

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

Date: 22 September 2021

Public Authority: Greater London Authority ("GLA")
Address: City Hall
London
SE1 2AA

Decision (including any steps ordered)

1. The complainant has requested information on any correspondence and communication, from August 2008 to August 2009, between Kit Malthouse, then Deputy Mayor of London, and HRH The Prince of Wales on the subject of the planned redevelopment of Chelsea Barracks.
2. The Commissioner's decision is that the GLA has conducted reasonable searches for the requested information which would have located the information if it was held. She has therefore concluded that, on the balance of probabilities, the GLA does not hold any information in the scope of the request.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Background

4. The Chelsea Barracks are a high-profile development site in the London Borough of Kensington and Chelsea after the land was sold by the Ministry of Defence in 2007. The Mayor is consulted on all planning applications that are of potential strategic importance to London. These are commonly known as 'referred' applications. A number of planning applications concerning Chelsea Barracks have been referred to the Mayor since 2008.

5. Various media articles¹ discussed the involvement of HRH The Prince of Wales in the planning applications for the Chelsea Barracks.

Request and response

6. On 13 April 2020, the complainant wrote to the GLA and requested information in the following terms:

"Please note that I am only interested in information generated between 1 August 2008 to 1 August 2009. Please note that I am interested in all correspondence and communication which in any way relates to the planned redevelopment of Chelsea Barracks. This correspondence and communication will include but not limited to matters referring to the actual plans for the site; the Prince's opposition to and concerns about the proposed development; the form the Prince's opposition has taken or is likely to take; the Prince's alternative plans for the site; the public's opposition to the proposed development; the Mayor's view of the development; the Deputy Mayor's view of the development; Qatari Diar's role in the planned development; Richard Roger's designs/plans for the development; any other design/plans for the development; the role played by the Qatari Royal Family and the role played by the Candy brothers and CPC group.

Please do supply copies of any documentation submitted along with the correspondence and communication. This documentation could include feasibility studies (or similar), maps, drawings, sketches, plans, designs and photos.

1. During the aforementioned period did The Prince of Wales write to or correspond with Kit Malthouse, the then Deputy Mayor, about the planned redevelopment of Chelsea Barracks. I am interested in all correspondence and communications irrespective of what aspect of the development it refers to.

2. If the answer to question 1 is yes can you please provide a copy of this correspondence and communication including emails.

¹ <https://www.theguardian.com/uk/2009/jun/16/richard-rogers-prince-charles-architecture>
<https://www.bbc.co.uk/news/10454244> <https://www.bbc.co.uk/news/uk-england-london-11489404>

3. During the aforementioned period did Mr Malthouse write or correspond with The Prince of Wales about the planned redevelopment of Chelsea Barracks. I am interested in all correspondence and communications irrespective of what aspect of the development it refers to.
4. If the answer to question 3 is yes can you please provide a copy of this correspondence and communication including emails.
5. If any relevant documentation has been destroyed can you please provide the following information:
 - a. Can you please provide a description of each destroyed document. For instance, was the document an email? A letter? An internal memo?
 - b. In the case of each piece of destroyed documentation can you state when it was destroyed and why?
 - c. In the case of each piece of destroyed documentation can you please provide a brief outline of its contents?
 - d. In the case of each piece of destroyed correspondence and communication can you please state when it was generated? Can you also identify the author(s) and the recipient(s)?
 - e. If any destroyed documentation continues to be held in another form can you please provide a copy of that documentation?"
7. The GLA responded on 7 May 2020 with a refusal notice in reliance of FOIA section 37(2) neither confirming or denying holding information within the scope of the request.
8. The complainant requested an internal review on 7 May 2020. Following its internal review the GLA wrote to the complainant on 20 August 2020. It stated:

"The Authority concluded that it wished to uphold its decision to exempt the requested information under section 37(2) of the FOIA which relates to Communications with Her Majesty and the awarding of honours. The Authority should have also considered your request under the Environmental Information Regulations and examined the equivalent exception to disclose under reg 12(5)(f) of the EIR, namely the interests of the person who provided the information.

I have reviewed both your initial request and request for an internal review and the responses provided to you by the GLA and I have decided to overturn the original decision and I can confirm that the GLA does not hold the information within the scope of your request."

Scope of the case

9. The complainant contacted the Commissioner on 21 August 2020 to complain about the way his request for information had been handled. The complainant explained that he did not have confidence in the GLA's response, advising the Commissioner that:
- "a. The Greater London Authority ignored the environmental aspects of the original request – even though [sic] the request was clearly about matters which have direct implications for the environment. I maintain that if the GLA really does not hold any environmental information relevant to the request it should have said so instead of applying section 37 of the Freedom of Information Act. It's difficult to see how its initial response could have been less transparent or more unhelpful.
- b. The Greater London Authority chose to ignore my reference to destroyed documentation in the original request. I specifically asked for the information relating to the destruction of documents as well as information relating to destroyed documents which are held in another form. If documentation has been destroyed why has the GLA been unable to state when and what documentation has been destroyed.
- c. The time taken to process the request for an internal review which I maintain is unacceptable. I note the current health crisis did not impact upon the processing of the original request even though it was submitted at the height of the pandemic. I note that the GLA has not claimed the crisis had any impact on the processing of the internal review."
10. The complainant confirmed to the Commissioner that his request relates only to the correspondence and communications between the named individuals regarding the redevelopment as set out in points 1-5 of the request.
11. The Commissioner considers the scope of her investigation to include the handling of the request and the GLA's determination that no information within the scope of the request is held.

Reasons for decision

Is the information 'environmental information'?

12. Regulation 2(1) of the EIR defines environmental information as any information in any material form on:
- (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)'

13. The Commissioner considers that the phrase 'any information...on' should be interpreted broadly. In this case the requested information concerns the redevelopment of Chelsea Barracks which she considers falls within regulation 2(1)(c) "activities affecting or likely to affect the elements and factors referred to in (a) and (b)".
14. In its submissions to the Commissioner the GLA clarified its internal review and added that it should have cited regulation 12(4)(a) to confirm that it did not hold the requested information at the time of receipt of the request.
15. The Commissioner notes that a public authority has the opportunity to provide its final view to a requestor at the time of the internal review. Therefore, although somewhat surprising, the Commissioner accepts that the GLA appropriately considered the request at the time of the internal review.

Regulation 5(1): duty to make information available

Regulation 12(4)(a) – information not held at the time of the request

16. Regulation 5(1) of the EIR states that, subject to other provisions, a public authority holding environmental information shall make it available on request. Regulation 12(4)(a) provides an exception from the duty to make information available if the authority does not hold the requested information at the time of the request.
17. In cases where there is a dispute as to the information held by a public authority, the Commissioner will use the civil standard of proof, ie the balance of probabilities. Accordingly her investigation will consider the public authority's reasons for stating that it does not hold the information in question, as well as the extent and reasonableness of any search conducted. The Commissioner will also consider any arguments put forward by the complainant as to why the information is held (as opposed to why it ought to be held). Finally, the Commissioner will consider whether there are any further steps she could require the public authority to take if the complaint were upheld.
18. The GLA provided detailed submissions including explanations and background information which the Commissioner considers helpful to include as follows:

"Kit Malthouse was elected to the London Assembly following the Assembly elections which took place on 1 May 2008 for the seat of West Central. He was also appointed as Deputy Mayor for Policing by the Mayor of London. Elected Assembly Members (AMs) hold the Mayor and Mayoral advisers to account by publicly examining policies and programmes through committee meetings, plenary sessions, site visits and investigations.

The Deputy Mayor is a member of the London Mayoral cabinet, of which the Mayor of London may appoint up to 11. They serve as political advisors with responsibilities and powers corresponding to portfolios delegated by the Mayor.

I make this distinction at the outset as the information held or created by Kit Malthouse during his time at the GLA would have fallen into one of several categories, depending on the specific work he conducted as an AM and as a Deputy Mayor.

- i. As a Deputy Mayor, any information held or created in relation to "GLA business" – i.e. the work of the GLA - would have constituted information held by the GLA.
- ii. In October 2008 Kit Malthouse was appointed Vice Chairman of the Metropolitan Police Authority (MPA) by the former Mayor. The MPA was a separate public authority to the GLA. The MPA ceased to exist on 16 January 2012 when its functions were transferred to the Mayor's Office for Policing and Crime (MOPAC). MOPAC is also a separate public authority to the GLA. Any information created or held

by Kit Malthouse concerning his work at the MPA would have been transferred to MOPAC (where appropriate) when MOPAC replaced the MPA in January 2012.

- iii. Information created or held by Kit Malthouse as an elected AM relating to his work holding the Mayor to account or investigating issues, such as through Assembly Committee hearings, would constitute information held by the GLA.
 - iv. As an elected representative (representing the then 'West Central' constituency), any constituency casework conducted by Kit Malthouse would not constitute information held by the GLA. Elected representatives themselves are not public authorities for the purposes of FOIA or EIR. Any constituency casework stored on GLA owned or managed systems is held on behalf of that elected representative and is not held by the GLA for the purposes of FOIA or EIR."
19. The GLA explained that it had not considered any information falling within points ii or iv as any information would not be held by the GLA.
 20. The GLA explained that it uses a specific correspondence management system to register, allocate, track and respond to public correspondence received by the organisation. This includes all email correspondence sent to the mayor@london.gov.uk email address, submissions through their "Contact Us" forms on the GLA website, along with letters received through the post. It also uses the same system to manage FOIA requests and any complaints received by the authority.
 21. The system is not used to manage or store general email correspondence which GLA staff engage in as part of day-to-day activities. Normal day-to-day emails would be stored in the email accounts used by each member of staff. The GLA does not use any Electronic Document & Records Management System (EDRMS).
 22. The GLA added that the correspondence system is managed by the GLA's Public Liaison Unit (PLU) who load each piece of correspondence on to the system, entering the necessary metadata about that piece of correspondence and allocate the case to the appropriate team or individual in the GLA. Hard-copies of letters and documents are scanned by the PLU and uploaded on to the same system.
 23. The GLA provided the Commissioner with the following points:
 - Correspondence cases remain in the "live" environment for a period of two years.
 - After two years, cases are moved into the Archive, a read-only archive environment where these "historic" records are held to reduce the burden on the live system.

- Records are kept in the Archive for a period of approximately four years. Therefore, in general, correspondence is held for approximately six years after it was received.
 - Following this records are reviewed and deleted from the Archive on a yearly basis.
 - The GLA last deleted correspondence from the Archive in May 2016.
 - Nothing has been deleted from the Archive since May 2016 or since this request was received.
 - The oldest piece of correspondence held in the Archive is dated 28 December 2012.
 - The GLA does not hold archived correspondence from any systems that pre-date its current system.
24. The GLA advised that any correspondence generated by one of the former Deputy Mayors would be held by that Deputy Mayor or their support officers. Responses to any of this correspondence could be captured on the correspondence management system (where a paper letter is sent to City Hall or an email to 'mayor@london' email address) but any replies directly to an email account of that Deputy Mayor would be held on their own MS Outlook email accounts.
25. AMs use a dedicated correspondence system for their constituency casework and correspondence but use GLA MS Outlook email accounts for any correspondence relating to their committee or scrutineering work.
26. In response to the Commissioner's questions regarding the specific searches undertaken to locate information in the scope of the request, the GLA explained the separate searches conducted.
27. The GLA conducted a search of the correspondence management system Archive. The initial search was conducted by a member of the team who has full unrestricted access to the system. The searches were set to the dates 1 August 2008 to 31 August 2009 and used the following names: Kit Malthouse; Kit Malthouse AM; Kit Malthouse MP; HRH Prince of Wales; Prince of Wales. The GLA conducted separate searches using these names in each of the following search fields: the 'Sent By' field; the 'Subject/Title' field; and the 'Text' field (which would search through the text of any emails on the system). There is no "Sent To" or "Recipient" field as the system is only used to reply to correspondence received by the Authority.
28. The 15 searches of the Archive did not locate any information in the scope of the request.

29. Similar searches were conducted using the name Sir Michael Peat, who the GLA understand to have been HRH The Prince of Wales' Principle Private Secretary at the time. Searches for correspondence referencing Sir Michael Peat did not identify any correspondence covered by the time frame cited in the request.
30. Regarding searches in respect of the Deputy Mayor's Office the GLA advised that it does not hold details of any members of staff who may have worked with, or on behalf of Kit Malthouse. It is therefore unable to conduct separate searches for any cases allocated to specific members of staff who may have worked with Kit Malthouse at that time.
31. Following the election of Sadiq Khan as Mayor of London in May 2016, the Deputy Mayors appointed by Boris Johnson left those posts with the former Mayor. Many of the Private Office support staff who worked to support the former Mayor also left at the time.
32. The GLA confirmed that the email and IT accounts of staff are deleted from the GLA servers shortly after they leave post. The GLA only retains back-up copies from its servers for a three-month period. This process predates the Mayoral Election in 2016 when Kit Malthouse left the GLA. Therefore any information that may have been held on the accounts of Kit Malthouse or other staff during the time frame covered by the request has long since been destroyed with no means to recover that information.
33. The GLA explained the role of the London Assembly Secretariat and included searches of its correspondence. The Secretariat supports the work of AMs in areas including providing:
 - A comprehensive meetings service for the Assembly;
 - Supporting the investigative work of the Assembly and its committees;
 - Support for AMs individually by providing personal assistants and research officers, and by providing managers for staff supporting each Political Group;
 - The Communications Team support service to promote the work of the Assembly through press office, social media, publicity and events.

The Secretariat conducted electronic searches of their records to search for copies of any correspondence which may be in the scope of the request, using the same names and terms referenced above. Their searches did not locate any information that was in the scope of the request.

34. The GLA planning team also conducted searches to see if it held copies of any correspondence. The GLA explained that it was aware that it was

unlikely to produce any in-scope information as it was improbable that any member of the planning team would have been involved in handling correspondence involving Kit Malthouse as he was the Deputy Mayor for Policing during the period covered by the request. Similarly, the planning team would not have been involved in handling correspondence involving Kit Malthouse in his capacity as an AM. The Commissioner considered whether the planning team may have been consulted by Kit Malthouse to assist with responding to any communications on the matter. However, the searches conducted were, nevertheless, sufficient to address this possibility. The planning team conducted searches for copies of any correspondence which might have been retained by the team if any such information had been transferred to their team as the appropriate GLA policy area when Kit Malthouse left the GLA. The GLA confirmed that no information was held.

35. The Commissioner questioned the GLA on its formal records management policy regarding the retention and deletion of the type of information requested. The policy is available on the GLA's website².
36. Under the GLA's current retention and disposal guidance, where information is not specifically covered by one of the conditions listed in the policy, GLA records are retained for the duration of the Mayoral Term in which they were created and for the duration of the subsequent Mayoral Term. Generally, this is a period of between 5 and 8 years. The GLA explained that the guidance that was in effect during the 2008-9 period covered by the request refers to information held on the correspondence management system and states that correspondence on the system could be destroyed 2 years after the final action on the case.
37. The GLA advised the Commissioner that with respect to both the former and current records management policies and the "Retention & Disposal Schedule", there is no reason why any of the requested information would have been archived off-site, or otherwise retained for over 12 years.
38. The GLA explained that it only retains back-up copies from its servers for 3 months. Any information that may have been held on the accounts during the time period covered by the request would have been destroyed with no means to recover it.

² https://www.london.gov.uk/sites/default/files/records_management_policy_v3.3.pdf

39. The GLA also explained that it does not use any electronic document and records management system or any other corporate or central information or records repository to record metadata concerning the creation, existence or disposal/destruction of any records that have been held by the GLA. Staff are not required to otherwise document or record the creation, existence or disposal/destruction of any information or records that may have been held by the GLA.

40. Furthermore the GLA stated that its searches have not indicated that any of the requested information was ever held by the GLA. It reiterated that it has no means of determining whether the requested information ever existed:

“we do not know whether there was ever any exchange between HRH Prince of Wales and Kit Malthouse and there is no clear indication why any correspondence would have been exchanged between the two or if any correspondence did exist, when it was received, what it discussed, where it was held and when it was destroyed.”

The Commissioner's view

41. The Commissioner has considered the points raised by the complainant in paragraph 9 above. She accepts his point that the GLA should have identified that the request asked for environmental information. However, as mentioned in paragraph 15, the outcome of an internal review constitutes a public authority's final response to a requestor. By this stage the GLA had identified its error although it did not state its reliance on regulation 12(4)(a).

42. The complainant raises a valid point with regard to records of the destruction of any information previously held by the GLA. The Commissioner notes the GLA's submission and its explanation above in paragraph 39. As this matter concerns the section 46 code of practice³ she will comment in "Other matters" below. Similarly, the time taken for the provision of an internal review will be considered below.

3

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1010395/Freedom_Information_Code_Practice_Web_Accessible.pdf

<https://ico.org.uk/media/for-organisations/documents/1624142/section-46-code-of-practice-records-management-foia-and-eir.pdf>

43. The Commissioner is aware that the complainant believes that there is a strong possibility that Kit Malthouse, as reportedly⁴ a supporter of the actions of HRH the Prince of Wales, did correspond and communicate on the redevelopment. The Commissioner understands that this may, or may not, be the case. However, she must focus on whether any information to support that belief was held by the GLA at the time of the request.
44. The Commissioner is satisfied that the GLA has carried out relevant searches and provided detailed explanations regarding the possible locations of any information in the scope of the request. She accepts that it is reasonable to expect that the searches carried out would have located this information, if held. It is unfortunate that the GLA does not have appropriate records of destroyed information which would have clarified whether any information had previously been held. In the circumstances the Commissioner does not consider that there are any further steps she could require the GLA to take to assist with her conclusions.
45. The Commissioner therefore finds that on the balance of probabilities the GLA does not hold any information in the scope of the request.

Other matters

⁴ <https://www.standard.co.uk/hp/front/boris-deputy-prince-charles-right-to-have-say-on-chelsea-barracks-6482263.html>

46. The Section 46 Code of Practice advises:

"It is important for an authority to keep records showing the location of the information it holds or has transferred to archives; or whether the information has been destroyed and if so, why and when.

If an authority receives a request for information that was destroyed, for example, as part of the routine disposal process these records will enable the authority to respond with confidence that it no longer holds the information."

47. In response to the question; "Does the GLA have a record of any document's destruction?" the GLA advised the Commissioner:

"The GLA does not use any Electronic Document & Records Management System (EDRMS) or any other corporate or central information or records repository to record any metadata concerning the creation, existence or disposal/destruction of any records that may have been held by the GLA. Staff are not required to otherwise document or record the creation, existence or disposal/destruction of any information or records that may have held by the GLA."

48. The Commissioner can take account of whether the section 46 code has been observed when considering section 50 complaints.

49. The Commissioner has the power to issue a practice recommendation under section 48 of FOIA if she considers that a public authority is not conforming to the code. The practice recommendation would indicate which provisions of the code had not been met and specify steps for the public authority to take.

50. The Commissioner expects the GLA to consider its current practices and make adjustments it determines are needed in order to more fully conform to the code in respect of the destruction of information. The recently updated section 46 Code of Practice, referenced at footnote 3, at part 2.7 should assist in this regard.

51. FOIA does not impose a statutory time within which internal reviews must be completed albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe. In the Commissioner's view it is reasonable to expect most reviews to be completed within 20 working days and reviews in exceptional cases to be completed within 40 working days.

52. The complainant asked for an internal review of the outcome of his request on 7 May 2020. The GLA did not provide the results of its review until 20 August 2020, clearly exceeding 40 working days. Although, as the complainant points out, the GLA did not rely on the effects of the COVID-19 pandemic to explain the delay the Commissioner notes that

this request for internal review was nevertheless sent during the time when the impact resulting from the pandemic was particularly prevalent. Notwithstanding this she would have expected the GLA to at least apologise – and account - for the delay.

Right of appeal

53. 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

54. 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.
55. 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

Susan Hughes
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