

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

Decision notice

Date: 1 December 2015

Public Authority: Westminster City Council
Address: Westminster City Hall
64 Victoria Street
London
SW1E 6QP

Decision (including any steps ordered)

1. The complainant has requested the details of all cases over the last 10 years where the council has exercised its powers of appropriation under section 122 of the Local Government Act 1972 for planning purposes. The council responded to this request citing regulation 12(4)(b) of the EIR. It stated that compliance would be manifestly unreasonable on the basis of cost.
2. The Commissioner's decision is that the request as a whole is manifestly unreasonable based on cost and so regulation 12(4)(b) of the EIR is engaged. In terms of the public interest test, the Commissioner has decided that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exception.
3. During the Commissioner's investigation, the council was asked to carry out various searches. Whilst doing so, three relevant cases came to light. The council decided to disclose the requested information for these cases to the complainant but withheld certain sections of the reports in question under regulation 12(5)(b) of the EIR.
4. The Commissioner has reviewed the application of regulation 12(5)(b) of the EIR to the redacted sections of the reports the council identified. He has concluded that regulation 12(5)(b) of the EIR does apply and that

the public interest in favour of disclosure is outweighed by the public interest in maintaining the exception.

5. The Commissioner therefore does not require any further action to be taken in this case.

Request and response

6. On 25 July 2014, the complainant wrote to the council and requested information in the following terms:

"1. In the last 10 years, how many times has land in which Westminster City Council holds an interest (freehold or leasehold) been appropriated for planning purposes?

2. How many of the sites referred to in question 1 were intended or likely, at the time of appropriation, to be sold (or an interest in that site sold) by Westminster City Council subsequently for financial consideration?

3. In the last 10 years, how many times have Westminster City Council been asked by a third party to appropriate a site for planning purposes or to acquire an interest in a site for planning purposes in order that a third party can take benefit of section 237 of the Town and Country Planning Act 1990?

4. Of those sites referred to in question 3, how many times have Westminster City Council agreed to so acquire or appropriate?

5. Where Westminster have not agreed to do so, was the refusal by officers or by committee?

6. Please provide copies of the relevant delegated reports or committee reports."

7. The council responded on 21 August 2014. It stated that it was unable to comply with the request, as to do so would exceed the appropriate limit prescribed by section 12(1) of the FOIA. It estimated that it would take the council 67 hours at a cost of £1675.00 to comply with the request.
8. The complainant requested an internal review on 2 October 2014. She requested that the council review its cost calculation, reconsider her request under the EIR and allow her to pay the fees. The complainant also stated that she was unhappy that the council had not provided advice and assistance and asked her to reframe her request.

9. The council carried out an internal review on 29 December 2014. It stated that it had reconsidered her request under the EIR and was of the view that the request was manifestly unreasonable. It informed the complainant that it now wished to rely on regulation 12(4)(b) of the EIR, as it still estimated that it would take the council a total of 67 hours to comply with the request. The council advised the complainant that it would not accept a payment of the fees in this case, as it had refused to comply with the request under the EIR and felt that it was not reasonably possible to provide advice and assistance due to nature of the request and the time that would be involved if it did comply.
10. The complainant made a fresh request on 9 March 2015 with a view to narrowing the scope of it to enable the council to comply without the need for it to rely on regulation 12(4)(b) of the EIR.

Scope of the case

11. The complainant contacted the Commissioner 10 March 2015 to complain about the way her request for information dated 25 July 2014 had been handled. She stated that she does not agree that the request is manifestly unreasonable and that the council could comply under the EIR.
12. Throughout the Commissioner's investigation the council has maintained its position that the request as a whole is manifestly unreasonable based on cost. This notice will outline the Commissioner's decision on the application of regulation 12(4)(b) of the EIR.
13. Although the council maintains that regulation 12(4)(b) of the EIR applies as a whole, during its enquiries it identified three cases where the powers of appropriation had been used. These being:
 - 1) Council House.
 - 2) Chiltern Street Car Park.
 - 3) VTI.

The council disclosed the requested information for these cases to the complainant with the exception of several paragraphs throughout the documents, which have been withheld under regulation 12(5)(b) of the EIR.

14. In addition to considering the application of regulation 12(4)(b) of the EIR to the request as a whole, the Commissioner will also consider the application of regulation 12(5)(b) of the EIR to the remaining elements

of the documents disclosed in connection with the three cases it identified, as outlined in paragraph 13 above.

15. It is noted that the complainant submitted a reframed request to the council on 5 March 2015. This reframed request is not subject to this investigation or indeed this notice. At the time the complainant approached the Commissioner in March 2015 to complain about the council's handling of her initial information request, the internal review process had not been completed. The complainant was advised that the reframed request would have to be investigated separately once the internal review process had been carried out.

Reasons for decision

Is the requested information environmental information?

16. The Commissioner considers information is environmental information for the purposes of the EIR if it falls within the definition as set out in regulation 2(1)(a) to 2(1)(f) of the EIR.
17. In this case the Commissioner notes that the request relates to the council's powers of appropriation and the exercise of these powers for planning purposes. The Commissioner considers the exercise of such powers for planning purposes is an activity as defined by regulation 2(1)(c) of the EIR which will or will be likely to affect the elements of the environment as outlined in regulation 2(1)(a). The requested information is therefore environmental information and the complainant's request should have been considered under the EIR from the outset.

Regulation 12(4)(b) of the EIR – manifestly unreasonable

18. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose environmental information if the request is 'manifestly unreasonable'. There is no definition of manifestly unreasonable under the EIR, but the Commissioner's view is that 'manifestly' implies that a request should be obviously or clearly unreasonable.
19. This exception is also subject to the public interest test. So in addition to demonstrating that the request is manifestly unreasonable, the council must demonstrate that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exception.
20. A request can be manifestly unreasonable for two reasons; firstly, if it is vexatious and secondly where it would incur unreasonable costs for a public authority or an unreasonable diversion of resources to provide the

information. This is not a charge to the requestor, but a consideration of the cost to the authority in searching for and providing the information.

21. In this case, the council has said that identifying the relevant information would incur a level of costs, in terms of being a disproportionate diversion of its resources, to the extent that responding to the request would be manifestly unreasonable.
22. The EIR does not provide a definition of what constitutes an unreasonable cost. This is in contrast to section 12 of the FOIA, which was initially applied by the council. Under section 12 of the FOIA a public authority can refuse to comply with a request if it estimates that the costs of compliance would exceed the 'appropriate limit'. This limit is defined in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Regulations) as £600.00 for central government and £450.00 for all other public authorities, such as the council in this case.
23. The Act allows a public authority to consider the above amount by charging for the following activities at a flat rate of £25.00 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 Act is not directly analogous to the EIR, in the Commissioner's view it can provide a useful starting point for public authorities wishing to argue that complying with a particular request would cause a disproportionate diversion of its resources and is therefore subject to regulation 12(4)(b) of the EIR.

Is this request manifestly unreasonable?

25. The Commissioner has made detailed enquiries to the council in respect of its application of this exception.
26. The council stated that it has estimated that it would take 67 hours of staff time in order to determine what information it holds falling within the scope of the request, retrieving the information and then extracting it from other information not within scope in order to provide it to the complainant. And, it has stressed to the Commissioner that this is a

conservative estimate on the basis that its compliance would in reality involve a full review of the council's records.

27. The council explained that there is no central location for this information so the process would involve a number of initial sifts of council records (all emails, files and archives) across many departments within the council in order to try and locate the relevant files and records required in order to determine what information it holds. It confirmed that this would entail assessing every file or email to determine whether the specific issue of appropriation arises in each case. It further explained that the entire file would have to be interrogated as material relating to appropriation is not listed in the file name or table of contents or necessarily any other opening details which could be used to pinpoint the information.
28. Locating the requested information would require a global search across many departments such as Planning, Legal Services, Housing, the council's ALMO/City West Homes Ltd, Democratic/Election services, Corporate Property and Finance. Although the complainant's request is limited to the use of such powers for planning purposes only, it would be necessary to search all departments due to the manner in which such cases have been handled in the past and records retained. The council explained that not all powers of appropriation for planning purposes have gone through the Planning Department so it cannot simply conduct a search of this department alone. The council can appropriate from a number of other uses to planning purposes, for example, housing, education, leisure and adult and children services and the Planning Department would not necessarily be involved. These departments could hold the requested information independently of the Planning Department thereby necessitating a search of these departments too and council wide.
28. The council also confirmed that not all decisions have involved the Legal Department so it would not be sufficient to simply review the Legal Department's records alone in order to comply with the complainant's request. The Legal Department has only more recently been involved as a matter of course in such decisions.
29. The council advised that the decision to exercise the powers to appropriate under section 122 of the Local Government Act 1972 would be authorised either by cabinet member resolution or under delegated authority. In either case the resolution or exercise of delegated powers could relate to various matters and not just to the powers of appropriation, which would not be evident from the title of the document. Where a cabinet member resolution is made the decision is issued and recorded in a central hard copy record of all cabinet decisions. It would be necessary to physically review all hard copy

decisions over the last 10 years by hand to check whether they relate to appropriation. Over the last 10 years this runs into several thousand decisions which itself would exceed the appropriate limit prescribed by the FOIA.

30. As stated above decisions can be made by delegated authority and the council confirmed that there is no central record of such decisions. It would therefore be necessary for the relevant departments to each review the decisions made by officers over the last 10 years to ascertain whether such powers have been exercised. It also explained that schemes of delegation have changed over the years and the council does not have an electronic or hard copy of all previous delegations and where these are held.
31. Added to this, the council explained that it has been through a number of restructures over the last 10 years and various changes in staff. There is no statutory requirement to record the requested information in the manner the complainant has described or indeed in a manner which would enable the requested information to be located and extracted easily. The records are generally in an unstructured format and are not referenced in a way that would make identification of relevant information from non-relevant information an easy task. It also confirmed that the departments that would need to be searched label and categorise records differently depending upon the transaction and individual departmental recording style.
32. The Commissioner accepts that due to the manner in which such cases are and have been recorded in the past compliance with the complainant's request would require a global search of several departments in the council. The council has explained that there is no statutory requirement for it to record the requested information in the manner the complainant has described or in a manner which would enable the council to comply. All records within a number of departments would have to be individually reviewed over a period of 10 years, as there is not one specific department within the council itself that would hold the requested information alone. Added to this, is the manner in which the records themselves are held. The council has explained that relevant records will be held in an unstructured format meaning that each individual record or file would have to be interrogated to establish whether it relates to the powers of appropriation or not. The records and relevant files are not structured in such a way so that identification would be relatively straightforward. Whether the council has exercised these powers or not would not be evident from the contents page for example and documents have not been named in such a way that identification would be easy from the title or description of documents.

33. The Commissioner asked the council to consider different ways of potentially complying with this request. For example, the Commissioner asked whether it would be possible to search one department only for the requested information on the basis that, maybe, the Planning Department or the council's Legal Department would always be involved in the cases the complainant is interested in. As stated above, the council has confirmed that the powers of appropriation for planning purposes would not always have involved the Planning Department, as the powers of appropriation can be used for many different contexts and it is the case that other departments (for example leisure, housing, adult and children services) will hold at least some of the requested information.
34. The Commissioner also asked whether it was possible to comply with this request from a review of all cabinet decisions and delegated authority decisions. Again, as explained above, the council confirmed that it would be manifestly unreasonable in terms of cost to comply with the request from these sources alone. It explained that over a period of 10 years thousands of cabinet decisions would have to be individually reviewed to see whether they are relevant to this request or not. The cabinet decisions would again not be referenced in such a way that it would be easy for those relating to the powers of appropriation to be extracted from those that are not. It considered the review of cabinet decisions alone would be manifestly unreasonable without taking into account the task of reviewing all delegated authority decisions over the same period.
35. The council explained that there is no central location for delegated authority decisions and again a global search of several departments would have to take place in order to identify those relevant decisions from those that are not.
36. The Commissioner considers compliance with this request would be a large and consuming task in light of how the council has described how the requested information is held. He has been informed that 10 years of records across a number of departments would have to be reviewed in order to extract the requested information. The Commissioner considers this would take the council at least the 67 hours it originally estimated if not more.
37. The Commissioner is satisfied that all possible avenues have been explored thoroughly and that compliance with this request would place a significant burden on the council in terms of time and cost such that he is satisfied that regulation 12(4)(b) of the EIR applies.

Public interest test

38. The council advised that it considered the arguments for and against disclosure but reached the view that the public interest is best served maintaining this exception. It felt that compliance would not constitute a reasonable use of public funds as the resources that would be required to fulfil the request go way beyond the statutory limits prescribed by the FOIA. Compliance would involve a disproportionate amount of time and resources over and above what can be fairly considered to be reasonable and would represent a considerable burden to the council in terms of time and cost.
39. The council reiterated that the request itself is generic in nature, in that it does not request the information for specific cases, locations, properties or developers. Compliance would therefore mean that the council would have to search thousands of records both electronic and hard copy using the term 'appropriation' to see what records if any it holds. As explained above, the manner in which this information is recorded is unstructured and it would not be possible to identify relevant cases from non-relevant cases from, for example, the contents page or table of contents.
40. Although the council estimated that it would take 67 hours to comply, the reality is that it is uncertain exactly how long it would take and it is likely that this is a conservative estimate considering the size of the task involved. The council decided that the usefulness of this information was limited in terms of the wider public and therefore compliance would represent a poor use of already strained public resources.
41. The Commissioner is of the view that there is a public interest in the disclosure of this information. It would aid transparency and accountability and enable members of the public to scrutinise more closely cases where the council has exercised its powers of appropriation for planning purposes. However, such factors must be weighed up against the public interest in maintaining the exception and the need to protect the use of already strained public resources in this context.
42. While the Commissioner accepts that the request does have serious purpose and value, it is apparent that compliance would constitute a large and consuming task for the council due to the manner in which the requested information has and continues to be recorded and held. The Commissioner has accepted that a global search of many departments over a 10 year period would be required, as there is no central location for the requested information. There is also not one department that could reliably be searched for the requested information alone. The Commissioner considers the council's estimation of time appears realistic

in the circumstances and considering the size of the potential task involved to be fairly conservative.

43. Complying with one request which would take in excess of 67 hours would place a significant burden on the council's resources and time and would result in a significant diversion of efforts away from the roles and functions it must perform as a public authority. The Commissioner agrees in this case that such consequences are not in the interests of the wider public and so the public interest rests in maintaining the exception.

Regulation 12(5)(b) of the EIR – the course of justice

44. Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
45. For the Commissioner to agree that this exception applies a public authority must demonstrate that the remaining withheld information relates to one or more of the factors described in the exception and that disclosure would adversely affect the factor or factors cited. The exception is also subject to the public interest test. Taking into account regulation 12(2) of the EIR which stipulates that a presumption in favour of disclosure must be taken, a public authority must demonstrate that the public interest in favour of disclosure is outweighed by the public interest in maintaining this exception.
46. In this case the council has argued that disclosure of the remaining withheld information would adversely affect the course of justice. This is because the council considers the remaining withheld information constitutes legal advice and is therefore subject to legal professional privilege (LLP).
47. The Commissioner considers regulation 12(5)(b) of the EIR is similar to section 42 of the FOIA in that the 'course of justice' incorporates information subject to legal professional privilege. However, under the EIR the threshold for non-disclosure is higher. It is not sufficient to demonstrate that disclosure 'would be likely' to adversely affect the course of justice. Under the EIR, a public authority must demonstrate that disclosure 'would' adversely affect the course of justice.
48. There are two types of LLP; litigation privilege and advice privilege. In this case the council has confirmed that the remaining withheld information constitutes advice privilege. Advice privilege covers

confidential communications between client and lawyer made for the dominant purpose of seeking or provision of legal advice.

49. The council explained the remaining withheld information discusses and quotes legal advice it has received on the cases in question. The Commissioner has reviewed the redacted sections of the reports disclosed and he is satisfied that these constitute legal advice. They quite clearly refer and document the legal advice the council has obtained in relation to each case.
50. As he is satisfied that the remaining withheld information constitutes legal advice and is therefore subject to LPP, the Commissioner now needs to go on to consider whether disclosure would have an adverse effect on the course of justice.
51. 'Adversely affect' means that there must be an identifiable harm to the course of justice and the probability of this harm occurring is more likely than not. It may be the case that disclosure will have an adverse effect on the course of justice simply through the weakening of the vital concept of LPP. However, the Upper Tribunal in *GW v Information Commissioner & Local Government Ombudsman & Sandwell MBC* [2014] UKUT 0130 (AAC) urged that this should not be an automatic assumption and each case should be judged on its own merits. At paragraph 43 it stated that deciding whether disclosure would have an adverse effect or not:

"...requires attention to be focused on all the circumstances of the particular case, and there is no room for an absolute rule that disclosure of legal privilege information will necessarily affect the course of justice."
52. The council confirmed that it considered disclosure would adversely affect its ability to speak free and frankly with its legal advisers to obtain appropriate legal advice in future cases and this ability is deemed a fundamental requirement of the English legal system. It stated that the concept of LPP and the need for confidentiality ensures complete fairness in legal proceedings. If disclosure of legal advice were ordered in this case it would adversely affect the overall concept of LPP and the ability to conduct legal proceedings on a fair and unbiased basis.
53. The Commissioner is satisfied in this case that there is a real potential that disclosure would result in the council being discouraged from seeking legal advice, particularly in the context of contentious planning matters such as compulsory purchase orders and the council's powers to appropriate under section 122 of the Local Government Act 1972. If the council felt reluctant to seek such advice on such contentious issues due to the real risk of disclosure, this would adversely affect its ability to

carry out its public functions. The council should be able to obtain free and frank advice on issues such as this. A real risk of public disclosure would adversely affect the quality of legal advice in the future; it would be less free and frank and tailored as such to reflect the possibility that it could be disclosed to a wider audience.

54. For the above reasons the Commissioner agrees in this case that disclosure of the remaining withheld information would adversely affect the course of justice. He therefore now needs to go on to consider the public interest test.
55. The council argued that it has given due consideration to the arguments for and against disclosure. It stated, in this instance, it received legal advice in relation to the three identified cases and this advice informed its decision making process on the matters that fall within the scope of the complainant's request. The Council asserted that there is a strong public interest in maintaining LPP in order to ensure it is able to speak freely and frankly with its legal adviser to obtain appropriate legal advice. The council argued that LPP is a fundamental requirement of the English legal system and the public interest rests in maintaining the integrity of this concept.
56. The Commissioner considers that there are clear and compelling arguments in favour of disclosure in this case. Disclosure of the requested information would aid transparency and accountability. It would also enable members of the public to consider more closely how the powers of appropriation are exercised by the council and to what degree decisions made by the council are supported by legal advice. Disclosure of the legal advice obtained for these cases would also reveal the potential advantages and disadvantages of elements of each case and this would aid public debate.
57. However, in this case, the Commissioner is satisfied that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exception. In this case it is noted that the council has taken a positive approach to public disclosure and has released all elements of the reports in question, with the exception of those elements it considers constitutes legal advice. The council has therefore taken a proactive approach in this case to transparency and accountability.
58. Although each case is judged on its own merits, it remains the case that there are strong and compelling arguments in favour of protecting the concept of legal professional privilege and even more so in cases of this nature which involve contentious planning decisions. There is a strong public interest in protecting the council's ability to seek independent legal advice, which is of a free and frank nature. The Commissioner

considers legal advice needs to be free and frank to ensure that all possible advantages and disadvantages to a situation are explored thoroughly, as this generally results in better decision making. Hindering the council's ability to secure such candid legal advice would adversely affect its ability to make well debated decisions and this is not in the interests of the public as a whole. Rather, it is in the interests of the public for the council to carry out its public functions as effectively and concisely as it can.

Right of appeal

59. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

60. 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.
61. 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

Mrs Samantha Coward

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SK9 5AF