Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **15 March 2022**

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 information about section 20 major works notices issued by London Borough of Lambeth (the Council).

2. The Council refused to provide the requested information, citing section 12 of FOIA as its basis for doing so. The Council later accepted the Commissioner's view that the information is environmental and therefore relied on regulation 12(4)(b) (manifestly unreasonable) of the EIR.

3. The Commissioner's decision is that the Council has failed to demonstrate that regulation 12(4)(b) is engaged and is therefore not entitled to rely on this exception.

4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

    - Issue a fresh response to the request that does not rely on regulation 12(4)(b) of the EIR.

5. 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 FOIA and may be dealt with as a contempt of court.

Background

6. Section 20 major works notices are issued in accordance with section 20 of the Landlord and Tenant Act 1985, where, by law, leaseholders must be consulted before a landlord carries out works above a certain value.

7. A leaseholder's contribution to the cost of any major works will be capped at £250 if the landlord, or their agent, fails to follow set consultation procedures before commencing the work.

8. The section 20 procedure is broken down into stages –

    - Notice of intention – a notice is served setting out the proposed works and why they are required, and inviting comments from the leaseholders.

    - Statement of estimates – once estimates for the works have been obtained, a notice must be served to all leaseholders detailing the costs and inviting any comments.

    - Notice of reasons – once the contract is awarded, the landlord must notify the leaseholders if they did not choose the cheapest estimate or a contractor nominated by the leaseholders. It must explain why they chose that particular option.

Request and response

9. On 13 January 2021, the complainant wrote to the Council and requested information in the following terms:

> "[1] How many s20 major works notices has the Council issued in each of the last 3 years.
>
> [2] How many major works projects has the Council entered into in each of the last 3 years.
>
> [3] In respect of each major works project: provide the total estimated costs detailed in the s20 notice. The actual costs charged to the tenants.
>
> [4] For the ten projects in each year with the highest percentage increase over the initial estimated cost provide the name of the contractor and the name of the Council's project supervisor in the format "Job title and the initials of the post holder's first and last name."
>
> The following are in respect of [address redacted] only:

[5] Provide copies of the s20 notices.

[6] Provide the contract specification as submitted to (i) the tenants, and (ii) each of the prospective tenderers.

[7] Provide copies of each tender as submitted by each of the tenderers.

[8] Provide details of the Council's procedures for assessing and controlling the costs, including supervising the project?

[9] Provide the name of the person who caried out the site inspection visits in the format "Job title and the initials of the post holders first and last name."

[10] How many queries or complaints were received in respect of the works? And how many of these queries or complaints from tenants were responded to or otherwise dealt with?

[11] Is the person identified above employed by the Council and if not them by whom are they employed? How many inspection visits did they make during the works period?

[12] Did the tender for [address redacted] form part of a larger tendering exercise? If so, provide details of the other properties included in the tender an subsequent contract."

10. The Council responded on 9 February 2021. It refused to provide the requested information, citing section 12 of FOIA – cost of compliance exceeds the appropriate limit.

11. Following an internal review, the Council wrote to the complainant on 23 February 2021. It stated that it was maintaining its reliance on section 12 of FOIA.

Scope of the case

12. The complainant contacted the Commissioner on 26 April 2021 to complain about the way their request for information had been handled. In particular, the complainant highlighted that the Council had offered no further explanation regarding its reliance on section 12 of FOIA to refuse the request. The complainant was also concerned that the internal review outcome which they received appeared to be an automated response, in their opinion, which could indicate that no review had in fact been carried out by anyone, based on having received an almost identical internal review response to a separate request for information.

13. During the course of his investigation, the Commissioner wrote to the Council and set out his view that the requested information was likely to constitute environmental information as defined in regulation 2(1) of the EIR, which was later accepted by the Council. The Council therefore changed its stance and relied on regulation 12(4)(b) to refuse the request on the grounds that complying would impose a manifestly unreasonable burden.

14. The Commissioner considers the scope of his investigation and the following analysis is to determine if the Council is entitled to rely on regulation 12(4)(b) to refuse this request for information.

Reasons for decision

Is the requested information environmental?

15. Regulation 2(1) of the EIR defines environmental information as being information relating to:

> (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
>
> (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
>
> (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
>
> (d) reports on the implementation of environmental legislation;
>
> (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
>
> (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or,

through those elements, by any of the matters referred to in (b) and (c);"

16. The Commissioner has not seen a copy of the requested information, but he is satisfied that it is environmental. The major works envisaged by section 20 notices will be "measures" affecting the elements of the environment. The requested information is information "on" that measure and therefore falls under regulation 2(1)(c) as detailed above.

17. The EIR contains exceptions from the duty to disclose information but there is a presumption in favour of disclosure. This presumption of disclosure stems from the Aarhus Convention on access to environmental information. The principle behind the Aarhus Convention was to enable citizens to participate in decision making about environmental matters by giving them powerful rights of access to the information used to inform such decision-making.

18. The Commissioner considers that the burden always falls on the public authority to demonstrate to the Commissioner why any exception under the EIR has been properly engaged.

Regulation 12(4)(b) – manifestly unreasonable

19. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.

20. The Commissioner considers that a request can be manifestly unreasonable either if the request is vexatious, or where compliance with the request would incur a manifestly unreasonable burden on the public authority both in terms of costs and the diversion of resources.

21. In its submissions to the Commissioner, the Council has relied upon the latter interpretation of regulation 12(4)(b), that it considers the amount of work required to comply with this request in full would bring about a manifestly unreasonable burden.

22. Under FOIA, the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') specify an upper limit for the amount of work required beyond which a public authority is not obliged to comply with a request. The Fees Regulations provide that the costs associated with dealing with a request (determining whether the requested information is held; finding the information, or records containing the information; retrieving the information or records; and extracting the requested information from records) should be worked out using a notional rate of £25 per hour per person. For local authorities, the appropriate limit is set at £450, which is the equivalent of 18 hours work.

23. The EIR differ from FOIA in that under the EIR there is no upper cost limit set for the amount of work required by a public authority to respond to a request.

24. While the Fees Regulations relate specifically to FOIA, the Commissioner considers that they provide a useful point of reference where the reason for citing regulation 12(4)(b) of the EIR is the time and costs that compliance with a request would expend. However, the Fees Regulations are not the determining factor in assessing whether the exception applies.

25. The Commissioner's guidance on regulation 12(4)(b)[1] states that public authorities may be required to accept a greater burden in providing environmental information than other information.

26. Regulation 12(4)(b) sets a robust test for a public authority to pass before it is no longer under a duty to respond. The test set by the EIR is that the request is "manifestly unreasonable", rather than simply being "unreasonable" per se. The Commissioner considers that the term "manifestly" means that there must be an obvious or clear quality to the identified unreasonableness.

27. Given the high burden referred to within paragraph 18, the Commissioner expects a public authority to provide both a detailed explanation and quantifiable evidence to justify why complying with a request would impose such an unreasonable burden on it, and therefore why regulation 12(4)(b) is engaged.

28. Where a public authority has shown that Regulation 12(4)(b) is engaged, Regulation 12(1)(b) requires that a public interest test is carried out to determine whether the arguments in favour of maintaining the exception outweigh those in favour of disclosing the requested information. A public authority may still be required to comply with a manifestly unreasonable request if there is a strong public value in doing so.

The Council's position

29. The Commissioner asked the Council to reconsider its handling of the request for information in accordance with the EIR, and set out his view that the requested information is environmental. The Commissioner also

[1] https://ico.org.uk/media/for-organisations/documents/1615/manifestly-unreasonable-requests.pdf

asked for the following further information to be provided by the Council in its final submissions –

- to provide a detailed estimate of the time/cost it would take to provide the information falling within the scope of the request, including any calculations and descriptions of the work that would need to be undertaken.

- to clarify the nature of any advice and assistance given to the applicant in this case, in accordance with regulation 9, and if no advice and assistance was provided to explain why not.

- to clarify the Council's public interest considerations, in accordance with regulation 12(1)(b), both in favour of disclosing the requested information, and in favour of maintaining the exception to disclosure. The Council was also asked to explain why it considers that on balance the public value in maintaining the exception outweighs that in disclosing the withheld information. And, finally, the Council was reminded to ensure that any submissions focus on the content of the information which was actually withheld rather than simply being generic public interest arguments.

30. The Council based its response to the Commissioner on the work it considered would need to be carried out in response to questions 3 and 4 of the request. The entirety of the Council's response stated -

"There have been 97 relevant projects in the timeframe suggested by the applicant and the following steps would be needed:

1. Review the list of 97 schemes.
2. Identify if the scheme had leasehold contributions.
    a. If yes, access the original Section 20 scheme data and total sum all the contributions. Go to point 3.
    b. If no, note the scheme as tenant only.
3. Identify if the scheme has been final accounted.
    a. If yes, access the final account data and total sum all the contributions.
    b. If yes, calculate the % variance from 2a by 3a.
    c. If no, note the scheme as at estimate stage only.

If the scheme has leaseholder contributions then it would take in the region of 20 min. If the scheme does not have leaseholder contributions then I'll need 5 – 10 min to confirm its tenanted only.

We therefore estimate that this question alone could take up to 32 hours to respond to; dependent on the type of scheme which can only be established by undertaking the above steps.

In conjunction with the other questions and considering any redactions of personal data needed, we consider the entire request is therefore over the cost/time limit as a whole."

31. The Commissioner wrote to the Council again due to the majority of the questions from his original letter to the Council remaining unanswered. He asked for the Council to clarify the following –

- the Council's position in respect of whether the information is environmental and therefore should have been handled under the EIR, due to neither the EIR or FOIA being cited in the Council's previous response.
- provide a full breakdown of how the Council arrived at the figures of 20 minutes or 5-10 minutes to review the schemes. Whilst review of all 97 schemes **could** take 32 hours, it **could** also take just 8 hours if none of the schemes have leaseholder contributions and therefore take only 5 minutes each to review.
- provide details of any sampling exercise conducted in order to evidence how the Council has arrived at a sensible and realistic estimate of time, and which takes into account the Commissioners guidance[2].
- presuming that the Commissioner's assertion about the requested information being environmental is correct, the Council should clarify its public interest considerations, both in favour of disclosing the requested information, and in favour of maintaining the exception to disclosure. The Council was also asked to explain why it considers that on balance the public interest in maintaining the exception outweighs that in disclosing the withheld information.
- clarify the nature of any advice and assistance given to the applicant, and if no advice and assistance was provided explain why not.

32. In its response the Council gave a further breakdown of the 97 schemes, and confirmed its reliance on regulation 12(4)(b). It stated –

[2] https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

"... of the 97 schemes; 57 have leaseholder contributions, 15 are tenanted only and have no leaseholder recharges, leaving 25 schemes requiring further investigations to determine if they are also tenanted.

As per our previous correspondence, we therefore consider that it will take 19 hours to collate the information for the 57 schemes (20minutes x 57) plus a further 1.25 hours for the 15 tenanted only schemes. We also note that this question is only the first part of the request; the remaining parts of the request will also involve significant research and it has taken our officer 8 hours to confirm the above schemes information. We therefore consider Regulation 12(4)(b) is engaged."

The Commissioner's view

33. In reaching his decision, the Commissioner has taken into account the presumption in favour of disclosure under Regulation 12(2) of the EIR. He also notes the requirement to interpret the exception restrictively.

34. The Commissioner notes that the request is primarily of value to the complainant rather than the public as a whole, however he considers that there is an underlying expectation that planning matters will be taken in as transparent a way as possible. Furthermore, with such a large section of the public falling into the category of being tenants, and therefore liable for charges inline with Section 20 Major Works Notices, there is a wider public value in information of this sort being disclosed to some degree.

35. The Commissioner does not agree that the Council has sufficiently demonstrated that the time or cost required to meet this request in full would result in it incurring a manifestly unreasonable burden. During the course of the Commissioner's investigation the Council stated figures "in the region of" of 20 minutes and 5-10 minutes to review the schemes, dependent upon whether there had been leaseholder contributions. The Commissioner asked the Council to provide further information on how it had arrived at these figures, and pointed it in the direction of published guidance about conducting sampling exercises to produce a sensible and realistic estimate of time. The Council's response does not evidence any sampling exercise or provide any explanation of how it arrived at its estimate of 20 minutes or 5-10 minutes per scheme, rather it shows that the Council has instead merely counted how many of the schemes have leaseholder contributions and how many schemes are tenant only.

36. Even if the Council's figures were found to be robust, its estimate of 19 hours (or £475) would only just exceed the £450 limit that would have applied had the request been dealt with under FOIA. Whilst the Commissioner notes that the Council's estimate only applies to two parts of a 12 part request, he also notes that the Council has made no effort to quantify the work required to respond to the remaining elements.

Given that parts 1 and 2 would probably be answered once the Council had dealt with parts 3 and 4 and the remaining parts relate to just a single address, the Commissioner is not convinced that the additional work required would be significant – and the Council has failed to demonstrate that it would.

37. The Commissioner considers that a public authority should usually be required to shoulder a higher burden when responding to requests under the EIR than under FOIA. There is a public value to the information – as it would indicate how successful the Council was in controlling the costs associated with works of this kind.

38. The Commissioner notes that the Council is a medium-sized local authority with many staff at its disposal. Even if its estimate for responding to parts three and four was entirely accurate, the Commissioner considers that, whilst there may well be a burden placed upon the Council in providing a response to this request, he is not satisfied that the Council has provided sufficient evidence to convince him that it is a manifestly unreasonable one. The Council, therefore, cannot rely on Regulation 12(4)(b) to refuse this request.

Other matters

39. The Commissioner wishes to comment more generally on the way the Council has handled this request for information. Firstly, the Commissioner is disappointed that the Council did not deal with the matter of which was the appropriate access regime to handle the request under more expeditiously when it was raised by the Commissioner. The Commissioner should not have to prompt the Council several times before it considers if it has relied upon the correct regime according to the nature of the information being requested.

40. The Council's email to the complainant on 23 February 2021 setting out the outcome of the internal review, was limited to one sentence, "I write to advise we maintain our original reliance on s12 for this request". The FOIA section 45 Code of Practice provides guidance to public authorities on their responsibilities under the FOIA[3]. Paragraphs 5.8 – 5.10 explain that the internal review procedure should provide a fair and thorough review of procedures and decisions taken in relation to the FOIA. It says that the public authority should "in all cases re-evaluate their handling

[3] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

of the request and pay particular attention to concerns raised by the applicant".

41. While the Council may have conducted a thorough internal review, the cursory nature of the correspondence it has had with both the complainant and the Commissioner, does not demonstrate this.

42. Although on this occasion the Commissioner has found that regulation 12(4)(b) is not engaged, had the Council managed to demonstrate that the exception was in fact engaged, it is the Commissioner's view that the Council would not have met its obligations in respect of regulation 9 - to provide advice and assistance to the complainant in refining their request to enable the Council to comply with it without it being considered a manifestly unreasonable burden. In the Council's initial response to the complainant on 9 February 2021 it stated that it "may be able to provide information if you were to narrow the scope of your request". However, in it's response, the Council had provided no explanation as to why the request would go over the cost threshold for compliance (the Council was still considering the request under FOIA at this point), nor had it given an indication by how much it estimated the request would go over the threshold. The Commissioner does not consider it reasonable to expect the complainant to guess how to suitably refine their request without any guidance from a public authority.

43. Furthermore, had the Council demonstrated that regulation 12(4)(b) was engaged, the Commissioner would have found that the Council failed to meet its obligations in accordance with regulation 12(1)(b). The public interest arguments put forward by the Council during its submissions to the Commissioner focused solely on the burden placed upon the Council by responding to the request, and did not put forward any arguments either in favour of disclosure or in favour of maintaining the exception, which focus on the actual content of the information which has been withheld. The Commissioner's published guidance[4] discusses a wide range of reasons and scenarios which could be considered when concluding if the balance of the public interest in maintaining the exception outweighs that in disclosing the withheld information.

44. The Commissioner has set out on his website the positive benefits for public authorities of conforming with the section 45 Code of Practice[5].

[4] https://ico.org.uk/media/for-organisations/documents/2021/2619013/exceptions-pi-test-eir.pdf

[5] https://ico.org.uk/for-organisations/section-45-code-of-practice-request-handling/

These include improved public perception of an organisation, saving of staff time and potentially less resource being spent on dealing with complaints to the Commissioner.

45. The Commissioner is also disappointed in the quality of the engagement the Council has had with him. Whilst the Commissioner attempts to restrict the information required to that necessary to reach a decision, he expects public authorities to provide comprehensive answers to all of his questions and to provide the necessary evidence to back up any assertions. The Commissioner has had to ask the Council several times for the same information, which has still not been provided fully.

46. The above concerns will be logged and used by the Commissioner when considering the overall compliance of the Council.

47. The Commissioner will use intelligence gathered from individual cases to inform his insight and compliance function. This will align with the goal in his draft Openness by design strategy[6] to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA and EIR enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in his Regulatory Action Policy[7].

[6] https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf

[7] https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf

Right of appeal

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

49. 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.

50. 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 .....

Catherine Fletcher
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF