

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 February 2018

Public Authority: London Borough of Lambeth
Address: PO Box 734
Winchester
SO23 5DG

Decision (including any steps ordered)

1. The complainant requested information from the London Borough of Lambeth (LBL) on 4 December 2016 about the Local Audit and Accountability Act 2014.
2. The Commissioner's decision is that LBL has breached section 10 FOIA, has breached section 16 FOIA and is not entitled to rely on section 12 FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the request dated 4 December 2016 which does not rely on section 12.
4. 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

5. On 4 December 2016, the complainant wrote to LBL and requested information in the following terms:

"Can you please provide copies of any correspondence or meeting minutes between Lambeth officers, councillors, external consultants and

KPMG with regard to answering questions raised by members of the public in connection with the Local Audit and Accountability Act 2014. I would like to see any information from between 1st July 2016 to 11th August 2016 inclusive."

6. Following 3 further emails from the complainant dated 8 January 2017, 12 January 2017 and 17 January 2017, LBL issued a response on 31 January 2017 - 39 working days after receipt of the request. It relied on section 12 to refuse to comply with the request. It set out the process for seeking an internal review.
7. In an email sent on 5 February 2017 and received at LBL on 7 February 2017, the complainant requested an internal review.
8. His correspondence set out clearly that he was requesting a review and that if LBL could explain how it had calculated the costs then he would be content to refine his request. He set out what his request would be if the calculations supported the application of section 12. It read as follows:

"If the calculation requested above demonstrates that the 18 hour FOI limit would be exceeded, my refined request would be for you to provide the information requested (up to a limit of 18 hours), based on the following hierarchy of people:

- 1. Given that the two people that would principally be involved in dealing with requests under the Local Audit and accountability Act would be [named individual] and [named individual] from the finance department, I would like to see correspondence to and from these two individuals as the vast majority of information would have flowed through them..*
 - 2. Correspondence to and from senior management, such as [named individual] and [named individual].*
 - 3. Correspondence to and from councillors.*
 - 4. Correspondence to and from KPMG.*
 - 5. Correspondence to and from other officers."*
9. On 9 March 2017, LBL wrote to the complainant in response to this correspondence. It disclosed some information within the scope of the 'fresh request'. It did not refer to the request for an internal review and did not set out why it had relied on section 12 in its initial response. The correspondence set out that the complainant could seek an internal

review of this response. It remained the case that the request dated 4 December 2016 had not been complied with.

10. Further correspondence dated 15 March 2017 from LBL to the complainant set out that it had treated the correspondence dated 5 February 2017 as a revised request rather than an internal review and asked if the complainant wished the response of 9 March 2017 to be considered under the internal review process. The complainant responded on 16 March 2017 setting out that he had asked for an internal review of the original response and did not consider that he had submitted a fresh request for information.
11. A response from LBL to the complainant dated 12 April 2017 set out that in response to his request for an internal review, LBL has complied with the 'request' in previous correspondence.

Scope of the case

12. The complainant contacted the Commissioner on 26 June 2017 to complain about the way his request for information had been handled. He set out the chronology of the case and explained that he considered LBL to be withholding information.
13. Having considered the detail of the case, the Commissioner considers that the scope of her investigation is to determine whether or not LBL handled the request dated 4 December 2016 in accordance with the FOIA and whether or not LBL was entitled to rely on section 12 to refuse to comply with the request.
14. She considers that the correspondence dated 5 February 2017 was clearly a request for a review of the decision dated 31 January 2017 and that in treating it as a fresh request, LBL has denied the complainant a review of the decision to apply section 12 to his request dated 4 December 2016; his only option for review now being to seek a review of the response to his 'fresh request'. That response stated: *"Please see the attached information as requested"*. LBL did not explain in its response that it had treated the complainant's letter as a fresh request for information and that there would be no review. As a result of this response, the complainant disputed that LBL had provided him with all of the information he had requested.
15. The Commissioner considers that the handling of the correspondence dated 5 February 2017 is a procedural issue which will be addressed in the 'other matters' section of this notice.

Reasons for decision

16. Section 1(1) of the Act states that:

“(1) Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.”*

17. Section 10 of the Act states that:

“(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

18. The Commissioner notes that the response to the request was made 39 working days after the request was made on 4 December 2016 and that LBL has therefore breached section 10 FOIA.

19. Section 12(1) of the Act states that:

“(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

20. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations) at £450 for local government such as LBL. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a limit of 18 hours.

21. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) states that an authority can only take into account the costs it reasonably expects to incur in:

- determining whether it holds the information;
- locating the information, or a document containing it;
- retrieving the information, or a document containing it; and
- extracting the information from a document containing it.

22. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required.

However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the Commissioner considers that any estimate must be "sensible, realistic and supported by cogent Evidence."¹

23. In its initial response to the complainant, LBL set out that the process of determining whether the requested information is held would exceed the appropriate limit. LBL stated to the complainant that to retrieve the information for this request would take several dozen officers at least one hour each to review their email accounts; the process of retrieving and collecting the data is therefore likely to exceed the appropriate limit.
24. In his request for a review the complainant asserted that the term 'several dozen' would imply more than 36 officers. He asked LBL to explain how it had reached this calculation. He did not receive any explanation.
25. In response to the Commissioner's initial request for a submission regarding LBL's reliance on section 12, LBL set out that it had now disclosed all of the requested information to the complainant and did not therefore rely 'at present' on section 12.
26. The Commissioner wrote again to LBL setting out that as its final position in relation to the request dated 4 December 2016 was its reliance on section 12, the Commissioner's investigation would consider that aspect and she again asked LBL to provide a submission setting out the rationale behind its reliance on section 12.
27. In a second submission to the Commissioner, LBL set out that it noted the Commissioner's comments in respect of section 12 and explained that there would be several dozen officers who would potentially hold information and for each to check their emails would take an hour per officer which would exceed 18 hours.
28. Having given LBL two opportunities to fully explain its reliance on section 12 in relation to the request dated 4 December 2016, it has not provided any detail to support its position.
29. The Commissioner considers that having relied on section 12 to refuse the request dated 4 December 2016, LBL has been asked by the complainant and twice by the Commissioner to explain the rationale for its decision but has failed to provide any detail to support its assertion that complying with that request would exceed the cost limit.

¹<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf>

30. In these circumstances, the Commissioner considers that LBL is not entitled to rely on section 12 to refuse the request dated 4 December 2016 and that its response to the 'fresh request' does not mean that the request dated 4 December 2016 has been complied with.
31. Section 16 of the FOIA places a duty on a public authority to provide advice and assistance to persons who propose to make or have made requests for information to it.
32. In its response to the complainant's request, LBL set out that if the complainant wished to redefine or shorten his request then he should submit a further request and LBL would consider if it could respond. It did not offer any advice or assistance as to how the complainant might redefine or shorten his request and without any substance to the response citing section 12, it is difficult to see how the complainant might be expected to redefine his request so that it fell within the cost limit.
33. The Commissioner considers that LBL has failed to comply with its duty under section 16 FOIA.

Other matters

34. The Commissioner considers that although it is important to reach a decision on LBL's reliance on section 12, it is equally important to address LBL's overall handling of the complainant's request.
35. It is clear from the correspondence that the complainant was offered the opportunity to make a fresh request for information and was also offered the opportunity to seek an internal review. These options were not mutually exclusive.
36. The ensuing correspondence from the complainant made it abundantly clear that he wanted LBL to review its reliance on section 12 and in the event that he accepted the explanation, he would then make a fresh request. At this stage his request dated 4 December 2016 was extant.
37. The Commissioner considers that although the complainant had set out what his fresh request would be in the event that he accepted the explanation behind the application of section 12, a review of how LBL had reached its decision in respect of section 12 would have allowed the complainant to consider whether he accepted LBL's position and if not, he could have brought his concerns to the Commissioner at that point.

38. In the event that the complainant had received a review of LBL's decision and did accept the application of section 12, that explanation may have allowed him to make a different refined request.
39. The Commissioner considers that her guidance about recognising a request² may be relevant here. Paragraphs 86-93 set out her position regarding conditional requests.
40. Her guidance sets out that a request which is conditional upon a change to the status quo is not a valid request for information as the requester does not want information 'as things stand'. This is clearly the case with this request. She would ask LBL to ensure that it refers to current guidance when responding to requests for information.
41. In setting out what his refined request would be, the complainant made it clear that he was requesting the same information but had provided a priority list suggesting that LBL could provide him with information in line with that list up to the 18 hour limit.
42. The Commissioner notes that there is no requirement for a public authority to work up to the cost limit where a request exceeds the appropriate limit.
43. Whilst it is unclear whether LBL has provided the complainant with information up to the 18 hour limit or has provided all of the information set out in the 'fresh request', it is clear that the information it has disclosed should also have been disclosed had LBL complied with the request dated 4 December 2016. However it remains unclear whether complying with the request dated 4 December 2016 would have resulted in the disclosure of more information.
44. In its correspondence with the complainant, and in its initial submission to the Commissioner, LBL set out that it had treated the complainant's correspondence as a fresh request for information but in its final submission to the Commissioner, this position changed; LBL set out that although the correspondence was treated as a new request, it was in effect an internal review as it resulted in further information being provided to the complainant. The Commissioner considers this assertion to be at best disingenuous on the part of the public authority since the response offered the complainant a review of its decision and it had already asserted that it was handled as a fresh request.
45. In considering the scope of the request, the Commissioner had to consider how to deal with LBL's response to the request for an internal

² <https://ico.org.uk/media/for-organisations/documents/1164/recognising-a-request-made-under-the-foia.pdf>

review and whether this should be considered in terms of a separate decision or as a procedural issue.

46. The Commissioner considers that if it was the case that there was any ambiguity as to whether the correspondence constituted a fresh request then she would consider it as such and issue a decision notice on that basis. However, as a responsible regulator, she considers this to be entirely a procedural issue and to consider it as anything other than procedural would be to effectively endorse a position with which she disagrees i.e. that this particular request for an internal review was a fresh request for information. She notes too that in accordance with his assertion that he did not make a fresh request, the complainant did not seek an internal review of LBL's second response.
47. The complainant has set out to the Commissioner that the second response is missing certain documents and he feels that LBL is withholding information. Although the Commissioner is not going to consider the substance of the response to the 'fresh request', she would ask LBL to ensure that should any disclosure of information stem from this decision notice that it is complete and where LBL asserts that documents are attached, they are in fact attached; she notes that LBL has asserted that a particular document was attached to the submission to her office when in fact it was not attached. The complainant has raised the same concerns.
48. In his complaint to the Commissioner, the complainant has asserted that the response to the 'fresh request' did not include the provision of legal advice which he was aware had been sought. In its initial submission to the Commissioner LBL set out that his request did not specifically ask for legal advice but that this would be likely to be exempt under FOIA section 41 FOIA – information provided in confidence.
49. In its second submission to the Commissioner, in relation to the provision of legal advice, LBL set out that it did not interpret the original request to be for internal communications but that any legal advice would be likely to be exempt under FOIA section 42 – legal professional privilege.
50. The Commissioner considers that this is a case where the public authority should have considered entering into meaningful dialogue with the complainant in order to clarify the request and assist in perhaps reaching a mutually agreeable position; this may have precluded the need for the Commissioner's involvement.
51. The Commissioner considers that LBL's handling of this case from the request through to the provision of submissions to her office, falls well short of her expectations and would ask LBL to ensure in future that it

can demonstrate that it has handled requests in accordance with the FOIA and in accordance with its own procedures. The Commissioner notes that she has recently issued a decision notice FS50693900³ where she was critical of LBL's handling of a case and would ask that it ensures that in liaising with her office LBL takes on board advice offered in respect of case handling.

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2172910/fs50693900.pdf>

Right of appeal

52. 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 7395836

Email: GRC@hmcts.gsi.gov.uk

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

53. 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.

54. 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

Jonathan Slee
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