

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

Date: 29 January 2020

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

Decision (including any steps ordered)

1. The complainant has requested information generated by the Westminster Bridge Road Regeneration Project. The public authority relied on regulation 12(4)(b) (manifestly unreasonable) to withhold the information.
2. The Commissioner's decision is that the public authority has failed to demonstrate, to her satisfaction, that the requests are manifestly unreasonable. She therefore finds that the public authority is not entitled to rely on regulation 12(4)(b) to refuse the requests.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the requests, under the EIR, which do not rely on the exception at 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.

Background

5. The Westminster Bridge Road project was a £3.2m regeneration scheme funded by local planning contributions from nearby developments. Its

aims was to refurbish and improve the area of Westminster Bridge Road from Addington Street roundabout to the borough boundary at Morley Street.

Request and response

FER0840425

6. On 18 January 2019, the complainant made to the public authority, the following request for information under the EIR:
 1. Research and Consultation documentation in relation to the proposed landscaping of the forecourt of Lincoln Tower as part of the Westminster Bridge road Regeneration Project.
 2. Any documents/emails/minutes etc. referring to the decision to exclude the forecourt from the scheme.
 3. Preliminary drawings, specifications and any other documents, emails, minutes, photographs etc indicating the proposed landscaping of the forecourt of Lincoln Tower as part of the Westminster Bridge road Regeneration Project.
 4. All communication between Lambeth Council or its agents and (named individuals) Oasis Academy or any associated entity and/or their representatives in relation to the proposed incorporation of the forecourt of Lincoln Tower as part of the Westminster Bridge road Regeneration Project.
 5. All communication between Lambeth Council, Oasis Academy and/or any of their staff, agents, advisers or representatives in relation to the Westminster Bridge Road Regeneration Project.
7. The public authority responded on 15 February 2019 and refused to provide the requested information as it considered that it was a manifestly unreasonable request in accordance with regulation 12(4)(b) EIR. The public authority stated that it considered that the regulation applied due to the amount of time it would take it to collate information to respond to the request and the burden that this would place on it.
8. Following an internal review the public authority wrote to the complainant on 17 April 2019. It stated that it upheld its decision that the request was manifestly unreasonable.

FER0842858

9. On 20 February 2019, the complainant made to the public authority, the following request for information under the EIR:

Any documents/emails/minutes etc referring to the decision to include or exclude the forecourt from the Westminster Bridge Regeneration Project Scheme.

All communication between Lambeth Council, Oasis Academy and/or any of their staff, agents, advisers or representatives in relation to the Westminster Bridge Road Regeneration Project.

10. The public authority responded on 20 February 2019 and refused to provide the requested information as it considered that it was a manifestly unreasonable request in accordance with regulation 12(4)(b) EIR. The reason for its reliance on this regulation was given as above, the burden of compliance with the request.
11. Following an internal review the public authority wrote to the complainant on 9 May 2019. It stated that it upheld its decision that the request was manifestly unreasonable.

Scope of the case

12. The complainant contacted the Commissioner on 1 May 2019 (FER0840425) and 13 May 2019 (FER0842858) to complain about the way the requests for information had been handled.
13. The Commissioner considers that the focus of her investigation is to determine whether the public authority was entitled to rely on regulation 12(4)(b) to refuse the requests for information.

Reasons for decision

14. Information is "environmental" if it meets the definition set out in regulation 2 of the EIR. Environmental information must be considered for disclosure under the terms of the EIR.
15. The Commissioner has published guidance on regulation 2(1). It states that the test that should be applied by public authorities is whether the information is on, or about, something falling within the definitions in regulations 2(1)(a) – (f), and not whether the information directly mentions the environment or any environmental matter.
16. Regulation 2(1) of the EIR defines environmental information as information on:

"(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its

components, including genetically modified organisms, and the interaction among these elements;

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

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

17. The information in this case relates to the proposed development of land which is environmental information and therefore needs to be considered under the EIR.
18. Regulation 12(4)(b) provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.
19. The term "manifestly unreasonable" is not defined in the EIR. However the Commissioner follows the lead of the Upper Tribunal in *Craven v Information Commissioner & DECC* [2012] UKUT 442 (AAC). In this case the Tribunal found that there is, in practice, no difference between a request that is vexatious under the FOIA and one which is manifestly unreasonable under the EIR, save that the public authority must also consider the balance of public interest when refusing a request under the EIR.
20. A differently constituted Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC).¹ It commented that "vexatious" could be defined as the "manifestly unjustified, inappropriate or improper use of a formal procedure". The Upper Tribunal's approach in this case was subsequently upheld in the Court of Appeal. The Dransfield definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.

¹ <https://www.bailii.org/uk/cases/UKUT/AAC/2013/440.html>

21. In order to evaluate the public authority's reliance on regulation 12(4)(b) the Commissioner asked of it² a number of salient questions. These are reproduced at paragraphs 22 to 26 below.
22. "The EIR do not provide a definition of what constitutes an unreasonable cost. This is in contrast to section 12 of the FOIA under which a public authority can refuse to comply with a request if it estimates that the cost of compliance would exceed the 'appropriate limit'. This appropriate limit is defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Regulations) as £600 for central government departments and £450 for all other public authorities.
23. The Regulations allow a public authority to charge the following activities at a flat rate of £25 per hour of staff time:
 - Determining whether the information is held;
 - Locating the information, or a document which may contain the information;
 - Retrieving the information, or a document which may contain the information; and
 - Extracting the information from a document containing it.
24. Although the Regulations are not directly applicable to the EIR, in the Commissioner's view they can provide a useful point of reference when public authorities argue that complying with a request would incur an unreasonable cost and therefore could be refused on the basis of regulation 12(4)(b).
25. Therefore, with reference to the four activities set out above, please provide a detailed estimate of the time/cost that would be taken to provide the information falling within the scope of this request. In any calculations provided, please include a description of the work that would need to be undertaken (e.g. searching X number of files – 1 hour).
26. Please also confirm that the estimate has been based upon the quickest method of gathering the requested information, e.g. where possible databases would be used rather than searching manual files".

Public authority's submissions on the vexatious nature of the request³

² Letter dated 29 October 2019

27. The public authority stated that these requests have been made on behalf of (named individual) who has made a series of complaints about the Westminster Bridge Road Regeneration Project; he asserts that the work has impacted his access to his property. (Named individual) has initiated four judicial reviews at the High Court against the council, all of which have been unsuccessful. As context, the public authority explained that the scheme has been built and benefits the wider community by promoting a much safer junction for motor traffic, pedestrians and cyclists.

28. Burden of request

It considers that these requests ask for a significant amount of information and that it would be necessary to redact personal data from the records once retrieved. It may also be necessary to redact commercially sensitive information.

29. Obsessive nature of the request

It considers that the request attempts to reopen decided issues regarding this case which demonstrates an unwillingness to accept the judicial position.

30. Abusive language/harassment

The public authority stated that the complainant's client/manager was abusive on site with a council officer and a design engineer commissioned by the Council to understand his concerns.

It explained that at various stages since the case began, the complainant and colleagues have telephoned and emailed council officers in order to force officers to disregard and change approved and formally consulted designs. It has had to insist on interaction through solicitors to enable the formal court proceedings to take place without interference.

31. No clear purpose to the request

The public authority stated that the purpose of the request appears to be to reopen closed issues which will not be decided in another way. It does not therefore consider there is a valid purpose to the request. The traffic scheme has now been fully delivered.

³ Public authority to the Commissioner, 26 November 2019

32. As this request relates to environmental information, the public authority also considered the public interest in disclosure/maintaining the exemption.
33. It further stated that despite this agreed process (para 30) the applicant has tried several times to contact officers and other third party professionals commissioned by the Council to elicit responses.

Commissioner's consideration

34. What is laid out above is the totality of the public authority's submissions to the Commissioner setting out its arguments in support of the engagement of the exception. In addition the public authority provided the Commissioner with a copy of some of the correspondence between the parties as supporting evidence.
35. The Commissioner's view is that the said submissions are little more than bare assertions and lack the necessary detail for her to find that the request was manifestly unreasonable. For example, the public authority did not engage with the Commissioner's points on burden as set out in paragraph 25 above. Whilst there have been judicial proceedings between the parties, it is not explained why the outcome of those proceedings preclude the complainant from seeking the requested information. Neither does the fact that a project has been implemented necessarily act as a bar to disclosing information generated by the implementation of that project. Accordingly the said submissions do not persuade the Commissioner that the requests are a "manifestly unjustified, inappropriate or improper use of a formal procedure."⁴
36. Similarly, the evidence provided by the public authority is not persuasive. It consists of primarily of email exchanges between the parties over a limited time period. That time period is in September 2019 and therefore occurs a significant period of time after the origination of the information requests that are the subject matter of this decision notice. As the emails were not in existence at the time of the refusal they could not have been operative factors in that refusal. In any event, the content of the emails are largely concerned with legal proceedings, and while somewhat terse, are unmemorable and of little or no probative value.
37. The Commissioner's position is that it is always the responsibility of the public authority to justify why it wishes to withhold information – and not on the complainant to justify why the information should be

⁴ Supra paragraph 20

provided. In this case the Commissioner considers that she has not been persuaded by the public authority's submissions and evidence that the requests for information were manifestly unreasonable ones.

38. As the exception is not engaged, there is no need for the Commissioner to consider the balance of public interest test.

Other Matters

39. During the course of her investigation the Commissioner did attempt to resolve this matter by way of an agreement between the parties. However, this ultimately proved to be unachievable.

Right of appeal

40. 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

41. 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.
42. 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

Alexander Ganotis
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