

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

Date: 2 June 2021

Public Authority: London Borough of Lambeth
Address: Lambeth Town Hall
Brixton Hill
London SW2 1RW

Decision (including any steps ordered)

1. The complainant has requested planning performance agreement information from the London Borough of Lambeth ("LB Lambeth" or "Lambeth Council"). LB Lambeth refused to provide this citing FOIA section 43 (prejudice to commercial interests) and upheld this at internal review. During the Commissioner's investigation, LB Lambeth changed its position and sought to rely on EIR regulation 12(4)(b) (manifestly unreasonable on the grounds of cost).
2. The Commissioner's decision is that LB Lambeth is not entitled to rely on EIR regulation 12(4)(b). It also failed to provide a proper response under the EIR in time in contravention of regulation 14 and failed to provide adequate advice and assistance to the complainant in contravention of regulation 9.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information or explain why it is not obliged to under relevant provisions of the EIR which do not include regulation 12(4)(b).
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 12 April 2020, the complainant requested information of the following description:

"Please can you confirm the amount earned by Lambeth Council from planning performance agreements related to the following developments? Please provide totals per development and a grand total for all developments combined:

16/00795/FUL
16/03954/FUL
16/05114/FUL
16/05432/FUL
16/00323/VOC
15/03470/VOC
16/05309/VOC
17/05311/EIAFUL
17/05807/EIAFUL

Also, please provide copies of the agreements and correspondence relating to them where possible."

6. For ease of future reference in this notice, the Commissioner will refer to these as the "amounts", the "agreements" and the "correspondence relating to the agreements".
7. On 12 May 2020, LB Lambeth responded. It refused to provide the requested information. It cited the following exemption as its basis for doing so:
- section 43 (prejudice to commercial interests)
8. The complainant requested an internal review on 16 May 2020. LB Lambeth sent him the outcome of its internal review on 17 June 2020. It upheld its original position.

Scope of the case

9. The complainant contacted the Commissioner on 17 June 2020 to complain about the way his request for information had been handled.

He disagreed particularly with LB Lambeth's conclusion as to the balance of public interest.

10. During the course of the Commissioner's investigation, LB Lambeth changed its position. It accepted that it should have dealt with the request under the EIR and sought to argue that it was entitled to rely on regulation 12(4)(b) – manifestly unreasonable on the grounds of cost – as its basis for refusing the request. It argued that it would incur a disproportionate burden to consider the application of exceptions. It set out arguments in support of this.
11. The Commissioner asked how LB Lambeth could rely on regulation 12(4)(b) when it would have already considered the extent to which the information was exempt under FOIA and had applied FOIA section 43 having done so. There is an exception under the EIR which is broadly equivalent to FOIA section 43 (namely regulation 12(5)(e)). It, in other words, had apparently already completed its consideration and analysis of the requested information and any additional analysis under the EIR did not seem, to the Commissioner, to be an exercise which would place an unreasonable burden upon LB Lambeth.
12. The Commissioner asked LB Lambeth to explain what work it had done to engage FOIA section 43, for example, had it collated all the requested information. The Commissioner also asked LB Lambeth whether it had undertaken this work at internal review even if it had not undertaken it at the initial refusal stage.
13. LB Lambeth acknowledged that it had applied the wrong legislation to the information. In explaining further its reliance on regulation 12(4)(b) it also explained: "We have not yet redacted the [requested] agreements or reviewed them for redaction purposes; this would therefore fall into the time needed to respond to the request". It sought to reiterate its argument that the time it would need to take to consider the application of EIR exceptions would impose an unreasonable burden upon it.
14. The Commissioner is extremely surprised and disappointed that LB Lambeth:
 - failed to use the correct legislation. For over 15 years, planning information, such as that requested here, has generally been regarded, in the first instance, as environmental information subject to the EIR;
 - asserted reliance on an FOIA exemption despite having not reviewed the requested information to the extent necessary; and
 - failed to correct either of the above errors at internal review.

15. As lamentable as these failures are, it does not mean that LB Lambeth is now legally obliged to provide the requested information. The Commissioner will now consider whether LB Lambeth is entitled to rely on regulation 12(4)(b) as its basis for refusing to disclose the requested information.

Reasons for decision

Is the information environmental information?

16. Information is "environmental information" and must be considered for disclosure under the terms of the EIR rather than the FOIA if it meets the definition set out in regulations 2(1)(a) to 2(1)(f) of the EIR.
17. The Commissioner considers that the information in this case can be classed as environmental information, as defined in regulation 2(1)(c) of the EIR. This regulation provides that any information on measures such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements or factors of the environment listed in regulation 2(1)(a) and 2(1)(b) will be environmental information. One of the elements listed under 2(1)(a) is land.
18. The request in this case is for information concerning the redevelopment of land. The Commissioner considers that the request therefore relates to a measure as defined in regulation 2(1)(c) of the EIR which would or would be likely to, affect the elements described in 2(1)(a), namely land.
19. The Commissioner is, therefore, satisfied that the request was for environmental information, and that the request fell to be dealt with under the EIR.

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

20. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable. A request can be refused as manifestly unreasonable either because it is considered to be vexatious, or on the basis of the resource burden that it would cause to the public authority. In this case, the Council is citing regulation 12(4)(b) on the grounds that to comply with it would impose a significant and disproportionate burden on the Council's resources, in terms of officer time and cost.

21. Regulation 12(4)(b) of the EIR is designed to incorporate protecting public authorities from exposure to a disproportionate burden in terms of the amount of time and resources that a public authority has to expend in responding to a request. In that respect, it is similar to section 12 of FOIA, which can be applied where the cost of complying with a request exceeds the appropriate limit.
22. Under FOIA, the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Fees Regulations") specify the appropriate limit for the amount of work required (£600 for central government departments, £450 for all other public authorities) beyond which a public authority is not obliged to comply with a request.
23. However, the EIR differ from FOIA in that under the EIR there is no specific cost limit set for the amount of work required by a public authority to respond to a request.
24. While the Fees Regulations relate specifically to FOIA, the Commissioner considers that they nevertheless provide a useful point of reference where the reason for citing regulation 12(4)(b) of the EIR is the time and costs that would be incurred in dealing with a request. However, the Fees Regulations are not the determining factor in assessing whether the exception applies.
25. The Fees Regulations provide that the costs associated with the activities involved in dealing with a request (determining whether the requested information is held; finding the information, or records containing the information; retrieving the information or records; and extracting the requested information from records) should be worked out at a standard rate of £25 per hour per person. For local authorities, the appropriate limit is set at £450, which is the equivalent of 18 hours work.
26. Regulation 12(4)(b) sets a robust test for an authority to pass before it is no longer under a duty to respond. The test set by the EIR is that the request is "manifestly" unreasonable, rather than simply being "unreasonable" per se. The Commissioner considers that the term "manifestly" means that there must be an obvious or clear quality to the identified unreasonableness.

27. The Commissioner's guidance on regulation 12(4)(b)¹ states that public authorities may be required to accept a greater burden in providing environmental information than other information.
28. Therefore, in assessing whether the cost or burden of dealing with a request is clearly or obviously unreasonable, the Commissioner will consider the following factors:
- the proportionality of the burden on the public authority's workload, taking into consideration the size of the public authority and the resources available to it, including the extent to which the public authority would be distracted from delivering other services;
 - the nature of the request and any wider value in the requested information being made publicly available;
 - the importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue; the context in which the request is made, which may include the burden of responding to other requests on the same subject from the same requester;
 - the presumption in favour of disclosure under regulation 12(2) of the EIR; and the requirement to interpret the exception restrictively.
29. LB Lambeth apparently did not take the opportunity to explain to the complainant why it believed it could rely on this exception, despite the Commissioner asking it to do so. The Commissioner will now quote LB Lambeth's arguments directly:

"We consider that the request asks for nine separate agreements, associated financial information and correspondence for each agreement.

The agreements and the financial information are considered to be commercially sensitive; and have been withheld on this basis. We consider any attempt to redact the agreements would add to the time required to respond to the request.

¹ <https://ico.org.uk/media/for-organisations/documents/1615/manifestly-unreasonablerequests.pdf>

An agreement is typically between 15-20 pages and includes personal data, and commercially sensitive information as agreed with the developers. We would estimate that each agreement may take up to 30 minutes to review. We then would need to review the inboxes of relevant planning officers, some of which are no longer employed by Lambeth. Any emails held would need to be redacted for personal information, and for commercially sensitive information. At a conservative estimate of two hours per agreement to locate all relevant emails, potentially involving ICT to provide access to closed inboxes and then redacting the relevant information this would then equate to eighteen hours. We would therefore consider compliance with the request would exceed the eighteen hour threshold, and therefore engage Regulation 12 4(b)"

30. LB Lambeth also said "We applied Regulation 12 4(b) on further reflection as obtaining, providing and redacting the correspondence would exceed 18 hours; and as one part of the request exceeds the appropriate limit, therefore the entire request exceeds the limit."
31. The Commissioner assumes that LB Lambeth is referring here to the provision of the Fees Regulations which allows for the aggregation of costs. The Fees Regulations do not apply in EIR, although as referenced earlier they can be a useful guide.
32. The Commissioner's position is that there may be occasions where it is permissible to consider a number of EIR requests together when deciding if they are manifestly unreasonable on the grounds of cost. However, public authorities need to take care, not to apply this principle indiscriminately or too widely. In the Commissioner's view, public authorities should be sensible about this issue and to only use this approach when dealing with multiple requests would cause a real problem. The Commissioner would remind public authorities that the test for applying this exception is whether the request is "manifestly unreasonable" and as mentioned earlier this means that there must be an obvious or clear quality to the unreasonableness.
33. LB Lambeth has said that it would take 30 minutes per agreement to review the nine requested agreements for personal data or commercially sensitive information. That would mean four and a half hours work. It has then said it would take on average two hours per agreement to locate relevant correspondence. This would mean 18 hours work. In total, this is 25.5 hours work.
34. The Commissioner is not convinced the aggregation of the two amounts (18 + 4.5) is an additional relevant factor rendering this request manifestly unreasonable. Firstly, the Fees Regulations (from which LB Lambeth appears to have inferred the principle of aggregation) do not

apply to the EIR. Secondly, there is a clear and reasonable link between seeking the agreements and seeking the correspondence created in respect of those agreements. Seeking both is not, in the Commissioner's view, evidence of excessive burden. That is not to say that responding to the request would incur no burden. However, while it does exceed the appropriate limit set in the Fees Regulations (assuming the estimates arrived at are reasonable, that is), the Commissioner does not agree that it does so in a way that is manifestly unreasonable.

35. Other EIR exceptions such as the one similar to the FOIA exemption initially applied to the request may apply. However, it is for LB Lambeth to make those arguments and to provide advice and assistance to the requester to assist them in framing their request.

Conclusions – regulation 12(4)(b)

36. The Commissioner does not agree that LB Lambeth is entitled to refuse these requests on the grounds that they are manifestly unreasonable. Responding to the "any correspondence" element of the request may well meet the appropriate limit set out in the Fees Regulations. Considering the application of exceptions (which is permitted under EIR) in respect of the amounts and the agreements themselves may be an additional four and a half hours work. However, the Commissioner does not consider this to impose a manifestly unreasonable burden on LB Lambeth for the reasons explained above.
37. Furthermore, there is an explicit obligation of transparency under the EIR which adds further weight to the Commissioner's decision in this regard. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner (SGIA/44/2019)*, "*If application of the first two stages [ie engagement of the exception and public interest test] has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure...*" and "*the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations*" (paragraph 19).
38. There may well be a burden placed upon LB Lambeth to provide a response to this request but it is not a manifestly unreasonable one. In reaching this view, the Commissioner has also not been able to discern any factors (as set out in paragraph 28) in the circumstances of this case so as to conclude otherwise. LB Lambeth therefore cannot rely on regulation 12(4)(b) as its basis for refusing to disclose the requested information.

Regulation 14 – time for compliance

39. Regulations 14(1) and (2) state:

“(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing.

(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.”

40. Regulation 14(3) states:

(3) The refusal shall specify the reasons not to disclose the information requested, including any exception relied on under regulations 12(4), 12(5) or 13.

The refusal notice should therefore include the full regulation number, and precise wording of the exception or regulation concerned.

41. LB Lambeth failed to specify to the complainant the exception it was relying on and the regulations it had applied.

42. The Commissioner therefore concludes that the council failed to issue an adequate refusal notice and thus breached Regulation 14 of the EIR.

Regulation 9 – Duty to advise and assist

43. Regulation 9(1) of the EIR states that: “A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.”

44. As noted above, the Commissioner does not think that LB Lambeth can refuse to disclose the requested information on the grounds of regulation 12(4)(b). She has also considered whether LB Lambeth has provided adequate advice and assistance to the requester in this case.

45. Given that, by its own admission, it failed to consider the application of the exception it originally sought to rely on with specific reference to the withheld information, the Commissioner cannot conclude that it has provided adequate advice and assistance to the requester. At best, it appeared to give superficial consideration to the information. Had it looked at the information in more detail, it would have been better able to provide adequate advice and assistance.

46. In light of the above, the Commissioner has concluded that the Council has not complied with regulation 9 of the EIR in its response to this request for information.

Other matters

47. The Commissioner notes that regulation 7 of the EIR allows a public authority to extend the time for compliance with a request if the public authority “reasonably believes that the complexity and volume of the information means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so”.² The Commissioner notes that the regulation refers to a public authority’s reasonable belief that it needs the extra time in the circumstances of a specific request. It should not therefore be an approach taken to every request. However, the Commissioner wishes to point out that there are circumstances where the impact on resources may be a reason to extend the time for response in order to ensure appropriate consideration is given to an EIR request.

² <https://www.legislation.gov.uk/uksi/2004/3391/regulation/7>

Right of appeal

48. 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 123 4504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

49. 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.
50. 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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