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

Decision notice

Date: 9 October 2017

Public Authority: London Borough of Lambeth Council

Address: Southwyck House
Moorland Road
Brixton
London
SW9 8UR

Decision (including any steps ordered)

1. The complainant submitted a request to the public authority for a copy of the most recent version of its Housing Revenue Account business plan. The plan was withheld by the public authority in reliance on the exceptions at regulations 12(4)(d) and 12(4)(e) of the EIR.
2. The Commissioner's decision is that the public authority was not entitled to rely on either exception.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with a copy of the Housing Revenue Account business plan described as "the disputed information" in the body of this notice.
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.

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Request and response

5. On 11 January 2017 the complainant submitted a request for information to the public authority in the following terms:

"Please provide the updated full 30 year HRA [Housing Revenue Account] business plan that reflects the latest HRA budget presented to cabinet on 16 Jan 2017"
6. The provided its response on 7 February 2017. It confirmed that it held the information requested. However, it concluded that the information held was exempt from disclosure on the basis of section 21 FOIA (information accessible by other means). It advised the complainant that "the information you requested" was available at section 9 of the public authority's published financial guide:
<https://www.lambeth.gov.uk/elections-and-council/finance-and-payments/financial-information-guide>
7. The complainant requested an internal review of the public authority's decision on the same day (7 February). She thanked the officer who provided the response on behalf of the authority for bringing "to my attention [that] the update summary/dashboard of the 30 year HRA business is now online." She however added; "this is NOT the full 30 year HRA business plan. Please provide as originally requested, the full 30 year HRA business plan."
8. The public authority wrote to the complainant with details of the outcome of its internal review on 7 March 2017. It advised her as follows: "Lambeth Council has now reviewed our original response and can confirm that we have published all information from the plan which we consider appropriate to publish. The relevant web-link can be seen as follows: - https://www.lambeth.gov.uk/sites/default/files/ec-hra-business-plan_0.xlsx "
9. The public authority added, "Further information relating to the HRA business plan or underlying the HRA business plan is considered commercially sensitive. We therefore engage section 43 of the FOIA."

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Scope of the case

10. The complainant contacted the Commissioner on 7 March 2017 to complain about the public authority's handling of his request, specifically the decision to withhold the "updated full 30 year HRA business plan that reflects the latest HRA budget presented to cabinet on 16 Jan 2017" requested by her on 11 January 2017. The Commissioner has referred to the complainant's submissions at the relevant parts of her analysis below.
11. At this stage it is useful to first set out the background to the eventual scope of the Commissioner's investigation in this case.
12. During the course of the Commissioner's investigation, the public authority advised the Commissioner on 21 July 2017 that it had withdrawn its reliance on section 43(2) FOIA and was instead relying on the exception at regulation 12(4)(b) EIR (request is manifestly unreasonable). On 1 August 2017, at the Commissioner's request, the authority explained the rationale for its view that the information in scope constitutes "environmental information" within the meaning of the EIR, and also wrote to the complainant advising her of its revised position that regulation 12(4)(b) applied.
13. On 31 August 2017 the Commissioner advised the public authority that she would not uphold its application of regulation 12(4)(b) because she did not accept that complying with the request would impose a disproportionate burden on the authority.
14. On 7 September 2017 the public authority withdrew its reliance on regulation 12(4)(b) and sought to rely instead on the exceptions at regulations 12(4)(d) and 12(4)(e) EIR. It advised the complainant accordingly in writing on 5 October 2017.
15. The public authority's submissions in support of its reliance on regulations 12(4)(d) and 12(4)(e) were supplied to the Commissioner earlier on 21 September 2017.
16. In view of the above, the scope of the investigation was to determine whether the public authority was entitled to withhold the information requested by the complainant on 11 January 2017 on the basis of the exceptions at regulations 12(4)(d) and 12(4)(e).

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Reasons for decision

The disputed information

17. The disputed information is an interactive spreadsheet which, according to the public authority, is used by Housing and Finance officers to test scenarios and assumptions for financial planning purposes. It is a snapshot in time of the position of the HRA which is used to set the annual budget. It sets out the HRA expenditure on management and maintenance as well as capital expenditure over a rolling 30 year period.

Is the disputed information environmental information?

18. Environmental information is described in regulations 2(1) (a) – (f) EIR.¹
19. The public authority explained that the disputed information relates to financial decisions regarding homes within Lambeth including plans for new homes/regeneration and maintenance of existing properties. It submitted that “these economic analysis” fall within regulation 2(1)(e) and (c).
20. The Commissioner accepts that the assumptions and other financial analysis contained in the spreadsheet relate to measures and activities (ie plans for new homes, regeneration, maintenance of properties etc) likely to affect the state of the elements and factors in regulations 2(1)(a) and (b). She is therefore prepared to accept that the disputed information constitutes environmental information within the meaning in regulation 2(1)(e) EIR.

Application of exceptions

Public authority's submissions

Regulation 12(4)(d)

21. Regulation 12(4)(d) states:

“...a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data...”

¹ <http://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made>

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Public authority's position

22. The public authority stated that it considers the disputed information an "unfinished document" and provided the following submissions in support of this view:

"The HRA business plan is in a constant state of draft and revision dependent on new information received and our housing officers altering or reconsidering the financial information held. The plan includes expected expenditure for various contractual matters and changes within the budgetary process. We consider it could be harmful to disclose information as to do so may undermine ongoing negotiations with contractors as the plan demonstrates our financial considerations for each project.

We also note that there is significant public interest in the Council's housing strategy and consider that disclosure may cause some concern or anxiety to residents which may be misplaced as the spreadsheet does not represent a finalised position. We would not wish to disclose information which may easily be misunderstood or misinterpreted as this could result in further requests for clarity which would add to the Council's workload on these projects and cause further distress to residents."

Regulation 12(4)(e)

23. Regulation 12(4)(e) states:

"...a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications."

Public authority's position

24. The public authority provided the following submissions in support of its reliance on this exception:

"We consider that the HRA business plan is a "communication" as it is intended to be read/used by relevant officers.

We consider it could be harmful to disclose the information as to do so may undermine ongoing discussions and prevent the Council from being able to make various financial decisions in a safe space. Much of the same harm in disclosure as outlined above is still relevant here.

Public Interest in Disclosure

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We note Regulation 12(2) EIR has a presumption of disclosure. We also consider that disclosure would increase the public's understanding of housing issues and we note the general benefit in transparency where possible.

Public Interest in maintaining the exception

It is important that we protect our ongoing decision-making processes and premature disclosure may undermine the ongoing decisions we are making about regeneration and housing across the borough.

It is in the public interest that the Council can make effective decisions and we consider that disclosure may undermine our ability to do so in this instance. Disclosure of this spreadsheet would be misleading and may cause unnecessary concern to residents.

We also consider that there is a considerable amount of information about the regeneration and housing processes via our website which is sufficient to meet the public interest in disclosure.

We also disclose a version of this information online which should increase public understanding of the issues: -

<https://www.lambeth.gov.uk/elections-and-council/finance-and-payments/financial-information-guide> "

Complainant's submissions

25. The complainant advised the Commissioner that she had received a copy of "the full 30 year HRA business plan" following a request she submitted to the public authority in 2014.²
26. She further advised that in 2016 following a request to the public authority for an updated version of the plan³ she eventually received "the full HRA business plan" through the High Court judicial review proceedings. However, she acknowledged that "it was the full excel version...minus the formulas, ie cells copied and pasted."
27. She argued that releasing the disputed information "is of critical public interest, because in the 2016 version and to the High Court (Plant vs Lambeth, Nov 2016) [the public authority] was claiming that the

² https://www.whatdotheyknow.com/request/housing_revenue_account_5

³ https://www.whatdotheyknow.com/request/hra_business_plan

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Housing Revenue Account would be bankrupt by 2019/20 (a radical departure from the numbers presented a year before). However, just in a couple of months the numbers are radically different. It is only with the full model to be able to see all elements and assumptions can we see whether possibly either the council misled the High Court in 2016 or has manipulated the numbers this year to meet legal/audit requirements. The summary dashboard is insufficient as it is missing many elements. There is nothing commercially sensitive in the model (as can be seen from the 2014 version), as the numbers are so aggregate, ie it is a very high level budget."

The Commissioner's position

Regulation 12(4)(d)

28. As mentioned, the public authority is of the view that the disputed information is an unfinished document and therefore exempt from disclosure on the basis of regulation 12(4)(d).
29. The Commissioner considers that a document may be unfinished if a public authority is still working on it at the time of the request or because work on it ceased before it was finalised and there is no intention of finalising it. A draft document would also engage the exception because it is by its nature an unfinished document. A draft version of a document remains an unfinished document even if the final version of the document has been published.
30. The Commissioner does not accept that the disputed information was in a draft form at the time of the request. She understands that a summary of the version of the HRA plan requested by the complainant was published in advance of the Cabinet meeting scheduled for 16 January 2017 at which the HRA budget was presented to Cabinet. In the Commissioner's view, this version of the plan was not a draft given that it was going to inform budgetary decisions for the year.
31. Furthermore, the fact that the HRA plan is subject to future revisions does not undermine the view that the data in the version requested by the complainant was being relied on by the public authority to make budgetary decisions. Therefore, in the Commissioner's opinion, it cannot be considered unfinished (or incomplete) simply on the basis that it may be modified or amended in future. Where data is collected on a regular basis, it is not incomplete simply because the data collection is ongoing.
32. The Commissioner has therefore concluded that the public authority was not entitled to rely on this exception.

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Regulation 12(4)(e)

33. Regulation 21(4)(e) is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. The underlying rationale behind the exception is that public authorities should have the necessary space to think in private.
34. For the purposes of the exception, an internal communication is one that stays within one public authority. Once a communication has been sent to someone outside the authority, it will generally no longer be internal.⁴ The Commissioner considers that internal communications will include any information someone intends to communicate to others, or even places on file where others may consult it.
35. The Commissioner therefore finds that the disputed information constitutes an internal communication for the purposes of regulation 12(4)(e) and consequently that the public authority was entitled to engage the exception.

Public interest test

36. In common with all EIR exceptions, the exception at regulation 12(4)(e) is subject to the public interest test set out in regulation 12(1)(b) EIR. Therefore, the Commissioner has considered whether in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the disputed information.
37. The Commissioner has noted a number of pertinent factors below.
38. The public authority stated on a couple of occasions during the course of the investigation that the HRA plan was "inadvertently" disclosed to the complainant in 2014. However, despite being asked a number of times by the Commissioner, the public authority did not explain why it held this view in light of the fact that the disclosure was made pursuant to a request under the FOIA. The authority initially disclosed a summary of the version of the plan (similar to the disclosure in this case) following that request. However, the complainant requested an internal review of that decision and the full HRA plan was subsequently released on 2 December 2014.

⁴ However, communications between central government departments are expressly included as internal communications by virtue of regulation 12(8).

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39. Furthermore, the public authority did not specifically address the complainant's contention that there is a strong public interest in disclosure so that residents can have an informed view as to why the numbers from the 2016 plan are radically different from the most recent version of the plan.
40. In terms of the disclosure in 2016, the complainant explained that she had sought the HRA plan under the FOIA and also via judicial review with both processes running parallel to each other. However, once the High Court had ordered disclosure of the plan, she no longer found it necessary to pursue disclosure under the FOIA.
41. Finally, although a wide range of internal information will be caught by the exception, public interest arguments should be focussed on the protection of internal deliberation and decision making processes. This reflects the underlying rationale for the exception: that it protects a public authority's need for a 'private thinking space.'
42. The public authority has argued that there is a public interest in maintaining a safe space for ongoing decision-making processes and that premature disclosure may undermine the ongoing decisions it is making in relation to regeneration and housing across the borough. The Commissioner considers that the need for a safe space will be strongest when an issue is still live. Once a public authority has made a decision, a safe space for deliberation will no longer be required and the argument will carry little weight. The timing of the request will therefore be an important factor.
43. Taken in conjunction with its submissions in relation to the application of regulation 12(4)(d), it would appear the public authority is advocating that a continuous safe space is required in order for it to make decisions in relation to housing. In other words, that disclosure of a full version of the plan at any time would be premature in view of the ongoing need to refer to the plan for the purposes of taking decisions in relation to regeneration and housing. The Commissioner disagrees. She considers that once a decision has been made regarding the issue in question, maintaining a safe space becomes less necessary. In the context of this case, the Commissioner considers that the public interest in maintaining a safe space for deliberations was less strong once the decision had been taken to present the HRA budget to Cabinet using data from the disputed information.
44. The Commissioner does not accept the view that the public interest in withholding the disputed information is greater on the basis that it could be easily misunderstood and cause distress to residents. The public authority is able to provide an adequate explanation along with the

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disputed information should it consider this to be necessary. It is not in the public interest to withhold information from the public merely on the basis that it would be difficult to understand.

45. Finally, the fact the public authority considers that there is sufficient information in the public domain to meet the public interest in disclosure fails to take account of the contention by the complainant that the published summary of the plan lacks all the elements and assumptions to back up some of the public authority's pronouncements in relation to the HRA.
46. The Commissioner has therefore concluded that in all the circumstances of this case, the public interest in disclosing the version of the HRA plan requested by the complainant outweighs the public interest in maintaining the exception.

Right of appeal

47. 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

48. 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.
49. 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

Terna Waya
Senior Case Officer
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SK9 5AF