task. The sample reviewed identified that the case files differ greatly in size, dependent upon the circumstances of each claim and the amount of

correspondence and investigation that took place. It has reviewed a large claim and a smaller one to try and estimate as accurately as possible how long it would take to review each case file.

60. As the case files are unstructured and the requested information is not specifically recorded in a manner which would make extraction fairly simple, the Commissioner accepts that each case file, with its individual sub folders, would need to be retrieved and individually reviewed by a member of staff experienced in CPO claims. However, he considers this task only needs to be carried out once it has established which of the estimated 430 companies that have claimed are no longer trading and the task could then be limited to the case files for these companies.

61. The GLA has already highlighted that this task alone is not always straightforward. For the larger case file it reviewed, the GLA established that the company was still trading but under a different name and this took a little additional research. On the other hand, for the smaller case file, it knew relatively quickly, again, that the company was still trading from the file itself and staff knowledge. The Commissioner considers a conservative estimate to first identify whether the company is trading or not would be an average of five minutes per case. For 430 case files, this initial task would take almost 36 hours.

62. It is not possible to state now how many of the 430 companies that claimed are no longer trading, but if we estimate that 10% have now ceased trading this would then mean that the GLA would have to review 43 separate case files to establish *why* the company ceased trading. Even if we accepted the lowest estimate the GLA provided of 15 minutes (which is likely to be unrealistic due to the size of many of the case files and the very subjective nature of the request itself) per case file, it would take the GLA a further 11 hours to fully comply with this element of the request. Added to the initial 36 hours, this equates to a total of 47 hours, which is manifestly unreasonable in terms of time and cost albeit not to the extent claimed by the GLA.

63. This overall estimation is likely to be conservative. There will be cases where it will take longer than five minutes to establish whether a company is trading, there may be more than 10% that have ceased trading and then it may take longer than 15 minutes per case to establish why it is no longer trading and interpret whether this is directly the result of the CPO, connected to it or due to other factors in part or in full. So, the Commissioner considers overall the cost of compliance is likely to be higher than his own estimate and therefore comfortably within the realms of being manifestly unreasonable in terms of time and cost to the public purse.

Public interest test

64. The GLA stated that it accepted the request has serious purpose and value and there is an understandable public interest that could be served by collating this information for release. It advised that it does not consider the request to be frivolous or vexatious. Although it is an isolated request, in that it has not received any other requests for this information, it accepts that the requested information would inform and further public debate on matters relating to the Olympic CPO.

65. However, the GLA confirmed that the work required to retrieve, review and collate the requested information could only be carried out by a handful of individuals within the small Operational Property Team who have the specific knowledge and experience to review and extract the information. Taking a member of staff away from their normal duties and responsibilities for the length of time that would be required to comply with this element of the request in full would be extremely burdensome and disruptive to the public functions of this specific team. Compliance would be costly, extremely time consuming and would cause a significant amount of disruption to the day to day running of this team and the GLA does not consider this would be in the wider interests of the public.

66. The Commissioner accepts that there are public interest arguments in favour of disclosure. Disclosure would aid public debate and assist members of the public in understanding more clearly how CPO claims relating to the Olympics were handled and settled. It would also allow those concerned to see exactly how businesses have been affected by the CPO and what sorts of settlements have been made as a result. The Commissioner also accepts that there are clear public interest arguments in favour of disclosing information which relates to the utilisation of public funds. Public money has been used to develop the Olympic site and to compensate those businesses that were affected by the CPO. The public has a right to know what sorts of claims have been made, how these were managed and settled and the cost to the public purse.

67. However, in this case, he accepts that it would be particularly burdensome for the GLA to comply with this element of the request due to the very specific nature of the information requested, the number of claims that have been made and the way in which the information is held. It is not in the interests of the wider public to divert unreasonable amounts of time and resources to dealing with one particular request, as this will clearly have a negative impact on the GLA as a whole and the public functions it needs to carry out. The Commissioner has estimated that it would take at least 47 hours (and this is a conservative estimate) for the GLA to comply with this request. The GLA will more than likely

maintain that the cost of compliance is considerably more and this may indeed be the case. Either way, this equates to a significant diversion of already strained public resources away from statutory obligations and, despite the public interest arguments in favour of disclosure, the Commissioner considers the balance rests in maintaining the application of regulation 12(4)(b) of the EIR in this case.

Procedural matters

68. The Commissioner notes that the GLA took more than 20 working days to respond to this request and failed to inform the complainant in accordance with regulation 7 of the EIR that it required additional time to consider it. The Commissioner has therefore found the GLA in breach of regulation 5 of the EIR in this case.

69. It is also noted that the GLA took more than 40 working days to carry out an internal review. Again, a breach of regulation 11 of the EIR has been recorded in this case.

Right of appeal

70. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

    First-tier Tribunal (Information Rights)
    GRC & GRP Tribunals,
    PO Box 9300,
    LEICESTER,
    LE1 8DJ

    Tel: 0300 1234504
    Fax: 0870 739 5836
    Email: GRC@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

71. 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.

72. 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 Coward
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF