

Freedom of Information Act 2000 (FOIA) Environmental Information Regulation 2004 (EIR)

Decision notice

Date: 20 March 2017
Public Authority: Transport for London (TfL)
Address: Windsor House
42 – 50 Victoria Street
London
SW1H 0TL

Decision (including any steps ordered)

1. The complainant has requested information about a particular retail unit based in South Kensington Station which is occupied by his company together with information on the potential redevelopment of the station. TfL disclosed some information about the retail unit but withheld other information under the exceptions provided by regulation 12(4)(d) – information still in the course of completion, regulation 12(5)(b) – adverse effect to the course of justice, regulation 12(5)(e) – commercial confidentiality, regulation 13 – third party personal data. It refused to consider the request for information on the potential redevelopment of the station under regulation 12(4)(b) on the basis that, due to the volume of information involved, it was manifestly unreasonable. During the course of the Commissioner's investigation TfL extended its application of regulation 12(4)(b) to the entire request both on the grounds it was burdensome and that it now considered the request to be vexatious.
2. However the Commissioner advised TfL that not all the information was environmental. As a consequence TfL then applied the exemptions provided by section 12 – cost limit, section 14 – vexatious, section 40(2) – personal data, section 42 – legal professional privilege and section 43(2) – prejudice to commercial interests.
3. As well as challenging the application of these exemptions/exceptions the complainant believes there is missing information ie that TfL failed to identify all the information captured by the request.

4. The Commissioner's decision is that TfL is not entitled to rely on section 12 or 14 to refuse the request in its entirety in respect of the non-environmental information captured by the request. TfL is entitled to rely on section 40(2) to withhold the third party personal data. Although section 42 can be relied on to withhold some of the information to which it has been applied the Commissioner finds that some of the material is not capable of attracting legal professional privilege. Section 43(2) only applies to some of the information to which it has been applied. In respect of the environmental information the Commissioner finds that it can all be withheld under regulation 12(4)(b) and therefore has not gone on to consider the application of exceptions to specific pieces of information. However TfL has not fulfilled its obligations to provide advice and assistance under regulation 9.
5. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Having found that TfL is not entitled to refuse the request for non-environmental information under section 12 or 14, TfL is required to carry out searches for the information which the complainant believes to be missing and provide him with a fresh response in respect of that information.
 - Disclose the information which the Commissioner has found is not exempt under sections 42 and 43(2).
 - Provide advice and assistance in accordance with regulation 9 in respect of the environmental information captured by the request.
6. The public authority 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

7. The history of the request is complicated and at times confusing.
8. On 4 November 2015 the complainant's solicitors requested information of the following description:

"Re: [named unit], South Kensington Station

This is a request, pursuant to the Freedom of Information Act 2000, in respect of which we would be grateful for your urgent response.

Please provide us with copies of all correspondence (including correspondence sent electronically) between Transport for London and any third party relating to our client's lease of the above premises and in relation to [the complainant's company] and [the complainant],"

9. TfL acknowledged receipt of the request the following day ie, 5 November 2015. On 10 December 2015 TfL responded. It explained that the request had been interpreted as also applying to [an address in] Thurloe Street which it is understood the complainant also occupies. TfL said that in responding to the request TfL had not provided correspondence between itself and the complainant as he already had access to such information. TfL went onto provide the remaining information it had identified as being captured by the request.
10. On 21 December 2015 the complainant's solicitor wrote to TfL regarding this response and identified a number of concerns. It appears that this was an attempt to seek a review of TfL's handling of 4 November request. However the concerns raised did not necessarily relate to the information that would have been captured by that first request. In broad terms the concerns were TfL's failure to provide information regarding the potential redevelopment of the station, internal correspondence including that relating to specific events and the preparation and service of a legal notice, including legal advice obtained during that process.
11. TfL acknowledged receipt of this letter on 22 December 2015. On 12 February 2016 TfL wrote to the complainant explaining that the original request of 4 November 2015 was limited to correspondence with third parties in relation to the lease of the named property and therefore it did not capture the information referred to in the solicitor's letter of 21 December 2015. TfL therefore treated the letter of 21 December as a fresh request. The Commissioner accepts TfL was correct to take this approach and therefore this new request is set out in more detail below.
12. The solicitor's letter of 21 December 2015 included a reference to a meeting to discuss the assignment of the complainant's lease between the complainant, a third party and a representative of TfL. The Commissioner understands from the complainant that one of the obstacles to assigning the lease was the potential redevelopment of the station. TfL has subsequently advised the Commissioner that the meeting in question took place around June 2013. The request went on to seek the information described below:

"For avoidance of doubt we require all information relating to TfL's prospects at that time of undertaking the redevelopment of the station."

".... We also require disclosure of any documentation exchanged with English Heritage and the three local residents association, in particular relating to TfL's intention to develop the site."

The complainant also requested documentation,

"... generated internally by TfL staff concerning our client's occupation of the Premises and, in particular (but not limited to) (a) communications with Ms [named individual], Mr [named individual] and Mr [named individual]; (b) documentation relating to the instruction to Ms [named individual] to speak with Mr [named individual] and inspect [an address in] Thurloe Street with Dr [named individual]; (c) communications with the station manager relating to mice infestation; (d) communications relating to the agreement not to accept another tenant who would trade in direct competition with our client.

We also require disclosure of all documentation relating to the preparation and service of the Notice pursuant to Section 146 of the Law Property Act 1925 dated 16 May 2014 as well as the unauthorised inspections of the Premises (which include any advice given by TfL's legal team to other departments within the TfL relating to the lease)."

13. It can be seen that in broad terms the first parts of the request seeks information on plans to develop the station where as the other elements seek information on the complainant's occupation of the premises.
14. TfL's letter of 26 February 2016 included a response to this fresh request. TfL dealt with the entire request under the EIR and provided the complainant with a CD containing some of the information it held. The information which was provided had been retrieved from its Property Management Files. These relate to the complainant's occupation of the premises. However TfL withheld information from those files under the exceptions provided by;
 - Regulation 12(4)(d) – information still in the course of completion,
 - Regulation 12(5)(b) – adverse affect on the course of justice in respect of information which attracts legal professional privilege
 - Regulation 12(5)(e) – commercial confidentiality
 - Regulation 13 – third party personal data

15. Finally TfL refused to comply with the part of the request which sought, all information relating to TfL's prospects of undertaking the redevelopment of the station under;
 - Regulation 12(4)(b) – manifestly unreasonable
16. Following an exchange of correspondence with the Commissioner, the complainant's solicitor asked TfL to carry out an internal review of this response on 9 June 2016. In doing so the solicitor referred to correspondence that she had previously sent to the Commissioner. These letters, dated 13 April 2016 and 19 May 2016, were enclosed with the solicitor's letter to TfL asking it to carry out the review. The letter of 13 April 2016 lists, under ten numbered points, information which the complainant expected TfL to hold but which it had not provided.
17. On 9 August 2016 TfL wrote to the complainant's solicitor with its response to the request for an internal review. TfL advised her that under regulation 11(2) requests for an internal review have to be made within 40 working days of a public authority's initial refusal. In this case the second request had been responded to on 26 February 2016. Therefore the request for a review was outside the 40 working days and TfL refused to carry out a review. It did however explain why TfL considered the second request was manifestly unreasonable on grounds of the burden caused in so far as it sought information about the potential development of the station. TfL went on to provide some advice and assistance to the complainant's solicitor as to how the request could be refined so that some information could be provided without it creating too great a burden.
18. During the course of the Commissioner's investigation TfL changed its position and now argued that the request was manifestly unreasonable in its entirety. This was on the basis that not only did responding to the request place a burden on TfL, TfL now also considered the request was vexatious. To the extent that any of the information captured by the request was not environmental and therefore fell to be considered under the FOIA, TfL claimed that it was not obliged to comply with the request under sections 12 and 14. Section 12 provides that where dealing with a request would exceed a prescribed cost limit (known as the appropriate limit), it is not obliged to comply with that request. Section 14 provides that a public authority is not obliged to deal with a request which is vexatious. TfL informed the complainant of this development on or around 10 February 2017.
19. TfL has however maintained that should the Commissioner find that any of these exemptions relating to the request being manifestly unreasonable, exceeding the cost limit, or being vexatious do not apply, the other exceptions cited in its original refusal notice ie regulation 12(4)(d), 12(4)(b), 12(5)(e) and 13, apply to specific pieces of

information. It now also said that should the Commissioner find that any of this information was not environmental information it wished to rely on equivalent exemptions under the FOIA, namely section 43(2) – prejudice to commercial interests, section 42 – legal professional privilege and section 40(2) – third party personal data.

Scope of the case

20. The complainant originally contacted the Commissioner on 14 April 2016 to complain about the way his request for information had been handled. However it was only after TfL had been provided with the opportunity to carry out an internal review that the Commissioner accepted the complaint as being eligible for investigation.
21. When he initially contacted the Commissioner the complainant provided her with a non-exhaustive list of information which he expected TfL to hold and which had not been provided. During the course of the investigation he provided a more extensive list of the sort of information he believed TfL had failed to provide.
22. After some discussion the complainant accepted that the request of the 21 December 2015 was broader than the earlier request of 4 November 2015. The complainant therefore advised the Commissioner that he was happy for the Commissioner's investigation to proceed on the basis that the 21 December request amounted a new request.
23. The matter to be decided is whether any of the exemptions or exceptions cited provide grounds for refusing the request or withholding specific pieces of information. Due to the complicated nature of this case it may be helpful to provide some background to the request and outline the Commissioner's approach to considering those exemptions/exceptions.
24. The complainant has been a tenant of TfL for around thirty years during which a series of issues have arisen relating to his occupation of the premises. These included environmental issues, for example mice infestation and problems with the sewers, as well as non-environmental issues such as rent reviews. During his occupation the complainant has explored opportunities to assign his lease to third parties which he considers have been frustrated by TfL stating it had plans to redevelop the station. He has therefore also requested information to substantiate TfL's claims that it had a genuine intention to redevelop the site. As such the request captures both environmental and non-environmental information.
25. Furthermore given the complainant is the owner of the company which holds the lease on the property referred to in the request, it is also likely

to capture his own personal data. Requests for someone's own personal data should be considered under the subject access provisions of the Data Protection Act 1998 (DPA). Consideration of how TfL dealt with any subject access elements of the request is outside the scope of this notice. The Commissioner notes however that in dealing with the request TfL has taken a pragmatic approach and has provided a lot of information relating to the complainant and his business that might not have been provided to an applicant with no connection to the property. Nevertheless when considering TfL's approach to this request the Commissioner is obliged to consider any disclosure as being one to the world at large rather than a disclosure solely to the complainant himself. The application of the exemptions/exceptions will be considered on that basis.

26. TfL has applied a number of procedural exemptions and exceptions to the request in its entirety. These need to be considered first, if they were found to apply there would be no need to go on to look at the exemptions/exceptions which have been applied to specific pieces of information.
27. Due to the fact that the request captures both environmental and non-environmental information this notice has to consider the interaction between the two regimes.
28. The first of the procedural exemptions/exceptions which TfL has applied to the request in its entirety to be considered will be section 12. All written requests for information made to a public authority are technically freedom of information requests. Section 12 of the FOIA contains provisions which allow requests to be refused if the cost of compliance is too great. Where a particular element of a request captures both environmental and non-environmental information a public authority can take account of the cost of dealing with both types of information when estimating whether the appropriate limit would be exceeded. In this case the elements of the request relating to the complainant's occupation of his premises, ie that contained in the Property Management files, capture both types of information. However those elements seeking information on the redevelopment of the station relate purely to environmental information and there is no justification for including the cost of complying with this element of the request when applying section 12.
29. As stated at the start of the notice the Commissioner finds section 12 is not engaged. Therefore the Commissioner next considered TfL's application of section 14 to the non-environmental information contained in the Property Management files. Again as stated earlier, the Commissioner finds that the request is not vexatious. This means that the Commissioner will go on to consider the exemptions that have been applied to specific pieces of non-environmental information from those

files. Having done so the Commissioner will have considered the complainant's right of access to all the non-environmental information identified by TfL as being captured by the request.

30. The Commissioner will then return to the environmental information and consider TfL's application of regulation 12(4)(b) – manifestly unreasonable, to all of the environmental information captured by the request ie that contained in the Property Management files and that relating to the redevelopment of the station. A request can be manifestly unreasonable both on the basis that it is vexatious and on the basis that complying with it would be burdensome. As already revealed the Commissioner does not consider TfL has proven its case that the request is vexatious, therefore consideration of regulation 12(4)(b) will focus on whether complying with the request would be burdensome. It is important to note that when considering whether a request is burdensome under regulation 12(4)(b) account can be taken of a wider range of factors than when applying section 12 under the FOIA.
31. As ultimately the Commissioner does find the request in respect of environmental information is manifestly unreasonable due to burden, she has not found it necessary to go on to consider the application of the exceptions that have been applied to specific pieces of environmental information withheld from the property management file.
32. It should be remembered that the complainant has also claimed that TfL has failed to provide information which he believes TfL would hold and, if it was held, would be captured by his request. However TfL has applied sections 12, 14 and regulation 12(4)(b) to the request. If these provisions were engaged they would have the collective effect of removing TfL's obligation to undertake any searches for the requested information. Therefore the Commissioner was not in a position to ask TfL to conduct further searches for the information which the complainant believes is missing as part of her investigation. This is because to do so would undermine the purpose behind those provisions ie to prevent the public authority expending an unreasonable amount of time and money dealing with a request. TfL should therefore have a right to appeal the Commissioner's findings on section 12 and 14 before being expected to conduct further searches for non-environmental information.

Reasons for decision

Section 12 – the appropriate limit

33. Section 12 of FOIA states that a public authority is not obliged to comply with a request for information if it estimates that the cost of doing so would exceed the appropriate limit. The appropriate limit is a cost limit set out in regulations introduced under The Freedom of Information and

Data Protection (Appropriate Limit and Fees) Regulations 2004. These regulations are commonly known as the 'Fees Regulations'

34. Under the Fees Regulations the appropriate limit for public authorities such as TfL is £450. Very often the costs of dealing with a request relate to staff time. The Fees Regulations set the cost that can be charged for staff time at £25 per hour. This means that if it would take longer than 18 hours of staff time to comply with the request, TfL could refuse to comply with it.
35. The Fees Regulations also specify the activities which a public authority can take into account when estimating whether the appropriate limit would be exceeded. Under regulation 4(3) these activities are restricted to the time taken in determining whether the information is held, locating that information, retrieving that information or a document containing it and extracting the information from such a document. It is important to note however that a public authority cannot take account of the time involved in considering the application of any exemptions.
36. The application of the appropriate limit in this case is complicated by the fact that the request captures a wide range of information, some of which is environmental information and some of which is not. In line with the Commissioner's guidance 'Calculating costs where a request spans different access regimes', where it is not possible to easily separate out the environmental information from the non-environmental information sought by a particular element of the request, TfL is entitled to include in its estimate the cost of locating, retrieving and extracting all of the information that is captured by that element of the request. The reason why a public authority can include the costs of dealing with environmental information and the applicant's own personal data in its estimate is that technically any written request for recorded information made to a public authority is a valid freedom of information request (there are then provisions within the FOIA which provide exemptions for environmental information (section 29) and the personal data of the applicant (section 40(1))).
37. On 26 February 2015 in its initial response to the second request TfL provided the complainant with a CD containing 624 pages of information. This information had been extracted from Property Management files which are held manually. These files relate specifically to the complainant's premises and contain information on the management of his lease. TfL identified the information from these files as being relevant to that element of the request which sought the information "... generated internally by TfL staff concerning [the complainant's] occupation of the Premises...". Some information from those files was withheld under specific exceptions/exemptions. It is understood that in total around 750 pages of information were reviewed before TfL decided to release the information on the CD. TfL has advised

the Commissioner that the initial review of these files took place during four meetings, each scheduled for between 30 and 60 minutes and involving between 3 and 4 members of staff. These meetings accounted for a total of 10.5 man hours. TfL has said that the primary purpose of the review was to identify the information captured by the request. However some initial consideration was given to whether any of the information was sensitive; post-it notes were used to flag up information potentially covered by an exemption/exception. These documents were then considered in more detail later to determine whether there were in fact grounds for withholding any of the information.

38. The time taken to review the Property Management files would not on its own exceed the appropriate limit, particularly if the estimate of 10.5 hours is reduced to take account of the time taken to carry out the initial, brief, consideration of whether any of the information was likely to attract an exemption/exception.
39. More fundamentally however the Commissioner is not satisfied that there was any real need to review the information to determine whether it was captured by the request. TfL has argued that the request is wide ranging and includes any information relating the complainant's occupation of the premises he rents from TfL. The Property Management files relate to that specific property and therefore it follows that the information contained within these files would be captured by the request. When arguing that it was necessary to go through the files and decide what was in scope TfL was only able to direct the Commissioner to one particular page of the file. This contained the start of an e-mail chain which raised issues relating to the occupancy of a neighbouring retail unit. Subsequent emails in the chain reveal the issue also affected the complainant's property. It could be argued that the first email did not relate to the complainant's occupancy of his property and was therefore out of scope. However given it was placed in the Property Management file relating to the complainant's premises and that it does in some small way provide a fuller pictures of the issue raised, the Commissioner considers the more appropriate approach would be to apply an exemption to that information if needs be, rather than take the potential for such marginal information to exist it as a reason for to review the whole file to see what is in scope.
40. In the absence of other arguments as to why it was necessary to review the entire Property Management files the Commissioner finds that the only task permitted under the Fees Regulations in respect of this information was that involved in actually locating and retrieving the Property Management files themselves. The Commissioner considers this would be minimal.
41. As well as seeking information on his occupation of the premises the complainant has also asked for information on any plans TfL had to

develop the station. Such information will be environmental information as defined by regulation 2(1)(c) of the EIR. This is because it is information on a measure which is likely to affect a factor of the environment, namely the urban landscape of that part of London. Although TfL is permitted to take account of the cost involved in locating, retrieving and extracting both environmental and non-environmental information when responding to those elements of the request which relate to information contained in the Property Management files, TfL cannot take account of other elements of a request if they can easily be identified as only seeking environmental information. The Commissioner is satisfied that the first part of the request which seeks information on the redevelopment of the station can be isolated as a discrete element of the request which focusses on access to environmental information. This means that TfL is not entitled to take account of any costs involved in locating, retrieving or extracting the information captured by this part of the request when estimating whether the appropriate limit would be exceeded.

42. In conclusion the Commissioner finds that section 12 is not engaged.

Section 14 – vexatious

43. The Commissioner will now consider TfL's application of section 14. TfL considers the request in its entirety to be vexatious. However section 14 can only be used to prevent the disclosure of a request to the extent that it relates to non-environmental information.

44. Section 14 provides that a public authority is not obliged to comply with a request if that request is vexatious.

45. The term 'vexatious' is not defined in the FOIA, but the Commissioner has identified a number of 'indicators' which may be useful in identifying vexatious requests. These are set out in his published guidance on vexatious requests. In short they include:

- Abusive or aggressive language
- Burden on the authority
- Personal grudges
- Unreasonable persistence
- Unfounded accusations
- Intransigence
- Frequent or overlapping requests
- Deliberate intention to cause annoyance

46. The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of a

case will need to be considered in reaching a judgement as to whether a request is vexatious.

47. The Commissioner's guidance suggests that, if a request is not patently vexatious, the key question the public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. In doing so the Commissioner considers that a public authority should weigh the impact of the request will have on it and balance this against the purpose and value of the request.
48. Where relevant, public authorities may also need to take into account wider factors such as the background and history of the request.
49. TfL has argued that the request displays a number of the characteristics listed in paragraph 45 which suggest it is vexatious. TfL has explained that there has been a long running dispute between itself and the complainant's company. The complainant has made a series of, what TfL describe, as unfounded allegations against it. These include conspiracy to defraud tenants and accusations of acts of vengeance and victimisation. Allegations of wrong doing and cover-ups are extended to the then Prime Minister, David Cameron, and his predecessors in letters sent to his private office and presumably copied to TfL. TfL has taken account of this wider context and concluded it is likely that no matter what information is provided it is likely that another request will follow.
50. It is clear from the information seen by the Commissioner that the complainant has been in dispute with TfL for some years. She has also had regard for the tone of the correspondence sent by the complainant to David Cameron and to senior figures within TfL which contain allegations of the nature described above. Whilst these may indicate the sort of breakdown in the relationship between the complainant and the public authority which may give rise to vexatious behaviour, the Commissioner is not satisfied that it necessarily follows that this particular request is vexatious. TfL has not provided any evidence of earlier requests which would suggest there is a pattern of continual request making which would support TfL's conclusion that no matter what information is provided it is likely that another request will follow.
51. It could equally be argued that the request, made on the complainant's behalf by his solicitor, was a serious attempt to obtain information that would reveal whether the complainant's previous allegations were well founded.
52. In respect of the complainant's request making behaviour TfL has also argued that the complainant has claimed TfL failed to answer requests for information that do not appear to have been requested in earlier

correspondence. To support this contention TfL has pointed to the request itself, ie that of 21 December 2015. As explained earlier, the complainant originally made a request on the 4 November 2015 which was limited to external correspondence. It is clear, and now accepted by the complainant, that the scope of the request made on the 21 December 2015 was broader than that of the 4 November and was in effect a fresh request. Having spoken to the complainant's solicitor the Commissioner is satisfied that this was a genuine mistake and not indicative of a vexatious pattern of request making.

53. TfL has also pointed to the complainant's letter to the Commissioner dated 13 April 2016. This letter (referred to in paragraph 16) set out the complainant's concerns regarding how TfL had handled his requests and identified a number of pieces of information which the complainant believed would have been held by TfL and therefore should have been provided in response to the requests. This letter of 9 June 2016 was later enclosed with the complainant's letter to TfL requesting an internal review. At the time that letter was written and also when it was forwarded to TfL as part of the request for a review, the complainant had not yet accepted the limited scope of the initial, 4 November, request. Therefore it did refer to information not being provided in response to the 4 November request which clearly fell outside the limited scope of that request. TfL is correct in that point.
54. However given the Commissioner is satisfied that at the time this letter was written, and later provided to TfL, the complainant was under the mistaken impression that he had made a valid request which essentially captured all information about the occupation of his premises and the redevelopment of the site, the intention of the letter was to identify specific examples of the sort of information which he believed was missing from TfL's responses to his requests. Given the complainant's mistaken belief that the scope of his initial request, and the actual scope of the 21 December request, this would be a reasonable means of challenging the responses he had received. It is however unfortunate that the complainant failed to recognise the limited scope of the initial request and the difference between that and his request of 21 December.
55. The Commissioner accepts that this failure led to confusion and frustration on the side of both parties, but she does not consider either of the letters referred to by TfL are indicative of the request being vexatious.
56. Finally TfL has argued that there is little wider public value to the request as it relates to a purely private business matter between the complainant and TfL. Whilst it may be that the complainant's primary focus is to gather information in respect a business matter personal to

him, the Commissioner considers there is a value in the principle that an individual can use the legislation to obtain information which would reveal the veracity of statements made by a public authority and the justification of any actions it has taken.

57. The Commissioner accepts that the tone of some of the correspondence sent by the complainant to TfL is not very constructive. There also is some evidence within the information from the Property Management file which indicates the complainant's persistence in his pursuit of complaints against TfL. However the Commissioner is not satisfied that this necessarily renders the information request of 21 December 2015 vexatious. Section 14 is not engaged.
58. So far the Commissioner has considered TfL's application of the exemptions provided by section 12 and section 14. If the Commissioner had found that either of these exemptions applied, TfL could have refused to provide any of the non-environmental information captured by the request. However as the Commissioner has found that neither of these exemptions are engaged it is necessary to consider whether any of the non-environmental information which TfL has already located, but then withheld, is in fact exempt under the exemptions cited. Those exemptions are section 40(2) – third party personal data, section 42 – information subject to legal professional privilege and section 43(2) – prejudice to commercial interests.
59. Before tackling those exemptions the Commissioner wishes to comment on the non-environmental information which the complainant considers TfL should hold, but which has not so far been provided. As the Commissioner has found that TfL is not entitled to refuse the request for non-environmental information under either of the exemptions that it has attempted to apply to the these elements of request as a whole, ie sections 12 and 14, TfL is still obliged to carry out appropriate searches for the 'missing' information and provide the complainant with a fresh response in respect of that information. The 'missing' information will be identified in an annex to this notice which will be provided to both TfL and the complainant, but which will not form part of the public notice. The Commissioner was unable to insist these searches were conducted during the investigation as TfL has a right to consider its rights to appeal the Commissioner's decisions on section 12 and 14 first.
60. The Commissioner will now consider the information which TfL has already located but has withheld under section 40(2), 42 and 43(2).

Section 40(2) – third party personal data

61. So far as is relevant, section 40(2) of FOIA provides that information is exempt if it constitutes the personal data of someone other than the

applicant and its disclosure to the public would breach any of the data protection principles contained in the Data Protection Act 1998 (DPA).

62. In this case TfL has applied section 40(2) to the names and contact details of various individuals on the basis that disclosing this information would breach the first data protection principle which states that the processing of personal data shall be fair and lawful. The processing also has to satisfy at least one of the conditions in schedule 2 of the DPA. The term 'processing' includes disclosing the information.
63. The first issue to consider is whether the information constitutes personal data. Personal data is defined by the DPA as being information which both identifies and relates to a living individual. Clearly the names and contact details of someone constitutes personal data.
64. The second issue is whether the disclosure of that personal data would breach the first principle. The Commissioner's approach when considering the first principle is to start by looking at whether the disclosure would be fair. Only if the Commissioner finds that it would be fair will she go on to look at lawfulness, or whether a Schedule 2 condition can be satisfied.
65. 'Fairness' is a difficult concept to define. It involves consideration of:
 - The possible consequences of disclosure to the individual.
 - The reasonable expectations of the individual regarding how their personal data will be used.
 - The legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the particular individual.

Often these factors are interrelated.

66. The majority of the personal data relates to various individuals who were either employees of TfL or professionals, such as solicitors or surveyors, who were instructed to act on behalf of TfL. The Commissioner considers that there is a realistic possibility that if the contact details of those involved, or who had been involved in the management of properties on behalf of TfL, were disclosed to the world at large they could receive unsolicited contact, including phone calls and emails, that would be disruptive to their professional lives. Given that the information already disclosed reveals the organisations which these people work for and that the exclusion of these details does not affect the ease with which these documents can be understood, the Commissioner finds there is little or no legitimate interest in disclosing this personal data.

67. In this context the individuals concerned would not expect their personal data to be disclosed.
68. There are other examples of where the personal data of tenants or a guarantor of a prospective tenant of TfL has been withheld. In one case the personal data of another tenant is contained in the start of an e-mail chain which raised issues relating to the occupancy of a neighbouring property. Subsequent emails in the chain reveal the issue also affected the complainant's property. The Commissioner accepts that it would be unfair to disclose to the world at large information critical of the neighbouring tenant and that the individual concerned would certainly have no expectation that such information would be disclosed. In the case of the guarantor of a prospective tenant, financial information has been withheld. Not only is such information highly personal, its disclosure would put the individual at risk of fraud.
69. The Commissioner is satisfied that section 40(2) is engaged in respect of the personal data contained in the non-environmental information.

Section 42 – legal professional privilege

70. Section 42 of FOIA states that information to which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.
71. In broad terms legal professional privilege protects the confidentiality of communications between a client and their legal adviser. This allows the client to set out the issues on which they need advice as fully as possible and the legal adviser to provide full and frank advice which may, on occasions, include the weaknesses of their client's position.
72. The Commissioner is satisfied that the information concerned does consist of communications between TfL staff and their legal advisers. These legal advisers are either in house solicitors or external solicitors working for well known, national, legal firms.
73. There are two types of legal professional privilege. Litigation privilege will apply where litigation is in prospect or contemplated. Legal advice privilege will apply where no litigation is in prospect or contemplated. TfL has not referred to any specific type of privilege when making its submission to the Commissioner. However having viewed the information she is satisfied that there is a mixture of both. For example some legal advice was obtained in relation to the negotiation of rent reviews or new leases which could only attract advice privilege whereas other advice was also obtained as TfL prepared for specific court action. There are also a number of attachments or enclosures to the communications. These will be addressed later.

74. For the information to be capable of attracting legal professional privilege the information must form a communication which has been made for the dominant purpose of seeking or providing legal advice. The term 'dominant' is taken to mean the 'main' purpose for which the information was created as opposed to the sole purpose. Having looked at the information the Commissioner is satisfied that the main purpose for its creation was to either to seek legal advice directly, or to provide legal advice.
75. The Commissioner understands that the communications in question have remained confidential.
76. In light of the above the Commissioner is satisfied that the actual communications between TfL and its legal advisers, whether internal or external, are capable of attracting legal professional privilege. This information is exempt under section 42.
77. However as mentioned in paragraph 73 some of the information which has been withheld under section 42 consists of enclosures to these communications. The enclosures consist of three documents all of which are legal or court documents. These in themselves do not either seek or provide legal advice, nor are they necessarily confidential. These three documents do not attract legal professional privilege, do not engage section 42 and should therefore be disclosed. These will be identified in a confidential annex supplied exclusively to TfL.

Public interest

78. Section 42 is subject to the public interest test as set out in section 2 of the FOIA. This means that in respect of the information which the Commissioner has found engages section 42 it is necessary to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.
79. There is a weighty public interest in preserving the principle that a client can consult with their legal adviser in a full and frank manner. This is necessary so that they can lay out all the issues relevant to the legal matter they require advice on and so that the lawyer can respond in full to those enquiries. This may include explaining any weaknesses in their client's position. Without being able to have such frank exchanges it would not be possible for clients to obtain the best legal advice possible and so defend their legal rights. That is why legal professional privilege is considered to be a cornerstone of the English legal system.
80. Although some of the information being withheld under section 42 was around ten years old at the time of the request, other information was far more recent. Recent communications between a client and their legal

adviser are clearly more sensitive than older ones and would have a greater impact on the openness of such communications. This increases the public interest in favour of withholding this information. In terms of the older information, given the history of disputes between the complainant and TfL, the Commissioner is satisfied that the disclosure of this information would also have a negative impact on the candour of the legal advice.

81. There is clearly some public interest in disclosing information which helps explain the actions of a public authority such TfL. This factor would be weightier if there was evidence that TfL had recklessly failed to follow the advice it received. However in this case there is no such evidence. Nor is there any suggestion that TfL has attempted to misrepresent the advice it received.
82. In a previous case, *Mersey Tunnel Users' Association v Information Commissioner and Merseytravel* (EA/2007/0052) 15 February 2008, the Tribunal found that the public interest in disclosure was increased because the legal advice affected a great many members of the public and concerned how a very large sum of public money should be spent. Both these factors are absent in this case.
83. In light of the above the Commissioner is satisfied that the public interest in favour of preserving the confidentiality of the advice and maintaining section 42 outweighs the public interest in disclosure. TfL are entitled to rely on section 42.

Section 43(2) – commercial interests

84. Section 43(2) provides that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
85. This exemption has been applied to a variety of information from the Property Management files. The majority of the information relates to either the calculation of rents during rent reviews or lease renewals produced during negotiations with the complainant. It is generally the actual figures of proposed rents and the comparable rents used in calculating that figure that has been withheld. Annotations made by TfL to letters received from the complainant's solicitor have also been redacted. One document setting out a recommended approach to a particular problem has also been withheld under section 43(2) as has a draft of a letter from TfL to the complainant, together with comments on that draft. Finally TfL has withheld information on the fees charged by ones of its consultants.
86. The Commissioner is satisfied that all the withheld information relates to commercial interests, primarily its own, but in one situation those of its consultants. The main issue to determine is whether disclosing the

withheld information would, or would be likely to prejudice either of those interests. The term 'would prejudice' is taken to mean that it is more probable than not that the prejudice would occur. The lower threshold of 'would be likely to prejudice' still means that there has to be a real and significant risk of the prejudice occurring, but that risk is less than 50%. TfL has not specified what level of likelihood it is relying on. In these circumstances the Commissioner's approach is to assume the public authority is relying on the lower threshold of 'would be likely'.

87. The Commissioner will first look at the information on rental values. The Commissioner notes that TfL has referred to some of the information as representing its negotiating position. However it would appear that it is only the actual value of the proposed rents, percentages and comparables that have been withheld. In most cases it appears the rest of the document containing these figures has been released. Therefore any discussion of the approach, or strategy, to be adopted in negotiations has already been revealed. The Commissioner has therefore focussed on how current the actual figures and values that have been withheld were at the time of the request could prejudice commercial interests. Some of the withheld information dates back to calculations produced for a 2009 rent review. Such information related to rental values that would have been five or six years old at the time the request was received. The Commissioner is not satisfied that given its age the information was still commercially sensitive at the time the request was made and therefore finds that the exemption is not engaged.
88. However some of the other information relates to commercial rents dating from 2014 or 2015. The Commissioner finds these could still be considered current values at the time the request was received in December 2015. Therefore it is possible that this information if released could undermine TfL's negotiating with tenants of comparable properties to those referred to in the request, including, of course, any ongoing negotiations with the complainant's company. The exemption is engaged in respect of this information.
89. Moving on to annotations made to letters received by TfL from solicitors acting on behalf of the complainant's company. Again the information in question is old, some it relates to correspondence from 2003. Furthermore the handwritten annotations are barely legible. The Commissioner is not satisfied this information attracts the exemption.
90. A document setting out a recommended approach to a particular problem has also been withheld under section 43(2). This document was very current at the time of the request and relates to an issue that was very probably on going at that time. The Commissioner has viewed the information in question and is satisfied that this being so it would have seriously undermined TfL's negotiating ability if the information was

disclosed at that time. The Commissioner finds this information engages the information.

91. In respect of the draft letter from TfL to the complainant and the comments on that draft, the Commissioner has carefully considered whether this information constitutes environmental information or not. Having done so she finds that although it discusses a number of issues the main focus appears to be on actions taken by TfL to remedy environmental issues such as problems with the dumping of rubbish and the potential redevelopment of the station. As such the Commissioner finds that both the draft letter and comments regarding that draft contained in an email exchange constitute environmental information and will therefore not be considered any further under section 43(2).
92. Finally TfL has redacted the fees charged by one of its consultants. These relate to work undertaken around 2009 to 2010. Again the Commissioner is not satisfied that information of this age can still be considered commercially sensitive. If TfL had provided evidence that the consultants themselves still considered that disclosing this information would undermine their position when tendering for other contracts the Commissioner may have given TfL's arguments greater weight. However in the absence of such evidence the Commissioner is not prepared to accept this information is still commercially sensitive.
93. The Commissioner has therefore found that recent rental values and comparables from 2014 and 2015 are exempt as is the document setting out a recommended approach to a particular problem. The Commissioner will use the confidential annex to identify this information. However section 43(2) is subject to the public interest test and it is only if the public interest test favours maintaining the exemption that TfL will be able to withhold this information.

Public interest test

94. The public interest test provides that even where an exemption is engaged, the information can only be withheld if the public interest in maintaining that exemption outweighs the public interest in disclosure.
95. There is a general public interest in disclosing information held by public authorities to further transparency and accountability. It is possible to argue that there is a wider public interest in understanding how TfL manages its commercial property and whether it obtains appropriate rents which in turn will have an impact on the public purse.
96. However if disclosing the requested information would hinder TfL's ability to negotiate a good rent or resolve difficult landlord and tenant issues, this would work against the public interest with potential implications for the public purse.

97. Although the complainant has raised concerns over the conduct of TfL as landlord, the Commissioner is not aware of any wider concerns. In any event the information on rental values and comparables would add very little to the public's understanding of such issues. In respect of the documents setting out a recommended course of action, this would assist the public's understanding of how TfL behaves as landlord. However having no independent evidence of concerns over how TfL performs that function and having read the document itself and found it contains nothing to raise any concerns, the Commissioner finds that the public interest favours protecting TfL's commercial position. The Commissioner finds the public interest favours withholding this document together with the more current information on rental values. TfL is entitled to rely on the exemption.
98. Having now considered all the non-environmental information which TfL has located within its Property Management files, the Commissioner will now look at all the environmental information captured by the request, This includes not just the environmental information from the Property Management files but also the information it has identified as relating to the redevelopment of the station. TfL has applied the exception provided by regulation 12(4)(b) to all the environmental information captured by the request.

Regulation 12(4)(b) – manifestly unreasonable

99. Regulation 12(5)(b) states that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.
100. Although TfL initially applied this exception to the request in its entirety it can only apply to environmental information. This includes both the environmental information contained in the Property Management files and that on the redevelopment of the station.
101. A request can be manifestly unreasonable on the basis that it is either vexatious or that the cost of compliance would be too great. Any consideration of whether the request for the environmental information was vexatious would include the same factors as previously taken into account when looking at section 14 in respect of the non-environmental information. It follows the conclusion would be the same. The Commissioner is not satisfied that the request is manifestly unreasonable on the basis that it is vexatious. She has therefore gone on to consider whether the cost of compliance would be too great.
102. Unlike the FOIA the EIR do not set out a specific cost threshold above which a public authority can deem the cost of compliance is too great. The other main difference between the two regimes is that a public

authority is not limited to what activities it can take in to account when considering the cost. Therefore not only can it take account of the cost of locating, retrieving and extracting the information, a public authority can also take account of the cost of applying any exceptions.

103. Some years before the request was received TfL had cause to collate some of the information it held, including that on its plans to redevelop the station. At the time the request was received an external firm of solicitors still held schedules listing this collection of documents. However these documents only covered the period going up to 2011.
104. The request specifically asked for information that was held about the redevelopment of the station at the time of a meeting to discuss assigning the complainant's lease which took place in June 2013. Therefore there is a further two years' worth of documentation to consider. In order to identify what additional information might be held for this period TfL searched the Commercial Development hard drive of its Property section. This revealed that there would be at least another 135 documents to consider. TfL conducted an initial sift of these 135 documents and advised the Commissioner that it had taken 2.5 hours to discount the information which was very obviously outside the scope of the request. This still left 880 pages of information which was potentially within scope
105. The Commissioner considers that TfL is entitled to take account of the 2.5 hours already spent on a rudimentary search of these 135 files. Some of the information contained in the Property Management files is environmental information and therefore an element of the 10.5 hours already spent reviewing those files and preparing the non-exempt material for disclosure should also be taken into account. The Commissioner considers it likely that TfL could justify a claim of at least 5 of the 10.5 hours relates to the environmental information. Therefore the time already spent dealing with those elements of the request which relate to environmental information is around 7.5 hours, less than half that at which a request could be refused under the FOIA and the appropriate limit. However the work already completed is only a fragment of that required to fully comply with the request.
106. Additional time would be required to review the remaining 880 pages from the 135 files covering 2011 to 2013 (referred to in paragraph 104) to check whether they did contain information captured by the request and then to consider the application of exemptions. Following a cursory look at the information TfL stated that it anticipates some of the relevant information would be exempt under the exceptions 12(5)(b) - adverse effect on the course of justice (for information protected by legal professional privilege, 12(5)(e) – commercial confidentiality and 13 - third party personal data. There is also the possibility that information which for example may be help to anyone planning a terrorist attack

such as that relating to non-public areas, would have to be withheld under 12(5)(a) – adverse effect to national security or public safety.

107. In addition TfL would still need to search the collection of documents referred to in the schedule provided by the external solicitors. These numbered 750 documents. From the schedule, which TfL provided to the Commissioner, it is clear that the documents are in various electronic formats and of various sizes, the largest identified by the Commissioner was over 111,000 kilobytes (KB), the smallest only 8 KB. They include email correspondence, letters consultation documents, minutes of meetings, architects' briefs and many other items.
108. It is not clear what the total number of pages contained in these 760 documents would be, but based on the schedule together with accompanying screenshots of the actual contents of each drive, she is satisfied that there is a very significant amount of information that would have to be searched.
109. The Commissioner considers that some of the files in the collection are more obviously relevant to the request than others. For example there are 260 documents identified as being held on the 'Property Development hard drive'. Other documents from this collection were held on other drives, for example the 'Stakeholder Communications. Although some of the information from such drives is potentially relevant to the request, it is likely that many of them will not be relevant. However, because the request is so broad, seeking all information relating to TfL's prospects of undertaking redevelopment, such files would have to be searched if TfL was to identify every scrap of information caught by the request. Then it would still be necessary to consider the application of exceptions to any relevant information.
110. Once account is taken of the tasks that would still have to be undertaken the Commissioner is satisfied that the request is manifestly unreasonable due to the burden it would impose on TfL.
111. Before reaching this conclusion the Commissioner has considered whether TfL adopted the most efficient approach to conducting its searches for the information. TfL has explained to the complainant in its letter of 9 August 2016, which formed its response to the complainant's request for an internal review, that the information sought relating to the redevelopment of the station would be held in multiple teams and locations across TfL. Although TfL accepts that it might be possible to access some information without it imposing an unreasonable burden this would require the complainant to narrow the focus of his request down to specific areas of development. For example the complainant has indicated that he is particularly interested in the introduction of a passenger lift in 2007. However without the request being refined in some way the Commissioner accepts that any searches of electronic files

using search terms required to return all the information on the potential development of the station extending back thirty years, ie the time over which the complainant has occupied his premises, would inevitably produce a significant volume of information which would then have to be reviewed. The Commissioner is satisfied that so long as the scope of request remains as broad as it currently is, complying with it would impose an unreasonable burden.

112. The Commissioner has also considered whether there has been any confusion over the interpretation of the request. The request seeks:

"... all information relating to TfL's prospects at that time of undertaking the redevelopment of the station."

The time in question is the June 2013 when there was a meeting to discuss the assignment of the complainant's lease. TfL has obviously interpreted this as capturing all information on the development plans up to the date of that meeting. A more natural interpretation of the request would be that it captured only that information which related to any development plans that were current and live at that time. This would have given the request a far narrower scope.

113. However during the investigation the complainant furnished the Commissioner with examples of the sort of information that he believes TfL should hold. From these examples it is quite clear that he was seeking information on the potential redevelopment of the station spanning a far longer period of his occupation.

Public interest test

114. Regulation 12(4)(b) is subject to a public interest test. This means that although the exception is engaged TfL can only continue to rely on it if in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

115. TfL has argued very strongly that the request has very limited wider public interest; that the complainant is primarily concerned with pursuing his own grievances against TfL. The Commissioner is not satisfied that this tells the whole story. Firstly there is a public interest in disclosing information that would reveal how a public authority manages its property and its tenants and whether it is a responsible landlord. However to give any significant weight to such a factor there would need to be credible concerns, from an independent source, that the public authority in question was not behaving responsibly or fairly. Whilst the complainant has made a number of allegations against TfL the Commissioner is not aware of any wider spread concern.

116. Secondly there is valid public interest in the public understanding what development plans TfL have for Kensington Station. This may be by those who seek to preserve the architectural merit of the property; the Commissioner understands that part of the station is a listed building, or from those more interested in how well it fulfils its function as a station and the amenities it provides. However as TfL correctly points out this public interest relates primarily to any proposals which TfL are currently considering, rather than plans going back many years and which have been abandoned. TfL has advised the Commissioner that it has already published comprehensive information regarding its plans to redevelop or improve the station created since September 2015 on its website.
117. Against the limited public interest in disclosing the information has to be weighed the value in ensuring that TfL can carry out its many functions without having to dedicate an unreasonable amount of resources in terms of staff time responding to this request. The Commissioner is satisfied that the public interest favours maintaining the exception and that TfL is entitled to rely on regulation 12(4)(b) to refuse the request in respect of all the environmental information it captures.

Regulation 9 - advice and assistance

118. Where a public authority refuses a request on the basis that it is manifestly unreasonable due to the volume of information that it would have to locate and review, the Commissioner considers it appropriate for that public authority to provide advice and assistance in accordance with its obligations under regulation 9.
119. Regulation 9(1) provides that a public authority shall provide advice and assistance, so far as it is reasonable to expect the public authority to do so, to applicants and prospective applicants.
120. Where a request has been refused under regulation 12(4)(b) this will usually involve setting out the costs involved in answering the request and explaining how the request might be refined to make it more manageable and therefore, not manifestly unreasonable. The aim of advice and assistance should be to help the requester to submit a new, more manageable, request.
121. TfL failed to provide any advice and assistance when it initially applied regulation 12(4)(b) on 26 February 2016. However when responding to the complainant's request for an internal review on 9 August 2016 it did attempt to remedy this error. It advised the complainant of the search terms that could be used to identify particular emails, ie email address of sender and/or recipient, date range and keyword. It also advised him that emails were only held electronically for 7 years, but that some older emails may be retained on manual files, the implication being that the older emails would take longer to search for. TfL also explained that the

information on redevelopment plans would be held in multiple teams and locations across the organisation. Therefore it suggested that information would be more likely to be accessible without the request becoming burdensome if the complainant focussed on specific areas of development.

122. This goes some way to satisfying TfL's obligations. However the Commissioner considers TfL could easily provide additional advice and assistance which would direct the complainant to those parts of TfL which are likely to hold the most relevant information. For example, based on TfL's submissions, it appears that Commercial Development hard drive of TfL's Property section could contain information of interest to the complainant and that this could potentially be searched using key words and date ranges. TfL should therefore use its understanding of its own working practices and of which teams would take the lead in redevelopment plans to assist the complainant in making a fresh refined request.
123. During the course of the investigation the Commissioner briefly discussed with TfL whether there were any reporting procedures in place that would result in reports being prepared summarising the development plans that existed at any given point in time. This point was not pursued further, but nevertheless, there may be scope for TfL to use its knowledge of how projects are progressed and managed to identify documents that might summarise the development plans that were current at a particular time.
124. The Commissioner requires TfL to consider what additional advice and assistance it is able to provide the complainant with and to then provide that advice and assistance to him.
125. When refining his request the complainant should bear in mind that TfL's application of regulation 12(4)(b) effectively removed its obligation to provide any of the environmental captured by the request, ie both that contained in the Property Management files and that relating to the redevelopment of the station. Therefore the complainant will need to prioritise which information he wishes to gain access to.

Right of appeal

126. 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

127. 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.

128. 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

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