

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

Date: 2 December 2021

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

Decision (including any steps ordered)

1. The complainant has requested terms of reference, policy information and related records referred to in correspondence from the London Borough of Lambeth ("LB Lambeth") on a planning matter. LB Lambeth refused to provide a response citing regulation 12(4)(b) of the EIR (manifestly unreasonable) as its basis for doing so. It upheld this at internal review.
2. The Commissioner's decision is that LB Lambeth is not entitled to rely on regulation 12(4)(b) as its basis for refusing the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide confirmation or denial as to whether the information is held; and
 - If held, provide the requested information or provide a refusal notice explaining why it is not obliged to do so that does not rely on 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.

Request and response

5. On 16 June 2020 the complainant requested information of the following description:

"I am seeking to understand the statement in [named officer]'s letter dated 9 April 2020 providing the Council's Final Review of formal complaint case reference UF 300048 that: 'The determination under delegated authority did not breach the Council's policies or terms of reference, and therefore I cannot uphold your complaint.' (Letter attached for your ease of reference).

Accordingly I wish to see evidence to substantiate the above. Therefore, please provide any information and [documentation] relating to, the following:

Terms of Reference

The assessment undertaken by [named officer], Assistant Director for Planning, Transport and Development, or any planning officer with the authority to take the decision in this matter, that application 19/02374 fell within criteria (a) (b) and/or (c) of Clause 2 of the Planning Applications Committee Terms of Reference, as set out in the Lambeth Council Constitution (pp27-28), and therefore did not require determination by the Planning Applications Committee.

I request all documentation relating to assessment under Clause 2 including emails, file notes, notes of meeting and telephone conversations etc.

Policies

The Council's procedural Policies which allow the determination of planning applications under delegated authority, and the officer assessment in relation to these procedural Policies that concluded that application 19/02374 could be determined under officer delegated authority.

I request the document(s) setting out the procedural Policies and documentation (as above) relating to the officer assessment that the decision on application 19/02374 was allowed to be taken by officers.

Whilst I would hope to be provided with the relevant documents in their entirety, I accept that names may be redacted if you consider it necessary to comply with the law and explain the reason. Please note that I do not require the naming of individuals (which I have not specifically requested) and ask that you do not use the naming of individuals as a reason for refusing Freedom of Information relating to my request.”

6. On 14 July 2020, LB Lambeth responded. It said that it refused to disclose the information on the grounds of regulation 12(4)(b) – that it was manifestly unreasonable. It is unclear from the explanation whether the request was refused on the grounds of cost or because it was deemed to be a vexatious request.
7. The complainant requested an internal review on 23 July 2020. LB Lambeth sent her the outcome of its internal review on 20 August 2020. It upheld its original position.
8. The complainant wrote to LB Lambeth on 20 August 2020 to ask it to confirm that it was refusing to confirm or deny whether it held the requested information. It confirmed that it was refusing to confirm or deny whether it held the information and alluded to the Commissioner’s guidance in support of its position. The guidance says: “We do, however, recognise that there will be a small proportion of cases where this simply isn’t practicable. If the public authority isn’t sure whether information is held, and the costs of establishing this are in themselves clearly and obviously unreasonable, then we would not expect the public authority to put itself to this expense. To do so would be counter to the purpose of the exception”¹.

Scope of the case

9. The complainant contacted the Commissioner on 25 August 2020 to complain about the way her request for information had been handled.
 10. The Commissioner, when in correspondence with LB Lambeth, asked it to explain more clearly what its position was. The Commissioner explained that it was difficult to determine from its correspondence with the complainant whether it was seeking to argue that it was refusing to
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¹ [Manifestly unreasonable requests - regulation 12\(4\)\(b\) \(ico.org.uk\)](https://ico.org.uk/manifestly-unreasonable-requests-regulation-12(4)(b)) (paragraph 43)

provide confirmation or denial because it would be too costly or because the request was deemed to be vexatious.

11. LB Lambeth explained that it was seeking to rely on regulation 12(4)(b) as its basis for refusing to respond to the request on the grounds that it believed it to be vexatious.
12. The Commissioner has therefore considered whether LB Lambeth is entitled to refuse to respond to the request on the grounds that it is vexatious.

Reasons for decision

13. In her initial letter to LB Lambeth, the Commissioner commented:

"given that LB Lambeth explicitly said [as set out in the original request] that it was not upholding a complaint because 'The determination under delegated authority did not breach the Council's policies or terms of reference', it seems unlikely that LB Lambeth can refuse to confirm or deny that they hold the relevant policies or terms of reference."

14. There is nothing in the EIR which specifically allows a public authority to refuse to confirm or deny whether it holds information about a manifestly unreasonable request. In most cases, the Commissioner expects a public authority to confirm that it holds the information (assuming it can be confident that it does), even if it is refusing the request as manifestly unreasonable.
15. However, the Commissioner recognises that there can be a burden involved in even establishing whether a public authority holds the information which may be in itself manifestly unreasonable. It may therefore not be practicable to do so. If the public authority is not sure whether information is held, and the costs of establishing this are in themselves clearly and obviously unreasonable, then the Commissioner would not expect the public authority to put itself to this expense. To do so would be counter to the purpose of the exception. However, the Commissioner is not satisfied that this is the case here. The complainant has requested information in documents that are referred to in other correspondence with her. The complainant's focus is a specific and referenced planning matter. The Commissioner sees no burden on LB Lambeth to provide confirmation or denial as to whether it holds any of the information described in the request.
16. However, this does not mean that LB Lambeth cannot rely on regulation 12(4)(b) as its basis for refusing to provide the information.

17. Regulation 5(1) states that:

“a public authority that holds environmental information shall make it available on request.”

18. Regulation 12 of the EIR states that:

“(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—

(a) an exception to disclosure applies under paragraphs (4) or (5); and
(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure.

...

(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—

(b) the request for information is manifestly unreasonable;”

19. The Commissioner considers that a request can be manifestly unreasonable either because it is vexatious or because it would incur unreasonable costs for a public authority or an unreasonable diversion of resources.

20. As discussed in the Commissioner’s guidance on vexatious requests, the relevant consideration is whether the request itself is vexatious, rather than the individual submitting it.^{2 3} Sometimes, it will be obvious when requests are vexatious, but sometimes it may not. In such cases it should be considered whether the request would be likely to cause a disproportionate or unjustified level of disruption, irritation or distress to the public authority. This negative impact must then be considered against the purpose and public value of the request. A public authority

² [Manifestly unreasonable requests - regulation 12\(4\)\(b\) \(ico.org.uk\)D40](#)

³ [dealing-with-vexatious-requests.pdf \(ico.org.uk\)](#)

can also consider the context of the request and the history of its relationship with the requester when this is relevant.

21. Regulation 12(4)(b) of the EIR requires a public authority to apply a public interest test (in accordance with regulation 12(1)(b)) before deciding whether to maintain the exception. The Commissioner accepts that public interest factors, such as proportionality and the value of the request, will have already been considered by a public authority in deciding whether to engage the exception, and that a public authority is likely to be able to "carry through" the relevant considerations into the public interest test.

The complainant's position

22. The complainant disputes that her request is manifestly unreasonable. She raised concerns about the approach taken by LB Lambeth on a planning matter. Its justification for the decision making process that it has used in this matter has not, in her view, been made clear to her. She believes that it is refusing to respond to the request in order to "safeguard their⁴ position regarding a complaint to the Local Government Ombudsman about their failure to abide by the Council Constitution in determining a planning application".

LB Lambeth's position

23. LB Lambeth provided a spreadsheet which showed a list of FOI/EIR requests, Members Enquiries and Complaints that the complainant and her husband had made. The Commissioner notes that of the eight complaints made over a period of approximately two years, four were either upheld or partially upheld. One complaint which had not been upheld by LB Lambeth (mentioned in the request) had been referred to the Local Government Ombudsman (LGO). Over a period of approximately a year, the complainant had made seven FOIA/EIR requests, four of which had resulted in disclosure.
24. LB Lambeth said that the complainant had made unfounded accusations in the past although it provided no evidence of this. It said that the complainant was "attempting to open or review an issue via FOI when there is a more appropriate process" and that the complainant had

⁴ She is referring to LB Lambeth here

“submitted sufficient continued requests or complaints to demonstrate intransigence”.

25. It said that the complainant had “made several requests [to it] relating to planning matters” and since the request in this case it had received a further five requests from the complainant. It said that “any response provided to the complainant necessarily results in further questions which creates a further burden on the council to respond.” It added that “we also note the additional burden caused by this applicant during a time of more limited resources due to the pandemic”.
26. It then reproduced text of a letter from the complainant in respect of the complaint which is mentioned in the request. The letter accuses the Council of delay as a deliberate strategy to avoid timely public scrutiny. It comments that it is “unreasonable” to make such an accusation.
27. LB Lambeth then argues that the complainant has made an EIR request in this case to further a complaint which LB Lambeth had closed (following completion of its complaint process). The complaint, LB Lambeth explains, is now being dealt with by the LGO.
28. Finally, it provided further arguments to support its view that the complainant was acting in an intransigent manner in respect of this issue. It said that it had received several EIR requests [the Commissioner notes this is seven over a period of approximately one year prior to the one under consideration in this case]. It said that the complainant invariably “challenges our response or requests an internal review if a planning matter was not decided in the way they would have expected”. It then speculated that, given the focus on a particular school “with which the applicant has had disputes in the past” – it did not support this comment with evidence – the “complaints do not necessarily reflect a genuine concern with our planning process but instead further the applicant’s other dispute with the school”. The Commissioner is unclear as to whether the term “complaints” means EIR requests and requests for internal review or other complaints. The Commissioner notes that half of the complaints made by the complainant to LB Lambeth outside of EIR have been upheld or partially upheld.

The Commissioner’s view

29. The Commissioner notes that there are many different reasons why a request may be considered vexatious or manifestly unreasonable for other reasons, as reflected in his guidance. There are no prescriptive “rules”, although there are generally typical characteristics and circumstances that assist in making a judgment about whether a

request is vexatious or otherwise manifestly unreasonable. A request does not necessarily have to be about the same issue as previous correspondence to be classed vexatious, but equally, the request may be connected to others by a broad or narrow theme that relates them. A commonly identified feature of vexatious requests is that they can emanate from some sense of grievance or alleged wrong-doing on the part of the public authority. The Commissioner's guidance emphasises that proportionality is the key consideration for a public authority when deciding whether to refuse a request as manifestly unreasonable. The public authority must essentially consider whether the value of a request outweighs the impact that the request would have on the public authority's resources in providing it. Aspects that can be considered in relation to this include the purpose and value of the information requested, and the burden upon the public authority's resources.

30. The Commissioner notes that LB Lambeth is strongly of the view that responding would place a burden upon its resources. However, the evidence it provided to support this view was not compelling. The spreadsheet it submitted that is referred to above did not indicate considerable burden. The Commissioner recognises that a single request can create more of a burden than, say, five requests, depending on what the request is for. However, without any clear explanation as to what the correspondence from the complainant referred to, it is difficult for the Commissioner to assess what burden that correspondence created.
31. The Commissioner notes that in LB Lambeth's letter of 9 April 2020 to the complainant setting out its final position in respect of the complaint which is mentioned in the request it has included a paragraph stating the following:

"Please note – at present the LGO [Local Government Ombudsman] is unable to accept new complaints due to the Coronavirus/Covid-19 crisis – more information can be found on their website. Please check www.lgo.org.uk for updates and confirmation that normal service has resumed should you wish to use their service."
32. The Commissioner thinks it would be reasonable for the complainant to conclude at this point that she would not be able to progress a complaint with the LGO as expeditiously as hoped. With that in mind, the Commissioner finds it difficult to conclude that submitting a subsequent EIR request that was manifestly unreasonable. The complainant sought to progress a matter that was important to her and it is reasonable to assume that she could not, at that time, submit a complaint to the LGO. Due to the Covid-19 pandemic, much of 2020 was extremely difficult for organisations, public authorities and, of course, for individuals to

progress matters unrelated to the pandemic in an ordinary way using previously understood processes.

33. The Commissioner also acknowledges that most public authorities were under particular pressure during 2020 to provide services in addition to those fundamentally connected with their response to the Covid-19 pandemic. This was particularly the case for local councils. Staff shortages in most areas of work were a regular occurrence during this period as staff were redeployed to key service provision areas or were personally affected by the pandemic such that they were not available for work.
34. With the above in mind and considering the pattern of requests and complaints that LB Lambeth has reported, the Commissioner does not agree that the request was manifestly unreasonable. The Commissioner has reached this view taking into account that at least half of the complainant's complaints to LB Lambeth over the past two years had been partially or fully upheld. It is difficult to see how her request has little or no objective purpose or value in such circumstances or from the other explanations provided. Had LB Lambeth been able to demonstrate this with clarity, the Commissioner would have taken it into account.
35. The Commissioner is not convinced, from the evidence that LB Lambeth has provided, that the complainant's language was unacceptable. In the evidence it presented, the complainant expressed their scepticism and frustration robustly but not to an extreme degree that would be manifestly unreasonable and unacceptable.
36. That said, the Commissioner does not think that the circumstances of the pandemic should be used as an excuse for conduct which is manifestly unreasonable. He acknowledges that some of a public authority's services may have been affected by staff shortages during the pandemic which may have had a knock on effect on their ability to provide full information access services. While this may have been frustrating for requesters, this would not be an excuse for manifestly unreasonable conduct towards public authorities and their employees. However, the Commissioner has seen no evidence of such conduct by the complainant in this case.

Conclusion

37. The Commissioner has concluded that the request under consideration here is not manifestly unreasonable on the grounds that it is vexatious and therefore LB Lambeth cannot rely on regulation 12(4)(b) as its basis for refusing it. As the request was not manifestly unreasonable, the

Commissioner does not need to consider the balance of the public interest.

Right of appeal

38. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

39. 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.
40. 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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Wycliffe House
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