

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

Decision notice

Date: 28 January 2014

Public Authority: London Borough of Camden
Address: Judd Street
London
WC1H 9LP

Decision (including any steps ordered)

1. The complainant requested advice and reports associated with a particular property and its perimeter walls. Whilst the London Borough of Camden (the 'Council') disclosed some information in response to the request, it denied holding any further information. During the Commissioner's investigation, the Council revealed that a further document relevant to the request (a 'preliminary schedule of dilapidations') had been identified.
2. The Information Commissioner has concluded that the preliminary schedule of dilapidations is in scope of the request; however, he finds that the Council correctly applied section 42(1) (legal professional privilege) of the FOIA in order to withhold it.
3. He further concludes, on the balance of probabilities that, with the exception of the information which was made available to the complainant, together with the dilapidation schedule, the remainder of the information requested by the complainant was not held by the Council. He also finds that some of the information requested constitutes environmental information and therefore should have been considered under the Environmental Information Regulations 2004 (EIR).
4. The Council also breached regulation 5(2) of the EIR by failing to make available some of the information it held within 20 working days of receipt of the request. The Commissioner does not require the public authority to take any steps.

Background

5. The complainant is not only a lessee of a flat within the named property, but also the freeholder of the entire estate. The Commissioner understands that a church shares an adjoining boundary to the named property, on which there is a wall which is in need of some repair. He further understands that some of the information requested relates to the external part of this wall, whereas some relates to an internal party wall.
6. The Council confirmed that it had commissioned Ellis and Moore, a firm of engineers, to carry out a structural report of the named property. It also confirmed that Landers & Associates (B&D) Design ('Landers') had been commissioned to negotiate a 'schedule of dilapidation' with the complainant in his capacity as freeholder, and to discuss and resolve the party wall issues with the church.
7. In response to the Commissioner's queries, the complainant confirmed that the advice and reports provided by both Landers and Ellis and Moore relate to the same length and area of the wall. He clarified that any Landers advice would be on the party wall legal aspects affecting just his building, whilst the Ellis and Moore report (of which he had been provided with a copy) is an assessment of the structural state of the wall and the action that needs to be taken and by whom. He also forwarded copies of two work orders associated with Landers in support of his view that Landers had indeed provided advice on the party wall.
8. The Council has told the Commissioner that "*the outcome of the Landers [work] orders would have been an agreed Dilapidation Schedule and a Party Wall Agreement (not 'full advice and any reports') and these commissions were not completed due to circumstances outside of Landers' control, therefore we could not locate the information requested*".

Request and response

9. On 16 April 2013 the complainant wrote to the Council and requested information in electronic format in the following terms:

"As a Lessee within [named property] who pays his legally demanded management expense dues, and a fully paid-up Camden council tax payer, who had contributed to the payment of the amounts specified below –

I should be obliged if you would please supply me with the full advice and any Reports relating to the Property or its perimeter walls given by:

- (1) Landers and Associates (B & D) Ltd of Rapier House WC1N 3LJ in all years after 2007 to present and in particular the periods (i) 28 March-10 May 2007 for which they seemingly charged £1155.81 and (ii) 28 February-07 May 2009 and 2000 for which they seemingly charged £1214,31, and*
- (2) Consulting Engineers Messrs. Ellis and Moore of Hill House London N19 5NA in the period 20 June -27 September 2012 for which that Firm charged £375."*

10. The complainant advised that he had informed the Council the words "and 2000" were a deleted typing error and should be ignored under point (1) of the above request.
11. On 13 May 2013 the Council responded. It said that it could not locate the original Ellis and Moore report but had requested a copy from Ellis and Moore, which it would forward onto the complainant. It provided some information in response to the request, namely two work order summaries and an arboricultural impact assessment of the trees adjacent to the named property. The Council confirmed it had applied the exemption for personal information (section 40(2)) to parts of the information provided, specifically, the names and personal details of the contractors and junior Council officers.
12. The complainant requested an internal review on 13 May 2013, which the Council acknowledged receipt of on 23 May 2013. Later that day the complainant submitted some facts pursuant to his internal review. He did not accept that the Council had located all the relevant information. The Council told the complainant it had now secured a further copy of the Ellis and Moore report and was in the process of checking the report for potential redactions before releasing it to him.
13. Following a further delay, the Council provided the complainant with the review outcome on 16 July 2013, which was that it did not hold any further information which the complainant was seeking. It provided no explanation as to why this delay had occurred. The Council did not provide the copy of the Ellis and Moore report until 27 August 2013.

Scope of the case

14. The complainant contacted the Commissioner on 30 July 2013 to complain about the way his request for information had been handled.

15. He confirmed that he did not wish the Commissioner to investigate the Council's application of section 40(2). Instead, the ground for his complaint was that he believed that the Council held the following information within the scope of his request and that this should have been disclosed to him:

"Copies or summaries of the two sets of professional advices from Messrs Landers for which they invoiced my building the amounts that I specified in my original FOI request."

16. It is not in dispute that the requested Ellis and Moore report (on the structure of the wall) has been provided to the complainant, albeit late; this notice considers whether the requested Landers advice and any full reports (on the party wall) were held by the Council and, if so, whether they should have been disclosed.
17. The Commissioner has therefore considered whether, on the balance of probabilities, any further relevant information is held by the Council beyond that originally identified in its response to the complainant's request. For the reasons covered below, the Commissioner believes that some of the information requested fell to be considered under the EIR. The issue as to whether any further information is held is dealt with in the same way under the EIR as under the FOIA.
18. As part of its response to the Commissioner's investigation, the Council confirmed that a *"preliminary view of an acceptable schedule of dilapidations"* had been sent by Landers to a Council surveyor on 26 April 2007. The Commissioner then wrote to the Council asking whether it considered this to be in scope of the request. The Council replied and said that if the report was held to be in scope it would be exempt by virtue of section 42 of FOIA (legal professional privilege) or by regulation 12(5)(b) of the EIR (course of justice). The Commissioner has therefore also considered whether the 'schedule of dilapidations' fell in scope and whether the Council properly applied the above exemption/exception to it.

Reasons for decision

Regulation 2 - Is any of the information environmental?

19. Information is environmental if it meets the definition set out in regulation 2 of the EIR. Regulation 2(1)(a) covers the state of the elements of the environment, including water, soil, land and landscape. Regulation 2(1)(c) provides that information is environmental where it is on:

"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 [2(1)](a) and (b) as well as measures or activities designed to protect those elements"

20. In the Commissioner's view some of the information requested by the complainant constitutes environmental information under regulation 2(1)(c) as it is on an activity, namely reports or advice on the perimeter wall, affecting or likely to affect several of the elements of the environment referred to in 2(1)(a).

21. The Council commented as follows:

"Insofar as the structural state of the perimeter wall may be affected by the atmosphere, water or soil, it may be the case that this aspect of the request falls under the EIR. Under normal circumstances the information would have been considered when collated to finally determine which information access regime applied – but this was not possible as the Council had to first obtain the information from its contractors."

22. The Commissioner has concluded that information relating to the external perimeter wall should have been considered under the EIR; however in his view, party wall information relates to an internal wall which was correctly considered by the Council under FOIA.

23. The remainder of this analysis covers whether the Council held any further information at the time of the request other than that it had previously disclosed to the complainant.

Section 1 / Regulation 5(1) – What recorded information was held?

24. Section 1 of FOIA 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."

25. Regulation 5(1) provides a general right of access to environmental information held by public authorities. Regulation 12(4) states that:

"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that – (a) it does not hold that information when an applicant's request is received."

26. Irrespective of the legislative regime, the task for the Commissioner here is to determine whether, on the balance of probabilities, the Council holds any further information relevant to the request to than it has already identified. Applying the civil test of the balance of probabilities is in line with the approach taken by the Tribunal when it has considered the issue of whether information is held in past cases.

Information disclosed

27. For clarity, the information which the Council had previously disclosed to the complainant consisted of two work orders which it had on record for Landers in relation to the named property, one from March 2007 for the negotiation of a schedule of dilapidation with the complainant in his capacity as freeholder, and the other from March 2009 for interim party wall matters. It had also disclosed details of an arboricultural impact assessment of the trees adjacent to the complainant's property. In addition, the Council had provided a copy of an Ellis and Moore structural report. The latter was not, however, provided until 27 August 2013 because the Council said it could not locate the report and it had been necessary to request a further copy from Ellis and Moore.

Information either not disclosed or not held

28. The complainant had confirmed to the Commissioner that he had not received any copies or summaries of the two sets of professional advices from Messrs Landers *"for which they invoiced my building the amounts that I specified in my original FOI request"*.

Details of the search for the requested information

29. The Commissioner asked the Council to explain the extent of the search undertaken in order to respond to the request. In reply the Council stated that:

"initial searches were made by Leaseholder Services who billed the requester. These searches recovered the works orders that formed the basis for the charge to the requester. The work order numbers were then forwarded to the Housing repairs and improvements Division who would hold 'any full advice and Reports' relevant to the work orders. The Officer who commissioned the Ellis and Moore structural report could not locate the original report – but was able to obtain the 'Arboriculture Impact Assessment' from the contractors".

30. In addition, the Council confirmed that its Housing repairs and improvements Division had searched for any documents but had not been able to locate any "full advice and Reports" relevant to the work orders for Landers.
31. It explained that there is no central repository for this type of report and, for this reason, any such reports would be held by the relevant individual surveyors on their personal drives. The Council stated that key members of staff who might have had copies of any of the report(s) in question were asked to check their personal drives and that no information had been found. It confirmed that it is not aware of any other locations in the Council where this information might be held.
32. The Council also advised that the information, if held, would have been stored electronically as an email, an MS Word document or a pdf. The Commissioner asked the Council what search terms were used; in reply it stated that searches were carried out by property address because this is how such reports are stored.
33. In addition, the Council stated that it had no record of any destruction of any relevant document, and confirmed that its retention policy requires it to retain such documents for six years or until superseded by a new survey.
34. The Commissioner asked whether there is a business purpose for which the requested information should be held. The Council said if the dilapidations schedule had been agreed this would have been held as documentary evidence of work agreed. It also said that if a Party Wall Agreement had been reached this would be held as evidence of notification of work and structure condition pre-work, so that any unintended damage caused by the work could be identified and rectified.
35. By way of additional explanation the Council stated that one of the work orders related to the discussion and resolution of party wall issues with an adjoining property on which a wall in need of repair sits. The Council said that it had not been possible to resolve the party wall issues.
36. In addition, the Council advised that *"it was decided to not pursue this further through Landers (which is why there was [sic] no further fees after the interim fee no.1) and to take this work back in house as their costs would have been prohibitive"*. The Council told the Commissioner that it had recently contacted Landers who had confirmed that no report was produced. It said: *"Clearly Landers were still entitled to be paid for the work they had undertaken from our commissions as, in*

both cases, it was factors outside of their control which stopped this work being brought to a satisfactory conclusion".

37. With regard to the second work order, the Council said that it became apparent that the matter would need to be conducted between the freeholder's legal representative and the Council's legal team, such that Landers did not complete the negotiations having undertaken some initial work for the Council. It said: *"No copy of any output with regard to the above could be found, although all staff who were likely to have copies of any reports were asked to search for such information"*.
38. During the investigation, however, the Council identified what it described as a *"preliminary view of an acceptable schedule of dilapidations"* dated 27 April 2007 from Landers. The Council said that the contents of this document were never used as it was superseded by the negotiations between the two legal teams and that, even if the document were to be in scope of the request, it considered it might be subject to exemptions.
39. The Commissioner understands that a schedule of dilapidation is a property survey carried out by a qualified chartered surveyor to identify the detailed condition of a building, both structurally and cosmetically, at a specific point in time, with the aim of identifying where the condition of the property has fallen below the expected standard as determined by written obligations under a lease, agreement or licence to occupy.
40. Although the Council has claimed that the preliminary schedule is not a 'report or advice', brief research has revealed that such a schedule is typically described as a report. With this in mind, and with the date falling into the specified period, the Commissioner wrote to the Council to ask whether it considered the preliminary schedule to be in scope.
41. In its response the Council referred to the relevant document as a 'report' even though the Commissioner had not used this term himself. It said that the report had been passed to the Council's Civil Litigation team who had advised that the report *"was prepared in contemplation of litigation"*. It said that even if the report fell in scope of the request, it considered it would be exempt from release under section 42 of FOIA, the exemption for legal professional privilege, or regulation 12(5)(b) of the EIR, the exception for course of justice, fair trial, conduct or disciplinary inquiry.
42. Having contacted the Council to clarify whether this preliminary schedule of dilapidation was held at the time of the request, the Commissioner was told that it was.

Was further information held at the time of the request which was not disclosed?

43. The Commissioner has concluded that the preliminary schedule would fall in scope of the complainant's request and should therefore have either been disclosed or withheld applying an appropriate exemption / exception. In failing to identify that information as falling within the scope of the request, the Council breached the requirements of section 1(1)(a) and regulation 5(1). As the Council stated that it considered this report to be covered by FOIA section 42, the Commissioner has gone to consider these provisions below.
44. The Commissioner has concluded, on the balance of probabilities that, aside from the preliminary schedule referred to in the preceding paragraph, the Council did not hold the requested Landers "reports and advice" which the complainant requested and considered to have been omitted from its response. The Commissioner considers the Council's explanation as to why work orders were raised but that advice was not held (as set out in paragraphs 34-38 of this notice), to be reasonable. With the exception of the preliminary schedule, the Commissioner has concluded that the Council, on the balance of probabilities, does not hold any further information.

Section 42 – legal professional privilege

45. Section 42(1) of FOIA provides that information is exempt from disclosure if it attracts legal professional privilege. As a qualified exemption, a public authority must apply the public interest test where the provision is found to be engaged.
46. There are two types of privilege within the concept of legal professional privilege; litigation privilege and advice privilege. Advice privilege covers confidential communications between a client and lawyer, made for the dominant purpose of seeking or giving legal advice. It will apply where litigation is not in progress or being contemplated. Litigation privilege, conversely, applies to communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation.
47. The Council has claimed that the preliminary schedule of dilapidations (or 'survey findings report' as it has referred to in its' response) is covered by section 42 for the following reasons.
 - There is information in the report where a claim for legal professional privilege could be maintained in legal proceedings in respect of legal advice privilege.

- The public interest arguments for releasing this information are that it would improve the transparency of the decision making process.
 - The public interest arguments for withholding the information are that disclosure of the legal advice would have the potential to prejudice the Council's ability to defend or prosecute its legal interests, either directly by unfairly exposing its legal position to challenge, or indirectly, by diminishing the reliance it could place on the advice having been fully considered and presented without risk of disclosure.
 - In addition, the Council received confidential legal advice in relation to this matter. It is in the public interest that the decisions taken by the Council are taken on a fully informed legal context. Such legal advice was of a comprehensive nature and without it the quality of the Council's decision making would have been reduced since it would not have been fully informed of the legal issues and this would be contrary to the public interest.
 - The public interest is in favour of maintaining the exemption and outweighs the public interest in disclosure.
48. The Commissioner asked for further clarification because the withheld information appeared to have been prepared by Landers, a Building and Design company as opposed to a lawyer, although he had noted there was a reference to contact with the Council's Legal Department in the document, and references to a list of documents which the Legal Department had provided to Landers.
49. In response the Council confirmed that its Legal Department were commissioned by the client to carry out this work a part of an ongoing litigation. It said that litigation privilege under section 42 of FOIA still applies as this litigation is an ongoing matter, and that litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. It confirmed that the withheld information was obtained in preparing a case for litigation.
50. The Council referred to the Commissioner's guidance¹ in stating that section 42 covers communications between lawyers and third parties

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/legal_professional_privilege_exemption_s42.pdf

so long as they are made for the purposes of litigation, which it said can apply to a wide variety of information including reports.

51. The Commissioner has considered whether the information falls into one of the following four categories. First, the information was produced by, or directly quotes from, a legal adviser. Second, the information represents communications made for the purposes of obtaining legal advice. Third, the information is information that a lawyer has selected as a supporting document, the release of which would betray the trend of the legal advice given or the trend of litigation arguments. Fourth, the information tells us something about the content or substance of the legal advice received by the Council. Legal professional privilege, be it advice privilege or litigation privilege, will only apply if one of these categories apply.
52. The Commissioner is satisfied that the second, third and fourth categories are relevant in the circumstances. His conclusion is, therefore, that the exemption provided by section 42(1) is engaged. The next step is to go on to consider the balance of the public interest.
53. The Commissioner accepts that there is a public interest in disclosing information which will lead to greater openness and accountability.
54. However in balancing the opposing public interest arguments in this case, the Commissioner recognises that the general public interest inherent in the exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.
55. The Commissioner considers that there is a very strong public interest in public authorities being able to consult with their lawyers, and or third parties in relation to litigation, in confidence and without fear that this information may be disclosed into the public domain.
56. On balance the Commissioner considers that the public interest in disclosure is outweighed by the public interest in favour of maintaining the exemption.

Regulation 5(2) – time for compliance

57. Regulation 5(2) states that: "*Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request*".
58. Insofar as some of the requested information is environmental, the Commissioner finds the Council breached regulation 5(2) EIR in its

delayed handling of this request in that it did not make available all the information it held relevant to the request within 20 working days.

Regulation 11 – representation and reconsideration

59. Insofar as some of the information requested constitutes environmental information, the Council was obliged under regulation 11 of the EIR to carry out an internal review within 40 working days. In this case it took over 43 working days; the Council therefore breached regulation 11 of the EIR.

Other matters

Internal review

60. Insofar as some of the requested information falls under the FOIA, part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 43 working days for an internal review to be completed, despite the publication of his guidance on the matter.

Poor records management

61. The code of practice issued under section 46 of the Act (the 'section 46 code') sets out the practices which public authorities should follow in relation to the creation, keeping, management and destruction of their records.
62. During the course of the Commissioner's investigation the Council confirmed that it had been unable to locate a copy of the Ellis and Moore report, and had failed to identify the Landers preliminary schedule of dilapidations as falling in scope of the request. The Council also failed to demonstrate that the Ellis and Moore document had been destroyed in accordance with a disposal schedule. The Commissioner expects that, in future, the authority will ensure that its records are retained in accordance with its own records management policy and that it will have

due regard for the recommendations of the section 46 code. The section 46 code is published online at this address:

<http://www.justice.gov.uk/guidance/docs/foi-section-46-code-of-practice.pdf>

Right of appeal

63. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

64. 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.
65. 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

Jon Manners
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