

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 August 2011

Public Authority: Tower Hamlets Homes
Address: Jack Dash House
2 Lawn House Close
Marsh Wall
London
E14 9YQ

Summary

The complainant asked Tower Hamlets Homes (the "public authority") to provide information relating to its management accounts. The public authority provided some information but maintained that further information was either not held or that it would exceed the appropriate limit to deal with the request. During the investigation the public authority sought to aggregate this request with two other requests made by the complainant thereby exempting all three by virtue of section 12 (cost of compliance would exceed the appropriate limit). It also sought to introduce section 44 (prohibitions of disclosure) of the Act. The Commissioner's decision is that the public authority was incorrect to claim that some information was not held. He also finds that it was not able to aggregate the requests and that it could not apply section 12. He further finds that that the public authority was not able to rely on section 44. The public authority's handling of the request also resulted in breaches of certain procedural requirements of the Act as identified in this Notice.

The Commissioner's role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. Tower Hamlets Homes is an Arms Length Management Organisation (ALMO) and a local authority controlled company owned solely by London Borough of Tower Hamlets. As set out in the Commissioner's guidance on publicly owned companies, ALMOs are public authorities for the purposes of the Act under section 6(2)(b).
3. The complainant has advised that he is seeking information in order to ascertain how the public authority calculates its leasehold service charges.
4. The complainant made three requests to the public authority which resulted in complaints to the Commissioner. All three requests were made via the 'Whatdotheyknow' website and can be followed through these links:
 - http://www.whatdotheyknow.com/request/20089_service_charges_costs#incoming-119959
 - http://www.whatdotheyknow.com/request/20089_service_charges_management#incoming-119976
 - http://www.whatdotheyknow.com/request/20089_service_charges_technical#comment-15007

This case relates to the middle request.

5. The complainant has also made reference to a publication provided by Tower Hamlets Homes entitled "Leasehold Focus" dated September 2009. This is available online via the following link:
 - <http://www.towerhamletshomes.org.uk/PDF/12182%20LH%20Focus%20Service%20Charge%20web.pdf>

6. This publication states:

"Every year Tower Hamlets Homes estimates how much the service is going to cost you at the start of the financial year. You pay for services in advance as part of the agreement you have with the Council, your landlord. We will then bill or credit you the difference between that estimated cost and the actual cost of delivering those services before the end of the following September. Information on the actual cost is presented in your service charge certificate."

Your "actual" service charge is your exact share of the costs for services we delivered to you during the period of 1st April 2008 to 31st March 2009".

The request

7. On 27 February 2010 the complainant made the following information request:

"With respect to the 2008/9 Service Charge Actuals, I request:

Comprehensive information from the management accounts about all cost centres and all apportionments which relate to the management fee (administration and housing management charge), housing management staff workload assessments for the latest year available (or 2006/7 at the earliest). At the very least, these should apportion the charges as mentioned on p7 of the "Leaseholder Focus" that arrived with the 2008/9 Service Charge Actual invoice....

Please provide tables, particularly very big ones, in an electronic format that preserves both the machine-readable and human readable information. Tables, for example, could be in XML, CSV, or Open Document spreadsheet formats. This should also take less time for you to prepare: you presumably already have the information on computers".

8. On 26 July 2010 the public authority provided a joint response to all three of the complainant's requests. In respect of this request, it provided a small table which contained total costs for 9 cost centres.
9. On 9 September 2010 the complainant sought an internal review. Within this he stated:

"The answer fails to include:

- * information about the administration costs*
- * information about apportionment between tenant and leaseholder costs, such as how the apportionment was done*
- * cost centres other than staff*

- * *what the cost centres actually mean*
- * *information about any more detailed information you hold but are not giving*
- * *apportionments as specific as the categories of work mentioned on p7 of the aforementioned "Leaseholder Focus"*

To save you some time, I will list the headings in the leasehold

focus:

- * *dealing with enquiries and complaints*
- * *the raising and collection of service charges*
- * *accountancy*
- * *legal services involving policy and insurance*
- * *attending resident meetings*
- * *dealing with nuisance and anti-social behaviour*
- * *dealing with repair queries/chase-ups, supplying information*
- * *enforcement of lease conditions*
- * *inspections*
- * *resident consultation*

It seems reasonable to expect that if you list these to justify the service charge bills, you say how much was spent on each of them".

10. On 12 October 2010 the public authority provided its internal review. It advised the complainant as follows:

"The review has shown that the "Leaseholder Focus" which went out with the 2008/9 service charge actual invoice was an explanation of what made up the services charges. The data was not organised in such a way that one can point to a cost centre which relates to one of those headings. The document was designed to give a general description of the methods of apportionment and sought to explain what the management and administration costs cover.

Whilst Tower Hamlet Homes can provide explanations about how the apportionments were done there are no documents which do this other than the Leaseholder Focus which you already have. Therefore, under the terms of the Freedom of Information Act, all existing information has already been supplied to you. There is

no requirement under the Act to produce further information to answer a query.

You have asked for cost centres other than staff and what the cost centres mean. The data held under these cost centres does not just relate to service charges and was held on excel spreadsheets. It was then extracted to calculate the service charges. Unfortunately the requested material is not held by Tower Hamlet Homes in a format which allows the detail you have requested to be identified without going through numerous spreadsheets, extracting the data and providing descriptive information. This would require in excess of 18 hours work and is why [name removed] supplied you with the summary of the costs. This should have been explained to you at the time you made your request".

The investigation

Scope of the case

11. On 28 November 2010 the complainant contacted the Commissioner to complain about the way all three of his information requests had been handled.
12. On commencing his investigation the Commissioner clarified, in respect of this case, that he wished to have the following points considered.
 - Whether information is held for some parts of the request.
 - Whether compliance would exceed the cost limit for other parts.
 - No breakdown of costs had been provided.
 - More information than has been released must be available within the limit.

Chronology

13. On 12 May 2011 the Commissioner commenced his enquiries with the public authority. As it had sought to rely on the cost limit the Commissioner asked for specific details about how this had been calculated. He also asked for details about how it gathers the financial information which is subsequently

included in the leaseholder's invoice or in the Leasehold Focus publication.

14. On 17 June 2011 an interim response was sent. Within this response the public authority advised:

"The Council should have aggregated these three requests into a single request. Clearly 18 hours effort would not have been sufficient to cover the elements of [the complainant's] request which was to provide every contributing piece of information that made up the service charge bills for every Tower Hamlets Homes leaseholder. Given the established process whereby individuals can query their accounts, it is clear that [the complainant's] request is excessive".

15. In response to this the Commissioner advised that it might be possible to aggregate the requests but that in order to consider this he would require a detailed breakdown to demonstrate how the cost limit would be exceeded.
16. On 22 June 2011 a substantive reply was received. In this the public authority made the following points:

"... It could be viewed that [the complainant] in asking for this information is attempting to circumvent the procedure inherent in the Common and Leasehold Reform Act 2002. We would, therefore, welcome your assessment of the (admittedly late) applicability of Section 44 to this request.

Moreover [sic], given the aggregation of this request, and the fact that to provide the information for all repairs incurred by THH in a prepared format would involve querying some 20,000 records (even on the basis of 1 minute per request) would cost over £8300 based on 333 hours effort (20,000/60) we would like to apply the late application of Section 12, and refuse all 3 requests based on costs".

Analysis

Substantive procedural matters

Section 1 – general right of access

17. Section 1(1) states that:

"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".*

18. In this case, the Commissioner has considered whether the public authority has complied with section 1(1)(a) of the Act in stating (as detailed in paragraph 9 above): *"all existing information has already been supplied to you"*. In order to do this the Commissioner has considered whether any further information is held by the public authority.
19. The Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072)* in which it was stated that *"there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records"*. It was clarified in that case that the test to be applied as to whether or not information was held is not certainty but the balance of probabilities. Therefore, this is the test that the Commissioner will apply in this case.
20. In discussing the application of the balance of probabilities test in the above case, the Tribunal stated that:

"We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed."

21. The Commissioner has therefore taken this into account in determining on the balance of probabilities whether or not the requested information was held.
22. The Commissioner notes that the public authority initially provided some information which it believed to answer the request. At internal review stage it then advised that it was unable to provide any further information based on the wording which the complainant had used, reflecting the contents of the Leaseholder Focus publication. However, the Commissioner here notes that the wording of the request was not limited to the contents of the Leaseholder Focus publication. It sought management account information about 'all cost centres and all apportionments', later saying that at the 'very least' these should apportion the charges in the publication.

Conclusion

23. In coming to a conclusion in this case the Commissioner has taken into account the explanation provided by the public authority as well as the wording of the actual request. Whilst it may well be the case that the titles within Leaseholder Focus are not mirrored within the public authority's cost centre structures the Commissioner does not agree that it holds no further information about its management accounts in respect of management fee charges. He further notes that no additional explanation about this was provided by the public authority, as it changed its position during the investigation and sought to aggregate the three cases.
24. Based on the limited information with which he has been provided the Commissioner does not agree that no further information is held and therefore concludes that the public authority breached section 1 of the Act.

Section 12 – cost of compliance exceeds the appropriate limit

25. For the same reasons given in his Decision Notice FS50369379, the Commissioner has concluded that the public authority's cost estimate and how this was arrived at is not reasonable, realistic or supported by cogent evidence. He has therefore concluded that section 12 of the Act does not apply in this case.

Section 16 – duty to provide advice and assistance

26. Section 16(1) provides an obligation for a public authority to provide advice and assistance to a person making a request, so far as it would be reasonable to do so. Section 16(2) states that a public authority is to be taken to have complied with its section 16 duty in a particular case if it has conformed with the provisions in the section 45 Code of Practice in relation to the provision of advice and assistance in that case.

Information 'not held'

27. The Commissioner considers that the public authority should have explained clearly to the complainant exactly what additional information it holds regarding this element of his request, and what information it felt it could provide, if any, within the cost limit prescribed by the Act. As it failed to do so, the Commissioner finds the public authority in breach of section 16(1) of the Act.

Application of cost limit

28. The public authority's response regarding the costs limit is set out in paragraph 9 above. It does not suggest to the complainant what sort of information it may hold or invite a further line of enquiry. It does not include a breakdown of how the cost limit has been applied. The Commissioner considers the public authority should have explained clearly to the complainant exactly what additional information it holds, if anything, which might assist with this element of his request. As it failed to do so, the Commissioner finds it in breach of section 16(1) of the Act.

Exemptions

Section 44 – prohibitions on disclosure

29. For the same reasons given in his Decision Notice FS50369379, the Commissioner has concluded that this exemption is not engaged.

Procedural requirements

Sections 1(1) and 10(1) - Time for compliance

30. Section 10(1) provides that:

“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.”

31. Section 1(1) provides that:

“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.”*

32. The Commissioner finds that the public authority breached section 10(1) by failing to inform the complainant whether or not it held the requested information within 20 working days of the request. In incorrectly denying that it held information it breached section 1(1)(a).

Section 17 - refusal of request

33. Section 17(1) of the Act provides that:

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,*
- (b) specifies the exemption in question, and*
- (c) states (if that would not otherwise be apparent) why the exemption applies.”*

34. In failing to provide a valid refusal notice within the statutory time limit, the public authority breached section 17(1).

The Decision

35. The Commissioner's decision is that the public authority did not deal with the following elements of the request in accordance with the Act:
- it breached section 1(1)(a) in failing to properly inform the complainant whether it holds information;
 - it breached section 10(1) by failing to inform the complainant whether or not it held the requested information within 20 working days of receiving the request;
 - it breached section 17(1) by failing to provide a valid refusal notice within the statutory time limit;
 - it breached section 16(1) of the Act by failing to provide advice and assistance;
 - it inappropriately relied on section 12 of the Act;
 - it inappropriately relied on section 44 of the Act.

Steps required

36. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act.
- The public authority should reconsider the complainant's request under the Act. It should either release the requested information, or issue a further refusal to the complainant in accordance with section 17 of the Act detailing why this information cannot be released. If appropriate, it should provide advice and assistance to the complainant, as explained in paragraph 27 above.

Failure to comply

37. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

38. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is sent.

Dated the 16th day of August 2011

Signed

**Jon Manners
Group Manager**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal annex

Section 12 - 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.

Section 16 - 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 and 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.

Section 44 – prohibitions on disclosure

- (1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-
- (a) is prohibited by or under any enactment,
 - (b) is incompatible with any Community obligation, or
 - (c) would constitute or be punishable as a contempt of court.