

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

Date: 8 November 2023

Public Authority: London Borough of Southwark
Address: PO Box 64529
London
SE1P 5LX

Decision (including any steps ordered)

1. The complainant requested information from the London Borough of Southwark (the Council) relating to historic expenditure data for a housing estate. The Council provided some information within scope of parts [1], [3] and [5] of the request however, on internal review, applied section 12 (cost limit) of FOIA to the request.
2. The Commissioner's decision is that the Council was entitled to refuse to comply with the request in accordance with section 12(1) of FOIA. In addition the Commissioner accepts that regulation 12(4)(b) (manifestly unreasonable) of the EIR also applies in respect of any environmental information. The Commissioner also finds that the Council complied with its obligations under section 16 of FOIA and regulation 9 of the EIR to offer advice and assistance.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 4 March 2023, the complainant made the following request for information to the Council:

“Dear Southwark Council,

This is a freedom of information request on behalf of [requester's details redacted].

Can you please supply all historic expenditure data for Nunhead Estate (including Tilling House, Creed House, Goodwin House, Glover House and Lancefield House)

1/ For the last 5 years

2/ For the last 10 years

Can this include:

1. Repairs costs and number of jobs listed by programme of works. Including Responsive repairs, Major works, Cyclical maintenance, Technical services, and all other works programmes.

2. 'Main Trades' costs, and number of jobs, such as drainage, carpentry, brickwork, and any others. 3. Administrative costs.

4. Dept repayments.

5. A key for any acronyms or codes.

Can you please also supply the number of 1, 2, 3 and 4 bedroom flats on our estate, broken down by building if possible.

Referring to your internal review response to my previous request on 16th February, please advise if this request is likely to be in the cost limit or if not how to bring it within the cost limit.

Best wishes"

5. The Council responded on 26 May 2023. It provided some information within the scope of parts [1], [3] and [5] of the request for the past 10 years, and stated that it required further clarification of part [4] of the request. The Council provided the complainant with a 50 page pdf document containing information in respect of works programmes carried out in blocks on the Nunhead Estate. The Council also provided the numbers of 1, 2, 3 and 4 bedroom flats broken down by building as requested by the complainant.

6. On 1 June 2023 the complainant requested an internal review. In their request the complainant stated:

"We are looking for the full cost of maintaining the estate.

Therefore as well as major works costs for the estate for the last 5/10 years, we also asked for the cost of repairs in general including responsive repairs, trades costs etc (see below)."

7. The complainant did not clarify part [4] of the request.

8. The Council did not provide an internal review response.
9. On 27 July 2023 the complainant contacted the Commissioner to complain about the way their request had been handled. The Commissioner accepted the complaint without an internal review.
10. On 12 October 2023 the Council provided its internal review. It stated that it held information within the scope of the request, but that the cost of complying with the entirety of the request would exceed the cost threshold of £450 for local authorities. In accordance with this finding, the Council issued a section 12 refusal notice in reply to the complainant's request for information. In accordance with its duties at section 16 of FOIA to provide advice and assistance, the Council suggested that the complainant could restrict their request to a single block or to a reduced timescale. However, the Council stated that, based on the scale of repairs that are carried out annually a refined request may still fall outside of the appropriate limit.

Scope of the case

10. The Commissioner has considered whether any of the requested information falls within the scope of the EIR rather than the FOIA.
11. In previous cases where the Commissioner has considered¹ information held relating to major works schemes, including external works such as those referenced in the Council's initial response to the complainant, the Commissioner has found this type of information to fall within the scope of regulation 2(1)(c) of the EIR as "measures affecting the elements of the environment".
12. However, per the Tribunal's decision in the case of Black v ICO (EA/2011/0064, 8 September 2011)² the Commissioner is satisfied that

¹ See, for example: <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4019953/ic-102631-g3h3.pdf>, <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4021774/ic-115239-n9h0.pdf>, <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4019783/ic-92789-y2h9.pdf>, and <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2616086/fer0812296.pdf>

²

<https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i566/20120503%20Webside%20Decision%20EA20110064.pdf>

any information held relevant to the request that relates to internal works on the estate would fall within the scope of FOIA.

13. In the Commissioner's view the request is likely to encompass both environmental and non-environmental information. Therefore, the Commissioner needs to consider both section 12(1) in FOIA and the equivalent provision in the EIR, regulation 12(4)(b) (manifestly unreasonable). In doing so, the Commissioner has adopted the approach set out in his guidance when dealing with requests that span both access regimes. Namely, that the costs of collating all the information can be taken into account under FOIA, but only the costs of collating the environmental information can be taken into account under the EIR.³
14. The Commissioner has also considered whether the Council met its obligation to offer advice and assistance, under section 16 of FOIA and regulation 9 of the EIR.

Reasons for decision

Section 12 – cost of compliance

15. Section 12(1) of the FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the "appropriate limit" as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations").
16. Section 12(2) of the FOIA states that subsection (1) does not exempt the public authority from the obligation to comply with paragraph (a) of section 1(1) (the duty to inform an applicant whether it holds information of the description specified in the request) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit. The Council relied on section 12(1) in this case.

The complainant's position

17. The complainant disagreed with the Council's application of section 12(1), arguing that the information is readily available as estate repair figures are 'used for internal purposes and in a more granular form to bill leaseholders annually.' The complainant also directed the

³ <https://ico.org.uk/media/for-organisations/documents/2021/2619010/calculating-costs-where-a-request-spans-different-access-regimes-31122020-version-12.pdf>

Commissioner to two similar requests submitted by WhatDoTheyKnow in which the Councils receiving the requests did not apply section 12(1).

18. In response to the complainant's position, the Council stated that:

"The first request for costs on the Heygate Estate provided total costs for the four financial years requested, not the level of breakdown that the complainant seeks, e.g. 'repairs costs and number of jobs listed by programme of works', 'responsive repairs', 'cyclical maintenance', 'all other works programmes' etc.

The second request for costs on the Ledbury Estate also provided total figures and on a very narrow timeframe from 29 June 2017 to 15 November 2017, not the level of breakdown nor the longer timeframe that the complainant seeks.

It is worth noting that the complainant raised similar points in the previous request and was advised as follows:

"With regard to the other point you raised about the council answering similar queries, please be advised that those requests were narrower e.g. specific timeframes, specific repairs etc. and therefore fell within the appropriate limit."

The council takes the view that these examples are both incomparable requests."

The Commissioner's position

19. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 at £600 for central government, legislative bodies and the armed forces and at £450 for all other public authorities. The appropriate limit for the Council is £450.
20. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 18 hours for the Council.
21. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held;

- locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
22. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v Information Commissioner & Medicines and Healthcare Products Regulatory Agency* EA/2007/0004, the Commissioner considers that any estimate must be “sensible, realistic and supported by cogent evidence”. The task for the Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.
23. Section 12 is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under FOIA to consider whether there is a public interest in the disclosure of the information.
24. Where a public authority claims that section 12 of FOIA is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit, in line with section 16 of FOIA.

Would the cost of compliance exceed the appropriate limit?

25. As is the practice in a case in which the public authority has informed the complainant that it holds the information, the Commissioner asked the Council to provide a detailed estimate of the time/cost taken to provide the information falling within the scope of this request.
26. In its submission to the Commissioner the Council stated:

“The council ran a report on the information requested (10 years of data for the 5 names properties on the Nunhead Estate) which resulted in a list of 6,751 records.

Out of these 6,751 records, there are 5,329 individual job descriptions describing the minor repairs undertaken. Each of the 6,751 records would need to be reviewed to assess the type and status of the job, whether an invoice was raised, what costs are associated with it etc.

As a minimum, spending 5 minutes assessing each records, this exercise would far exceed the appropriate limit of 18 hours / £450, as follows:

5 mins x 6,751 records = 33,755 mins (563 hours)

As a result, the Council maintains the view that applying the exemption under section 12(1) is appropriate for this part of the information request.

The Council has used the quickest methods for searching and extracting the requested information, by first downloading a dataset from 'iWorld', the electronic data management system and then using the filtering function in Excel to provide the figures above."

27. The Commissioner considers that the Council estimated reasonably that it would take more than 18 hours to respond to the request. Were the Council to reduce the time estimate per record by half, or even down to 1 minute per record, the amount of time required to respond to the request would still exceed 18 hours. The Council was therefore correct to apply section 12(1) of FOIA to the complainant's request.

Regulation 12(4)(b) – manifestly unreasonable

28. Regulation 12(4)(b) of the EIR allows a public authority to refuse a request for information that is manifestly unreasonable. A request can be manifestly unreasonable for two reasons: firstly, if it is vexatious and secondly where it would incur unreasonable costs for a public authority or an unreasonable diversion of resources. The second scenario is applicable here.
29. In contrast to FOIA, the EIR do not provide a definition of what constitutes an unreasonable cost. However, in the Commissioner's view the Fees Regulations can provide a useful point of reference when considering whether complying with a request would incur an unreasonable cost and therefore could be refused on the basis of regulation 12(4)(b).
30. When considering a request that seeks both environmental and non-environmental information, in terms of the EIR it will only be permissible to take into account the costs related to the provision of environmental information as defined at regulation 2(1). However, public authorities can take into account the costs of collating all the information falling within the scope of the request as long as doing so is a necessary first step because they cannot otherwise isolate the environmental information.
31. In the circumstances of this case the Commissioner is satisfied that the Council would have to collate all of the requested information before determining which access regime it would fall into. On the basis of the Council's submissions above the Commissioner is satisfied that this

would take a significant amount of time, so much so that he accepts that the request is manifestly unreasonable.

Public interest test

32. Even where a request is found to be manifestly unreasonable, the public authority must still respond unless the balance of the public interest favours maintaining the exception.
33. The Commissioner appreciates that compliance with the request would provide greater transparency regarding the costs incurred in respect of the estate.
34. However, the Commissioner is conscious of the significant amount of time that it would take the Council to comply with the entirety of the request. This would clearly place a significant burden on the Council and divert attention away from its core activities. As a result the Commissioner is satisfied that the public interest favours maintaining the exception.

Section 16(1) and regulation 9 – The duty to provide advice and assistance

35. Section 16(1) of FOIA provides that a public authority should give advice and assistance to any person making an information request. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45 code of practice⁴ in providing advice and assistance, it will have complied with section 16(1).
36. The equivalent advice and assistance provision is contained at regulation 9 of the EIR.
37. The Commissioner notes that the Council advised the complainant that they could reduce the scope of their request by either focusing on one building on the estate or by restricting the time frame to within one year. The Commissioner is therefore satisfied that the Council met its obligations under section 16 of FOIA and regulation 9 of the EIR.

⁴ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

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: 0300 1234504
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

Jonathan Slee
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