

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

Date: 12 October 2017

Public Authority: London Borough of Lambeth
Address: Olive Morris House
Brixton Hill
London
SW2 1RD

Decision (including any steps ordered)

1. The complainant has requested minutes of meetings and other information about the Estate Regeneration Board in Lambeth. The London Borough of Lambeth ("LBL") initially treated this as an FOIA request and refused under section 21 (information accessible by other means) and section 36 (prejudice to the effective conduct of public affairs) of that legislation. It upheld this at internal review. During the Commissioner's investigation, it acknowledged that the request should have been dealt with under the EIR because it was a request for environmental information. However, it argued that it was not obliged to comply with the request by virtue of regulation 12(4)(b) (manifestly unreasonable request due to the cost of compliance).
2. The Commissioner's decision is that LBL is entitled to rely on regulation 12(4)(b) as its basis for refusing to comply with the request.
3. No steps are required.

Request and response

4. On 6 August 2016, the complainant requested information of the following description:

"Please provide the following for the Estate Regeneration Board:
(i) all minutes, notes and documentation produced by and for the

board in the since June 2015

(ii) provide all documentation presented at the board meetings”.

5. On 1 September 2016, the London Borough of Lambeth (“LBL”) responded and requested further clarification. It asked: “Could you please specify whether there is a particular subject matter your request relates to?”.
6. On 5 September 2016, the complainant explained: “I am actually interested in all activities of the estate regeneration board”.
7. On 29 September 2016, LBL responded. It refused to provide the requested information. It cited the following exemptions as its basis for doing so:
 - Section 21 (information accessible by other means). It provided a link directing the complainant to relevant information.
 - Section 36(2)(c) (effective conduct of public affairs). It applied this to what it described as emerging policies and projects.
8. The complainant requested an internal review on 30 September 2016. She explained that “There has been no problem previously providing access to the Estate Regeneration Board”. On 19 October 2016, LBL sent her the outcome of its internal review. It upheld its original position.

Scope of the case

9. The complainant contacted the Commissioner on 3 January 2017 to complain about the way her request for information had been handled.
10. During the course of the Commissioner’s investigation, LBL acknowledged that it should have treated the request under the EIR. However, it argued that it was not obliged to respond to the request by virtue of EIR regulation 12(4)(b) because it was a manifestly unreasonable request. The Commissioner has looked at whether LBL is entitled to rely on regulation 12(4)(b) as its basis for refusing to comply with the request.

Reasons for decision

Background

11. LBL explained the following about its housing strategy:

"The purpose of the estate regeneration programme is to deliver additional new homes to deal with the housing crisis and to replace homes that are poor quality; it involves building new and additional homes on Council-owned land, including land acquired by the Council. Where tenants have exercised the right to buy, they will be leaseholders of their properties.

Individual buildings on the Council's estates therefore typically comprise a mix of leaseholders and tenants. This is a highly contentious area of work, because every estate now has a significant number of leaseholders, many of whom are (in due course) likely to require compulsory acquisition of their properties in order to enable the regeneration work physically to proceed."

12. LBL explained the role of the Board which is the subject of this request as follows:

"The Estate Regeneration Board is not a decision making body within the Council. It is an officer committee that enables officers to discuss ongoing matters that are continuously in draft and not signed off by the meetings. This does lead to formal Officer Delegated Decisions by Cabinet Member Decisions, all of which are published according to the constitution and available on our website."

13. LBL's website explains more about its approach to tackling the shortage of affordable housing in Lambeth:

<http://estateregeneration.lambeth.gov.uk/>

Is this environmental information?

14. Environmental information is defined in regulation 2(1) of the EIR as follows:

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

15. Having reflected on this, LBL explained to the Commissioner: "Lambeth Council is currently in the process of regenerating several housing estates in the borough and this request asked for information held by our internal estate regeneration board. We consider that estate regeneration will relate to part (c) and part (f) of the EIR."
16. The Commissioner agrees with LBL's analysis and has concluded that the information is clearly environmental information by virtue of regulation 2(1)(c). In reaching this view, she has also had regard for her own published guidance.¹
17. The Commissioner is disappointed that LBL did not consider the applicability of EIR to this case earlier.

Regulation 12(4)(b) – manifestly unreasonable request

18. Regulation 12(4)(b) says that a public authority may refuse to comply with a request if the request for information is 'manifestly unreasonable'.
19. The Commissioner has issued public guidance on the application of regulation 12(4)(b). This guidance contains the Commissioner's definition of the regulation, which is taken to apply in circumstances where either the request is 1) vexatious, or 2) where the cost of

¹ https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf

complying with the request would be too great. In this case, LBL considers that circumstance 2) is applicable.

20. The EIR does not contain a limit at which the cost of complying with a request is considered to be too great. However, the Commissioner's guidance suggests that public authorities may use the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Regulations") as an indication of what Parliament considers to be a reasonable charge for staff time. The Regulations specify that £450 is the appropriate limit for non-central government bodies and that the cost of complying with a request should be calculated at £25 per hour; this applies a time limit of 18 hours.
21. For the purposes of the EIR, a public authority may use this hourly charge in determining the cost of compliance. However, the public authority is then expected to consider the proportionality of the cost against the public value of the request before concluding whether the request is manifestly unreasonable.
22. LBL explained to the Commissioner that it would take a great deal of time to go through the documents and consider the extent to which EIR exceptions apply. LBL argued that the most likely to apply would be:

Regulation 12(4)(d) Unfinished Documents
Regulation 12(4)(e) Internal Communications
Regulation 12(5)(e) Commercially Sensitive information
Regulation 13 Personal Information.
23. However, it argued that it would take an excessive amount of time to work out which, if any, applied to the requested information.
24. It set out for the Commissioner why it thought the exceptions listed might apply to various parts of the information and sent the Commissioner a sample of the type of information it held. This was an Estate Regeneration Board Agenda Pack. It went on to explain that there had been 25 meetings in total with between six and ten items on the agenda. It said that, conservatively, it would take two hours to go through the paperwork for each meeting which means would take approximately 50 hours in total to go through all the information within the scope of the request.

Can LBL include the cost of considering exceptions?

25. Under FOIA, a public authority cannot include the cost of considering exemptions when calculating the cost of compliance with a request

under that legislation. However, this is not the case under the EIR. This is covered in the Commissioner's published guidance.²

Is regulation 12(4)(b) engaged?

26. The Commissioner is somewhat sceptical that it would take two hours to go through the sample provided to assess the application of EIR exceptions. She notes that that LBL described this as a conservative estimate. Even if the task could be done in half the time, that would still mean that it would take 25 hours to go through all the papers to determine what information may be caught by the exceptions listed above. Having read the sample, the Commissioner is satisfied that the exceptions identified can reasonably be assumed to, at least, be relevant for consideration. This is the case even if, ultimately, they are found either not to apply or not to pass the balance of public interest test such that they can be relied upon.
27. The Commissioner is satisfied that, in the circumstances of this case, it would be manifestly unreasonable for LBL to work through the withheld information to identify which EIR exceptions are engaged and whether or not they can be relied upon given the volume of information in question. The time it would take to do so, even if LBL had overestimated this, would exceed a reasonable time period. In reaching this view, the Commissioner has been guided by what is considered to be a reasonable time period under FOIA.
28. However, LBL can only rely on regulation 12(4)(b) if the public interest favours such reliance. The Commissioner has gone on to consider, therefore, whether or not the time cost outlined above is proportionate to the value of the request. This involves considering the balance of the public interest.

Public interest arguments – the complainant's position

29. The complainant said that she had previously accessed this sort of information although she was extremely disappointed as the extent of that previous disclosure. She sent the Commissioner a link to this earlier request.³ She was also concerned about information being deemed "out of scope" in that earlier request and not considered for disclosure. This

² <https://ico.org.uk/media/for-organisations/documents/1615/manifestly-unreasonable-requests.pdf>

³ The request was dated 2015 and sought information regarding the regeneration board but focused on a specific location within the area covered by the work of the board. This was information recorded over the previous four years

prompted her to make the wider request that is the subject of this notice.

30. The complainant clearly has concerns about the Estate Regeneration Board and decisions taken by LBL arising from its work. She considers that greater transparency is needed in order to address those concerns.

Public interest arguments - LBL's position

31. LBL acknowledged that regulation 12(2) set out a presumption in favour of disclosure.⁴ It drew attention to its own website to indicate that it was mindful of this obligation. It explained that it regularly updated its estate regeneration pages accordingly.
32. LBL explained that it would cause significant administrative burden to locate and consider all the information within the scope of this request. It added that this would be to the detriment of handling the large number of other FOIA/EIR requests it received in accordance with the requirements of that legislation. It argued that this was contrary to the public interest. It recognised a public interest in openness and transparency about estate regeneration but argued that this was served by its own website which was both comprehensive and regularly updated.

The Commissioner's conclusions

33. The Commissioner is mindful of the compelling public interest in transparency about estate regeneration and about how local authorities tackle the shortage of affordable housing. LBL has explained that some of the regeneration work may lead to compulsory purchase of homes. Clearly, this is an extremely controversial step which, if undertaken, demands considerable transparency. The affordable housing crisis is particularly acute in London and it is incumbent upon local authorities in the capital (and elsewhere) to be as open as possible about steps they are taking to address this.
34. The Commissioner would observe that the public has a right to know more about the workings of an unelected body that appears to have a degree of input into LBL's estate regeneration policy, even if any final decisions are made by the Cabinet, not the Estates Regeneration Board, and published accordingly.

⁴ <http://www.legislation.gov.uk/ukxi/2004/3391/regulation/12/made>

35. The Commissioner also notes that LBL's position in this case does not appear to impose a blanket refusal on disclosing information about the Board that is the subject of this request. LBL does assert, however, that it may be excepted from its duty under EIR to provide some information – it refers to its view that some EIR exceptions may apply.
36. In the Commissioner's view, the request in this case was too wide and imposed an unreasonable administrative burden upon LBL to comply with it. There is a very compelling public interest which would require LBL to consider the detail of the request anyway, despite the cost and burden it would create. This compelling public interest relates to importance of considerable transparency in decision making on housing matters. This includes transparency in understanding what factors came to be considered by decision makers through the work of the Estate Regeneration Board. The impact on people arising from decisions made about their homes cannot be underestimated.
37. However, the Commissioner thinks that, in the circumstances of this case, there is a more compelling public interest in ensuring that LBL's ability to comply with its FOIA/EIR obligations is not unduly impeded. The complainant can still make a more focussed request (as suggested by LBL in its letter of 1 September 2016). If LBL argues that it is not obliged to disclose some of the information in that more focussed request, the complainant can challenge that refusal. If she is unhappy with any continued refusal after internal review, she can make a formal complaint to the Information Commissioner. If she is unhappy with a formal decision issued by the Commissioner, she can appeal to the First-tier Tribunal (Information Rights).
38. In summary, the Commissioner is satisfied that LBL can rely on regulation 12(4)(b) as its basis for not complying with the request.
39. The complainant explained that she made a more wide-ranging request to address her concerns that LBL had excluded important information from consideration because it was out of the scope of her previous request. The Commissioner recognises her concern but does not think, in this case, that this approach resolves the difficulty.
40. The Commissioner has not formed a view on the applicability of EIR exceptions in this case other than the applicability of regulation 12(4)(b). This is because the applicability or otherwise of the named exceptions falls away if the request is manifestly unreasonable.

Regulation 9(1) – advice and assistance

41. Regulation 9(1) of the EIR says that public authorities should offer applicants advice and assistance, so far as it would be reasonable to do so.

42. In her guidance on regulation 12(4)(b), the Commissioner advises that when refusing a request on the grounds of cost, public authorities should provide the applicant with appropriate advice and assistance, in line with regulation 9(1).
43. This will usually involve setting out the costs involved in answering the request and explaining how it 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.
44. In its submission to the Commissioner, LBL explained that the complainant could make a request for information over a narrower timeframe. The Commissioner also notes that in its letter of 1 September 2016, LBL asked the complainant for clarification focussing on a more specific area.
45. In the circumstances, the Commissioner is satisfied that LBL offered the complainant reasonable advice and assistance and has complied with regulation 9(1).

Right of appeal

46. 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

47. 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.
48. 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

Elizabeth Hogan
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