UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

EA/2017/0056

B E T W E E N:-

DEREK MOSS

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

Heard at: Field House, London:

Date of Hearing: 16 August 2017:

Date of Decision: 16 February 2018:

Before

Brian Kennedy QC (Judge)
Rosalind Tatam
Steve Shaw

Appearances:

Derek Moss as a Litigant in Person

Counsel for the First Respondent: Rupert Paines instructed by Richard Bailey on behalf of the Respondent.

Subject matter: Freedom of Information Act 2000, specifically section 12 and 16 of the Freedom of Information Act 200 and by consent an out of time request by the Appellant to argue Sections 12 and 16 are engaged and the issue of "Scope" of a request..

Authorities Considered:

Kennedy v Charity Commission [2014] UKSC 20,
McInerney v IC and Department for Education [2015] UKUT 0047 (AAC)
Moss v IC EA/2016/0250;
Birkett v DEFRA [2012] PTSR 1299.
Williams v IC and Cardiff and Vale NHS Trust EA/2008/0042.

DECISION

The Tribunal refuse the appeal but substitutes the Commissioner's Decision.

REASONS

Introduction:

[1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("FOIA"), and the appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice dated 2 March 2017 (reference FS50624753), which is a matter of public record.

[2] The Tribunal Judge and members sat to consider this case on 16th August 2017 and thereafter for deliberations as availability permitted.

Factual Background to this Appeal:

[3] Full details of the background to this appeal, Mr Moss' request for information and the Commissioner's decision are set out in the Decision Notice and not repeated here, other than to state that, in brief, the appeal concerns the question of whether the Royal Borough of Kingston upon Thames ("the Council") was correct to withhold information regarding its housing stock on the grounds of the cost of compliance exceeding the statutory limit.

Chronology:

15 February 2016 Appellant's request for Information.;

"1. For each council estate (and any areas of council or ex-council housing which are not officially designated as an estate) in RBK, the number of a) resident and b) non resident leaseholders or freeholders (with leaseholders and freeholders shown separately) broken down by property type (flat, maisonette, house) and number of bedrooms,"

11 March 2016	Council releases information regarding leasehold properties and waiting lists, but states that it does not hold equivalent
information re	freeholds as it no longer owned the properties
	Appellant immediately requests internal review
15 April 2016	following the internal review, further information and explanations of information are given to the Appellant, but freehold information now available in the requested form.
	Appellant queries accuracy of information provided by the Council.
	The Council responds with further explanations of the Information and how it is collated.
17 May 2016	Appellant complains to the Commissioner regarding information provided concerning freehold properties
2 March 2017	DN FS50624753 upholding the Public Authority's reliance on s.12

Relevant Legislation:

Article 10 ECHR. (See: Commissioner's Response to the Grounds of Appeal and reliance upon Kennedy v Charity Commission [2015] AC 455).

s12 FOIA Exemption where cost of compliance exceeds appropriate limit.

(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.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.

(3) In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.

S16 Duty to provide advice and assistance.

(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004

Reg.3 The Appropriate Limit

3 (1) This regulation has effect to prescribe the appropriate limit referred to in section 9A(3) and (4) of the 1998 Act and the appropriate limit referred to in section 12(1) and (2) of the 2000 Act.

(2) In the case of a public authority, which is listed in Part I of Schedule 1 to the 2000 Act, the appropriate limit is £600.

(3) In the case of any other public authority, the appropriate limit is £450.

Reg.4 Estimating the cost of complying with a request – general

4.(1) This regulation has effect in any case in which a public authority proposes to estimate whether the cost of complying with a relevant request would exceed the appropriate limit.

(2) A relevant request is any request to the extent that it is a request–

(a) for unstructured personal data within the meaning of section 9A(1) of the 1998 Act(1), and to which section 7(1) of that Act would, apart from the appropriate limit, to any extent apply, or

(b) information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply.

(3) In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in–

(a) determining whether it holds the information,

(b) locating the information, or a document which may contain the information,

(c) retrieving the information, or a document which may contain the information, and

(d) extracting the information from a document containing it.

(4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour.

Commissioner's Decision Notice:

[4] The Council explained to the Commissioner that as it does not hold a complete single record of current and ex-freehold properties, it was unable to create a complete list for the purposes of comparison. The creation of a complete list of houses sold under the Right to Buy would require the collation of the Council's Right to Buy records, which are kept in paper form and also later in electronic form (from 2001 see page 5 of the Open Bundle), number approximately 2500 individual application records. They are not separated into completed and non-completed records, and would require manual checking that the Council estimated would amount to 83 hours.

[5] The Commissioner considered this a reasonable estimate, but even by reducing the checking time of each application by 75% the time would still be in excess of the s12 limit. Added to this the time already spent in locating, retrieving and extracting the information and already provided to the Appellant on the foot of the request, the Commissioner was satisfied that the Council had discharged its duties. (This Tribunal are of the opinion that the Council was not required to provide any further advice or assistance under s16 because the request was ambiguous.)

Notice of Appeal:

[6] The Appellant moved three grounds of appeal:

i) the Commissioner breached the Appellant's Art.10 rights and so s6 Human Rights Act 1998;

ii) the Commissioner erred in finding that the Council correctly applied s12 FOIA; and

iii) the Commissioner erred not determining a breach of s16 FOIA

Ground I – Article 10 right to access information

[7] The Appellant cited the decision of the Grand Chamber in *Magyar Helsinki Bizottság v Hungary* [2016] (Application 18030/11), in which it was held that Art.10 ECHR confers a right to access public information where four criteria are considered:

a) the purpose of the request is to enable the exercise the right under Art.10 to receive and impart information and ideas;

b) the nature of the information must be such as to invoke a public interest in its disclosure;

c) any particular role played by the requester acting as a 'public watchdog';

d) whether the information is ready and available.

The cost limit is not referred to in s.2 as an absolute exemption, and therefore the cost limits are subject to the public interest test, especially where the information is 'ready and available'.

Ground II – s12 Cost Limit

[8] The Commissioner ought not to have permitted the late addition of the s12 exemption as it was relied upon outside the 20-day statutory time limit, and in failing to give the Appellant the opportunity to refute it, breached his rights under Art.6 ECHR.

[9] In any event, the Appellant stated that the Council would not have to manually review all the paper applications, but rather subtract the number of leasehold and rented properties on any given estate from the total number of properties. The Appellant posited that the Council must have collated the number of houses lost per year to Right to Buy to manage its housing stock, and claimed to have information that prior to March 2017 the Council had supplied the London Land Commission with data on all homes classified as "ex-local authority" for the purpose of the GLA's

"Brownfield map". The Council's cost estimate was therefore fanciful and unreasonable.

Ground III – s16 Assistance

[10] As the Council's reliance on s12 was only communicated to the Appellant through the Commissioner's Decision Notice, there was no attempt to engage to see if the request could be refined.

Commissioners' Response:

Ground I – Art.10 right to access information

[11] The Commissioner points out that *Magyar* limited the right of access to "*circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression"*, and if that right is found to be engaged following an analysis of the four criteria, it must then be considered if any interference with that right is justifiable under Art.10 (2). The Commissioner stated that if s.12 cost limits are relied upon, it cannot then be said that the information is "ready and available" as *per* the fourth criterion. The First-Tier Tribunal has already held as such in *Moss v Information Commissioner* EA/2016/0250.

[12] While the Commissioner and the Tribunal must take Strasbourg jurisprudence into account in their decisions and not act in a manner incompatible with the Convention; the judgements of the ECtHR do not form part of English law and are not binding. The Commissioner cited *Kennedy v Charity Commission* [2014] UKSC 20, which held that as FOIA was not an exhaustive scheme for accessing state-held information, Art.10 is not relevant for construing an exemption under FOIA. Whilst non-binding, the Commissioner referred the Tribunal to *Moss*, where it was decided that *Magyar* did not affect or dislodge the judgement in *Kennedy*. Should the Appellant be denied access under FOIA he may arguably (following *Kennedy)* have a common law right to seek disclosure that could be challenged by judicial review. Contrary to the Appellant's claims, s.8 of FOIA does not mandate that all authorities treat requests for information as FOIA requests, and nothing in FOIA prevents authorities disclosing information outside the FOIA scheme. However, it is for the Tribunal to keep to the integrity of the FOIA scheme where invoked.

Ground II – s12 Cost Limit

[13] The Commissioner argued that it is the Tribunal's function to determine whether the Decision Notice is in accordance with the law. As for the late reliance upon s12, it is open to authorities to claim any exemption or exception for the first time before the Commissioner or Tribunal, an issue which is subject only to the Tribunal's case management powers and not something over which the Commissioner has discretion. The law was settled in *McInerney v IC and Department for Education* [2015] UKUT 0047 (AAC) to that effect.

[14] The Commissioner was satisfied that the cost estimate was "*sensible, realistic and supported by cogent evidence"* and therefore reasonable, as *per Randall v IC and Healthcare Products Regulatory Agency* (EA/2006/0004) and *Metropolitan Police v IC and MacKenzie* [2014] UKUT 0479 (AAC). It is not for the Commissioner to rule on how authorities choose to hold their information.

Ground III – s16 Assistance

[15] There are circumstances in which it is not reasonable to expect an authority to provide advice and assistance. (The Tribunal agree and are of the view that in the present instance, given the scope of the Appellant's request and the way in which the information is held, it would be difficult and unreasonable to expect the Council to advise the Appellant as to what numbers could be provided within the appropriate cost limits that could still provide the Appellant with the substance of the information he sought.)

Reply by the Appellant:

Ground I – Art.10 right to access information

[16] The Appellant highlighted that English jurisprudence states any departure from Strasbourg judgements should be rare, and only where the Grand Chamber failed sufficiently to appreciate or accommodate particular aspects of our domestic process. As *Kennedy* was decided prior to *Magyar* and only deals with a specific exemption relating to the Charity Commissioner, it is not of assistance to the Tribunal. Just because authorities may on occasion voluntarily disclose information outside FOIA, that has no bearing on the right to access information and whether there is any alternative statutory mechanism for the enforcement of information rights.

[17] The decision in *Moss* is not binding and the Appellant stated he was pursuing an appeal of that decision so it should not be relied upon at this juncture. The Appellant argued that it was erroneous to treat the "ready and available" criterion as equivalent to the s.12 cost limits, as Art.10 requires a proportionality assessment. Also, it is conceivable that information may be gathered within the 18 hours limit but as it is not held centrally or is difficult to precisely locate it may be deemed not to be 'ready and available'. Indeed, *Magyar* at [169] specifically held that where any difficulty in gathering information was caused by the authority's own practice, this would constitute unjustifiable interference with Art.10 rights. It is therefore incumbent upon the Commissioner to look at whether the practices of the Council have caused an interference with Art.10 rights.

Ground II – s12 Cost limits

[18] The Tribunal must determine the correctness of the Decision Notice in reference to all the law, including the Convention and common law, and any failure to allow the Appellant to make submissions on the late reliance on s12 is a breach of natural justice and Art.6. The Commissioner's own website specifically states that the Commissioner does in fact have a discretion to refuse a late claim that a request could exceed cost limits. Permitting the Council to rely on the exemption at such a late stage would defeat Parliament's intention in laying the s10 time limits.

[19] *McInerney* only dealt with the Tribunal's powers to accept late reliance on exemptions, and emphasised the need to control such late reliance to prevent prejudice, material unfairness or the distortion of the statutory scheme. In *Sittampalam v IC and BBC* EA/2010/0141 the Tribunal noted that "*the proper time for raising reliance on s12 is the time required by s17(5) i.e. promptly and in any event not later than the twentieth working day after receipt of the request. Late reliance – at least up to the conclusion of an internal review – is not a matter or right but is to be controlled by reference to the scheme and purposes of the Act*".

[20] The Commissioner appears to have accepted unquestioningly the Council's cost estimate without examining whether the work claimed is actually required or could be undertaken in a more simple or cheap fashion.

Ground III – s16 Assistance

[21] The Appellant repeated the arguments laid out in his Notice of Appeal, but stated that it would probably be unnecessary to consider this point as "evidence shows that the information requested was readily available and should have been provided". However, the Appellant reserved the right to consider any evidence that may be submitted should the Council be joined to the appeal.

Appellant's Skeleton Argument :

[22] Prior to the hearing, the Appellant indicated that he would no longer rely on the third ground of his appeal, claiming that "the evidence shows that the Council could have complied with the request within the s12 costs limit, thus there was no need to refine or revise the request". He further amended his second ground of appeal to a reliance on Article 6, claiming that the Commissioner breached his rights thereunder in a number of ways.

[23] The Appellant set out the legal framework regarding his understanding of any tribunal's functions under Article 6 ECHR, with particular emphasis on the impartiality, fairness and effectiveness of access to said tribunal.

Ground I – Article 10

[24] The Appellant reiterated that the four criteria in *Magyar* are met. Regarding the comments made in *Kennedy*, the Appellant contended that as s1 FOIA requires all requests to be treated as valid unless a specific exemption applies, authorities have no option but to treat requests as FOIA requests; therefore, they have no opportunity to make requests outside FOIA as it is the "only statutory mechanism" to exercise their right to access information. Additionally, any uncertainty about the application of Art.10 to FOIA that existed at the time of *Kennedy* was resolved by the subsequent decision of *Magyar,* which the Appellant contends takes precedence.

[25] As a public authority, the Council is obliged to safeguard the Appellant's Convention rights. S78 FOIA states that nothing in the Act "is to be taken to limit the powers of a public authority to disclose information held by it". As s12 is not an absolute exemption, it should be taken as guidance to be weighed against Article 10 rights.

Ground II – Article 6

[26] The Appellant claimed that the Commissioner breached his Art.6 rights in 'several' ways:

i. The Commissioner should not have ruled that the Appellant's request was dealt with lawfully, as the relevant exemption was not identified at the appropriate time. The Council's submissions to the Commissioner were not sufficient for her to have changed her finding, as the Appellant has proved that, contrary to the Council's assertions, it did hold relevant information at the time of the request. As the Decision Notice makes no mention of the Appellant's submissions, the Commissioner has not 'duly considered' the complaint and has therefore breached the Appellant's Art.6 rights;

ii. The Commissioner ought not to have accepted the Council's reliance upon s12; it breached s17 FOIA by its lateness and also was based on what the Appellant contended were demonstrable untruths. The Commissioner is not obliged to accept late reliance on exemptions, and care should be taken not to permit *ex post facto* justifications that prejudiced the Appellant by denying him the opportunity to respond to it;

iii. The Commissioner's impartiality is in question for the following reasons:

(a) The Commissioner failed to ask of the Council the questions listed in her Key Questions for Public Authorities document;

(b) The Commissioner breached her own policy of only giving authorities one opportunity to justify their decisions;

(c) the Commissioner only afforded the Appellant 10 days to reply to her letter on pain of having the investigation limited to specified terms, whilst

the Council was permitted repeatedly to breach the Commissioner's time limits with no adverse consequences;

(d) The Commissioner's adjudication was not expeditious.

Commissioners' Skeleton Argument:

[27] In regards to *Ground I – Article 10*, the Commissioner rebuts the Appellant's arguments in five points:

i. The *Kennedy* case is binding on all tribunals, regardless of subsequent Strasbourg jurisprudence, and it held that there was no Art.10 rights of access to state-held information;

ii. FOIA is not the only route of access to information, and the Appellant is free to seek a judicial review of the Council's refusal to disclose, as *per* the decision in *Moss v IC* EA/2016/0250;

iii. The Appellant does not satisfy the four criteria in *Magyar*, as he has not provided detail as to how he planned to inform the public of the information nor how the information would have been of legitimate interest to the public, and the fact remains that the information is not ready and available;

iv. Any interference with any Art.10 rights is justified and proportionate to protect the resources of public authorities;

v. Even if the Appellant's Art.10 rights had been subject to unjustifiable interference, he cannot seek a remedy in the Tribunal, as it has no jurisdiction to hear challenges under s6 HRA.

[28] Concerning the cost limits in s12, the Commissioner stated that public authorities raise exemptions as of right, at least until the service of their response on a Tribunal appeal: *Birkett v DEFRA* [2012] PTSR 1299. Any procedural complaints are of little relevance to the Tribunal, which exercises a *de novo* review of the decision.

[29] In any event, all that was required of the Council was to provide a reasonable estimate of cost and whether or not the relevant limit would be exceeded. It is not for the Commissioner or the Tribunal to take the view that the authority should or could have organised its records more effectively: *Williams v IC and Cardiff and Vale NHS*

Trust EA/2008/0042. The only caveat to this was explained in *Roberts*, as being the instance where "an alternative exists that is so obvious to consider that disregarding it renders the estimate unreasonable". There are no obvious bases for the Appellant's assumptions on what information the Council must hold or how it holds it, and he has not considered the costs already incurred by the Council in answering his request.

[30] The Commissioner reiterates her position that the Council could not reasonably have supplied any advice or assistance.

Appellants' Final Written Submissions:

Ground I – Article 10

[31] The Appellant argued that *Kennedy* is not binding on the Tribunal, as the Court in that instance only decided that the Government was free to secure Art.10 rights by means other than FOIA, and so the Charities Act could be remodelled to allow access to information held by the Charities Commission rather than s32 (2) FOIA. Any statement of the Court that Art.10 did not impose a general duty of disclosure was *obiter* and related to the specific context of obtaining information about court proceedings and inquiries.

[32] There is nothing binding in *Kennedy* that therefore conflicts with *Magyar*. The Courts cannot follow domestic precedent where it conflicts with Strasbourg jurisprudence; as such a contention would have been made explicit in the HRA. The Commissioner's assertion that FOIA is not the only vehicle for disclosure as authorities can *choose* to disclose information ignores the *rights* to access information. The Appellant claims that FOIA is the only statutory framework for enforcing information rights, and as s8 requires all written requests for disclosure to be considered under FOIA then it holds that any action by an authority under FOIA must be compliant with Art.10. Any arguments based on the decision in *Moss v IC* should not be considered as the matter is potentially under appeal.

[33] The Appellant's aim in his request is not to assist freeholders to achieve a reasonable price but rather "to facilitate public debate by allowing residents to properly assess the Council's assurances that owners will be fairly compensated" and enable participation in public governance. He provided examples of situations wherein he claimed Londoners had been "forced out" by accepting low prices. The

Appellant claims that only by the release of the requested information can residents independently audit assurances of market value. In order to appreciate the public interest, the Appellant asserted that his request must be seen in the context of the series of requests he has made as part of the Defend Council Housing campaign.

[34] Taking up the Commissioner's reference to the *Roberts* case, the Appellant explained that he was not claiming that the cost limit would not be engaged as all the records were stored centrally; rather, the fact that the Council is in possession of the viability assessment for the estate in question means it is in possession of the requested information in an obvious alternative form. The cost limit in s12 in this instance, the Appellant claimed, is neither legitimate nor necessary, and so does not fall within the Art.10 (2) exceptions and should be disapplied. (However, this Tribunal note that the Cambridge Road estate is the first the Council was dealing with, but the request sought; *" -- -every Estate".* In our view this was illogical as the Council were not in possession of information at that level of detail fro any other estate. Further this Tribunal are of the view that even the information provided to the GLA was not within the scope of his request.)

[35] The Appellant argues that the claim by the Council that they would have to examine manually 2,500 paper records in order to answer the request is at odds with its prior contention that it could only obtain certain residency information from the Land Registry. The Appellant claimed that the Council cannot refuse a request simply because it can only provide a partial set of information i.e. a complete set for one aspect and not others. He distinguished the cases of *Roberts* and *Renna* from the present case, as those requests were specific and indivisible, and any partial release would achieve nothing meaningful to the requester or general public. This request is for diverse but complete sets of information, and even if only some of those sets can be disclosed in their entirety it would still facilitate public debate. (The Tribunal's reading of the request is that it is one piece, not as sets of information as described by the Appellant. The Tribunal are of the view that to require that the Appellant break down his request into numerous highly specific requests, allowing for the reasonable interval between requests to elapse, would apply an overly prescriptive interpretation to FOIA that would unduly limit the Appellant's rights.)

[36] If the Council is required to produce the information in full or not at all, then, the Appellant argues, s12 is an irrelevant consideration, as the full information cannot be obtained from the paper records. (However, the Tribunal notes that the Commissioner has already rejected the claim that the Council did not hold the requested information.)

Ground II – Article 6

[37] The Appellant stated that Article 6 applies regardless of whether Article 10 does, as Art.6 is engaged whenever the decision of a public body determines or affects any civil rights be they Convention rights or otherwise. He denied that the possibility of a judicial review is open to him, and therefore if the Tribunal considered that it had no power to consider any breach of Article 6, this would mean there would be no consequences for the Council or Commissioner breaching these rights.

[38] The Commissioner ought not to have permitted late reliance on an exemption, as s17 requires the identification of a relevant exemption within the prescribed time limits; therefore, if the initial exemption turns out to be demonstrably false, it was not relevant and the notice did not satisfy s17. By denying the Appellant the opportunity to make submissions on the revised ground, the Commissioner is alleged to have infringed his rights to participate in this determination of his rights and unfairly favoured the Council both substantively and procedurally over him.

Commissioners' Final Response:

[39] The Commissioner stated that the Supreme Court must resolve any purported divergence between Kennedy and Magyar, and reiterated that any alleged violation of Article 10 must be dealt with by way of judicial review and not FOIA. As for the public interest in the information, the Commissioner asserts it is limited. The Appellant at hearing explained his aims to use the information in an attempt to have the Council 'reverse-engineer' the value of the properties. The information would be of little use for this purpose, as the financial compensation payable is determined by statute with no discretion available to the Council, as this only applies when

compulsorily purchased, not if purchased by negotiation. Furthermore, the nature of the information actually held by the Council (as distinct from that accessible in the Land Registry) would be insufficient for the Appellant's purposes.

[40] The Commissioner denied that she acted unfairly in permitting late reliance upon an exemption, stating that the Council had a right to raise the exemption with or without her consent. Contrary to the Appellant's arguments, s17 only requires that a refusal notice be issued, not that it must provide the final reasons relied upon. Even if there had been a procedural error occasioning a breach of Article 6, this is irrelevant to the Tribunal's considerations as it conducts a *de novo* hearing.

[41] The Tribunal finds that whilst the Council may consent to releasing partial information, or to narrow the request to permit the matter to fall within acceptable cost limits, it is not required to do so under FOIA. This may be a matter of best practice, but it is not one enforceable by the Tribunal.

Conclusion:

[42] The Tribunal accepts and adopts the Commissioners' reasoning in the DN and in her submissions before this Tribunal and can find no error of Law in the DN in so far as the Commissioner has considered the issues. Further, we note that the Public Authority were as helpful as they could be in the circumstances. They tried to deal with the appellant's request and in fact did supply him with such information as they could reasonably have done in the circumstances. We do not accept that the Council was not organised. On the contrary their records complied with their needs. This Tribunal make our decision "de Novo" and in that regard find the difficulty is the specific terms of the request. In FOIA the request determines the scope. We find the information requested is partly not held because some is not available from Land Registry, but mostly not held because the request is too specific, e.g. – number of residents/non residents and leaseholders per estate/area and per property type and per number of bedrooms. On the evidence before us, we find that this is not information that the Council is at all likely to, or in fact did, hold. It also, as the papers before us make clear, implies binary divisions where the situation is more complex (e.g. groups of leaseholders buying the freehold; the Council buying back properties that had been sold etc.). We find that the Council is not required to

"create" information in order to meet his request. We find it was not possible for the Council to provide all the information sought, even if s12 had not been engaged.

[43] We set out, again, the Request, which is the subject of the DN and this appeal as the Tribunal, find that it would have been impossible for the Council to provide the requested information in any event.

The request from the Appellant on 15 February 2016 was;

"1. For each council estate (and any areas of council or ex-council housing which are not officially designated as an estate) in RBK, the number of a) resident and b) non resident leaseholders or freeholders (with leaseholders and freeholders shown separately) broken down by property type (flat, maisonette, house) and number of bedrooms,

For example:

Alpha Road Estate 1 – bed flat:

50 resident freeholders

20 non – resident leaseholders

2- bed house;

15 resident freeholders

5 non – resident freeholders

[44] We find that the Appellant's request seeks a composite that the Public Authority did not have. On the evidence before us it seems, inter-alia, that the information the Council supplied to the London Land Commission would not have answered the Appellants specific request either.

[45] While acknowledging the Commissioners reasoning in the DN as correct in so far as it goes, the Tribunal are of the view, as demonstrated above, that the information in the form and to the detail it was requested was not held. Therefore the appeal is dismissed but the impugned Decision Notice substituted accordingly.

Brian Kennedy QC 16 February 2018.

Promulgation date: 19 February 2018