

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 May 2016

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

Decision (including any steps ordered)

1. The complainant has made a number of requests to the London Borough of Southwark (the Council) for information broadly relating to the serving of section 146 notices in accordance with the Law of Property Act 1925. The present notice concerns six of the requests. With regard to five of the requests (requests 1, 5 – 7 and 10), the Commissioner has decided that the Council either does not hold any information, or does not hold any further information in addition to the records that have already been provided. In relation to the remaining request (request 4(a)), the Commissioner has determined that the Council was not obliged to comply with the request under section 12(1) (appropriate costs limit) of FOIA but that it did breach section 16 (advice and assistance) by its initial handling of the request. In light of his findings, the Commissioner does not require any steps to be taken by the Council as a result of this notice.

Request and response

2. On 10 August 2015, the complainant wrote to the Council and requested information in the following terms under the heading "Service of a s.146 notice of the Law of Property Act 1925":
 1. *Please provide me with an explanation of the decision making process which the self employed solicitors – referred to as fee earners on their invoices – at the Legal Services Department apply when they decide to issue the s.146 notices with respect to major works and service charges debt (not current year's).*

2. *Please state how the sum charged £222 in 2011/2012 and now £270 is calculated, is there a statutory legal set fee for this? This is a two page standard notice used 2,074 times in past 5 years and so it must be a routine notice (8 sent per week as per information previously supplied)*
3. *Please provide the checking process in place at LBS legal Services department to ensure the self employed fee earner Solicitor is not paid twice, once by the public purse and once again by the leaseholder after litigation has been finalised?*
4. *(a) Please provide the total cost of Barristers instructed in past 5 years in relation to s.146 notices and attendances at Court by Barristers and their charges, including (b) the cost of the Woelke case which the Council lost, in the Upper Tribunal, on 27 June 2013 claim number below.*
5. *Please state any legal requirements or statutory regulations a fee earner at Legal Services must check prior to issuing a leaseholder with a s.146 notice of the Law of Property Act 1925 i.e Has the solicitor checked that the local authority has written permission from the FTT (First Tier Property Tribunal) to serve the s.146 notice (Commonhold & Leasehold Reform Act 2002 s.168(4) and that a Tribunal has declared that a breach of the lease has finally been determined to have occurred in respect of major works and service charges (not current year's service charges)*
6. *Please state the local authorities decision making process to seek possession orders pursuant to the s.146 notice of the Law of Property Act 1925 in relation to major works and historic service charge arrears (not current year)*
7. *Please provide me with details of the procedure at LBS from the first stage of debt arrears (not current year) to the final stage of a leaseholders seeking relief from forfeiture, ie. what is the trigger factor which results in the debtors file being sent from Home Ownership Unit to Legal Services in past 5 year's.*
8. *Please state how many files were passed from Home Ownership Unit to Legal Services in relation to major works and service charges after a resident leaseholder has been denied access to the Council's financial services (loans, charging orders) in past 5 years.*
9. *Please state whether the Invoices for major works and service charges are now provided on one single Invoice including all previous years debts in line with Martin Green QC's Upper*

Tribunal judgment in London Borough Southwark –v- Dirk Andrea Woelke (2013 UKUT 0349 –LC-) LVT Case LRX/6/2012 and please state, if these changes were implemented to serve major works and annual service charges on a combination notice at Home Ownership Unit, when this started?

10. *Please state the decision making process in relation to the Council's action to introduce interest free loans in 2014 and please provide the reason the Council decided to offer this financial service.*
3. The Council provided its response to each of the requests on 2 October 2015. The Council refused to comply with both parts of request 4, citing as the basis for doing so the 'appropriate costs limit' (section 12(1)) exclusion in FOIA for request 4(a) and the 'commercial interests' (section 43(2)) exemption to disclosure for request 4(b). With regard to the remaining requests, the Council either stated that it did not hold the specified information or provided a relevant document or an explanation that the Council considered answered the request.
4. The complainant contacted the Council later the same day and asked the Council to reconsider its response on the requests. Accordingly, the Council carried out an internal review, the outcome of which was provided to the complainant on 10 November 2015. The reviewer attempted to provide some further clarification that she considered might be helpful to the complainant in respect of some of the requests but ultimately upheld the Council's original responses.

Scope of the case

5. The complainant contacted the Commissioner on 10 November 2015 to complain about the way her requests for information had been handled.
6. In response to the Commissioner's query regarding the scope of the complaint, the complainant has confirmed that she was only seeking to pursue requests 1, 4(a) and (b), 5 – 7 and 10. Furthermore, during the Commissioner's investigation, the Council agreed to disclose the information requested at 4(b). It has therefore been agreed with the complainant that this request could also be excluded from the Commissioner's determination.

Reasons for decision

Background

7. The website of the Leasehold Advisory Service¹ provides the following information in relation to section 146 notices:

What is forfeiture, and what recourse do leaseholders have?

A lease is a contract and therefore if a leaseholder breaches the terms of their lease, the landlord could take legal action against them. Forfeiture of the lease is the ultimate sanction a landlord could pursue in such situation. In order to gain possession of the property by forfeiting the lease it is necessary to obtain a court order. The process is commenced, generally, by the service of a valid notice under section 146 of the Law of Property Act 1925, the Notice of Seeking Possession.

A valid section 146 notice cannot be served unless the leaseholder has agreed the arrears or that breach has occurred; or the breach or amounts due has been finally determined by the First-tier Tribunal (Property Chamber) or a court or under a post-dispute arbitration agreement. A determination becomes final at the end of any period provided for appeal and the landlord may not serve the section 146 notice until 14 days after that date.

If the breach relates to arrears, you cannot serve a valid section 146 notice where the amount of service charges, administration charges or ground rent owed (or a combination of all of these) total less than £350, or have been outstanding for less than three years. It is not necessary to serve a section 146 notice if the breach is for ground rent arrears.

A leaseholder can apply to court to seek relief from forfeiture. This means having the forfeiture set aside and the lease restored. The court has a wide discretion to grant or refuse relief, which is more likely to be exercised in favour of the leaseholder if they react swiftly, pay any arrears, remedy any breaches of covenant and pay the landlord's costs.

¹ <http://www.lease-advice.org/information/faqs/faq.asp?item=233>

Requests 1, 5 and 6 – extent of information held

8. The Council considers that it does not hold information covered by requests 1, 5 and 6. These requests share a general theme, in that they all ask for details of procedures connected to the serving of a section 146 notice.
9. FOIA is solely concerned with recorded information that is held by a public authority. This means that the legislation does not require a public authority to provide opinions or explanation, generate answers to questions, or create or obtain information it never held, or no longer holds, even where this would be helpful.
10. As the Commissioner's guidance 'Determining whether information is held'² explains, when the Commissioner receives a complaint that a public authority has not provided any or all of the requested information, it is seldom to possible to prove with absolute certainty that there is not either any information or anything further to add. The Commissioner will therefore apply the normal civil standard of proof in determining the case, ie he will decide on the balance of probabilities whether the required information is held. To exercise this test, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out and, or any other explanations offered that demonstrate why the information is not held.
11. The Commissioner has invited the Council to explain why it does not hold the information caught by the three requests. When doing so, he has suggested that these types of requests will normally be answered by a public authority providing a copy of a relevant policy document or piece of guidance that administers the way decisions are reached. Leading on from this observation, the Commissioner has sought clarification on the reasons why information of this nature could not be provided here.
12. To illustrate the Council's position, the Commissioner has reproduced below his questions to the Council alongside the Council's reply (a copy of which has been shared with the complainant, including the attachment referred to in the response to question (1)):

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

IC: (1) Does the Council have any policy, checklist or other kind of procedural guidelines not captured by the requests that refer to the serving of a section 146 notice?

- *The council does not have any policy, checklist or other kind of procedural guidelines that relate to the serving of a section 146 notice, not captured by requests 1, 5 and 6. I have however attached a flowchart which relates to any action and not just to the serving of section 146 notices.*

IC: (2) In the event that the Council confirms it does not hold any of the information cited in question (1), how does the Council regulate whether a decision to issue a section 146 notice was properly made?

- *Further to 1. above, I would add that section 146 notices are served when a breach of lease has occurred and been legally determined, i.e. when the council has received a court judgment for non-payment, it will issue a section 146 notice one month after the date of the judgment, if a leaseholder has not paid the debt in full, thereby removing themselves from the register of judgments. The council's enforcement administration team is responsible for the review of payments received, following receipt of judgment. If the council does not receive payment of the judgment debt in full within a month of the judgment, the team will issue a section 146 notice to the leaseholder. It reviews the account within three weeks of issuing a notice to check whether payment has been made.*

IC: (3) With regard to request 5, is the Council able to say that there are no 'legal requirements or statutory regulations' that must be checked prior to the issuing of a section 146 notice on a leaseholder? In any case, it would be helpful if you could confirm whether there are any other statutory instruments that are relevant to the serving of section 146 notices (even if they are not directly caught by the scope of the request).

- *With regard to request 5, the council is not aware of any legal requirements or statutory regulations that must be checked prior to the issuing of a section 146 notice or of any other statutory instruments that are relevant to the serving of section 146 notices.*

IC: (4) Regarding request 6, did the decision to seek possession orders in relation to major works and historic service charge arrears mark a departure in the policy of the Council? If so, what

guided this change and is there any information that reflects this shift in policy?

- *Regarding request 6, I have not been able to find any information about a change in policy in relation to seeking possession orders in respect of major works and historic service charge arrears.*
13. The Commissioner considers the Council's explanation effectively outlines the circumstances in which enforcement action may be considered and the trigger for serving a section 146 notice. Importantly, it indicates that the decision making process for issuing a section 146 notice rests primarily on the failure of a leaseholder to pay a debt in accordance with a court judgment. In view of the Council's claim that it is not aware of any legal requirements or statutory regulations that must be checked prior to serving a section 146 notice, the Commissioner considers that coherent reasons have been provided that demonstrate why the Council does not, and furthermore is not required to, hold further information.
14. Returning to the test of probabilities, however, the Commissioner has also considered whether there is any evidence that would appear to contradict, either directly or indirectly, the Council's position. The Commissioner has not become aware of any conflicting evidence from his own research. He has also taken into account the complainant's own submissions for doubting the Council's position. She stated:
- At a glance [of the Council's response to the Commissioner], the Council is refusing to provide me with a description of its decision making process and I have forward to you copies of case which plainly set out the law and which clearly state that s.146 cannot be used for service charges.*
- I have also provided you with copies of FOI which I have been sent from other national councils who state they have never served any s.146 notices in respect of service charge debts.*
15. The Commissioner understands that the complainant has significant concerns about the Council's enforcement policy and its use of section 146 notices in particular. The Commissioner is though restricted to considering whether a public authority has handled a request in accordance with FOIA and cannot offer any judgement on the propriety or lawfulness of a public authority's decision-making in other areas. In this sense, the Commissioner has found that neither the complainant's arguments nor the supporting evidence carry substantial weight in terms of demonstrating that the Council *does* or *should* hold further information.

16. Weighing up the submissions put before him, and based on his own research, the Commissioner has concluded on the balance of probabilities that the Council was correct to say that it does not hold the requested information.

Request 4(a) – appropriate costs limit (section 12(1))

17. The complainant has requested '*the total cost of Barristers instructed in past 5 years in relation to s.146 notices and attendances at Court by Barristers and their charges.*'
18. The Council has explained that section 146 notices are issued for breaches of a lease – this may be because of non-payment of service charges or use of a property in a way not permitted by the lease. The majority of these notices will result in payment being made or rectification of the breach in some other way and will not require any further action or the use of a barrister. The home ownership unit cases which have involved barristers will be ones that have progressed to the point of possession – and this, the Council has clarified, is only a small number of total cases of section 146 notices served.
19. The Council has refused to comply with the request under section 12(1) of FOIA. This provides 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.
20. The appropriate limit is specified by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations). These state that the costs limit for authorities like the Council is £450. The Fees Regulations further state that an estimate can only take into account the costs a public authority reasonably expects to incur in: determining whether it holds the requested information; locating the information; retrieving the information; and, extracting the information. The costs associated with each of these activities should be calculated using the standard rate of £25 per hour, per person. Where a public authority estimates that compliance would exceed the appropriate costs limit, it is not obliged to search up to that limit.
21. In its response to the complainant the Council stated it does not have a system in place that records the specific cases in which a section 146 notice has been served. In the absence of such a system, the Council informed the complainant that it would be required to go through many hundreds and possibly thousands of files individually to find out in which instances the advice was to proceed by way of a section 146. The Council considered the completion of this process would go over the appropriate costs limit.

22. A public authority seeking to apply section 12 does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. The estimate must, however, be reasonable, which means being sensible, realistic and supported by cogent evidence. The Commissioner has asked the Council a series of questions in order to test whether the Council's estimate was reasonable in the circumstances. Again, these are reproduced in this notice alongside the Council's response in order to show the development of the Council's estimate.

IC: (1) Is there any other way that the requested information could be collated other than by checking each of the case files on which a barrister had been instructed? For example, the Council may hold a general costs spreadsheet for audit purposes that provides a description of the case and the action taken.

- *The legal team have confirmed that the information requested is not held in any other format and can only be collated by checking each of the case files.*

IC: (2) With reference to the four activities listed previously, please provide a detailed estimate of the time required to provide the information falling within the scope of the request.

- *The legal team has estimated that for each case, the following activities need to be undertaken:*
 - a. Location of file in storage and completion of file retrieval form – 10 minutes*
 - b. Review of file to see whether case includes service or enforcement of section 146 notice – 10 minutes*
 - c. Review of file and case management system to determine if a barrister was used and, if so, how much this cost – 10 minutes*

Over the last five years, the legal team has opened 139 home ownership unit cases and, using the above estimate of 30 minutes per case, it is calculated that it would take in the region of 70 hours to provide the information falling within the scope of the request. Using the standard rate of £25 per hour per person gives a cost of £1,750 but I would note that b and c above would need to be undertaken by legal fee earners rather than administrative staff.

IC: (3) Please clarify whether a sampling exercise has been undertaken in order to determine the estimate.

- *Although no sampling exercise has been undertaken in order to determine the above estimate, it should be noted that the individual case files vary significantly in size. The time estimated has been based on small files, with no additional time factored in for larger, more complex files, and is expected to be exceeded in reality if the information were to be collated.*
23. The Commissioner's guidance on section 12³ explains that a sensible and realistic estimate is one which is based on the specific circumstances of the case. In other words, it should not be based on general assumptions – for example, that all records would need to be searched in order to obtain the requested information when it is likely that staff in the relevant department would know where the requested information is stored. This, the Commissioner advises, does not mean that a public authority has to consider every possible means of obtaining the information in order to produce a reasonable estimate. An estimate is unlikely to be reasonable though where an authority has failed to consider an absolutely obvious and quick means of locating, retrieving or extracting the information.
 24. The Council's initial estimate exceeded by a significant degree the cost threshold of £450, or the equivalent 18 hours of work. To demonstrate that the estimate emerged from sensible and realistic assumptions though, the Commissioner has encouraged the Council to undertake a sampling exercise. This has been done in respect of 10 files.
 25. The Council has found that the outcome of the sampling exercise supported the position that section 12(1) of FOIA applies. For the sake of the Commissioner's investigation, it has provided a step-by-step explanation of the processes associated with complying with the request, totalling 24 in all, and the corresponding time it had spent on each of the activities.
 26. Using the information gleaned from the sampling exercise, the Council advised that it would take over 23 hours to locate and retrieve the relevant files. A fee earner would then need to review each of the files in order to extract the required cost information, which would take the time needed to comply with the request well over the costs threshold.
 27. As stated, the Commissioner will accept that section 12(1) of FOIA applies where a public authority's estimate is sensible and realistic. In

³ https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

this case the Commissioner considers important the fact that the Council's estimate has been underpinned by the findings obtained from a sampling exercise. In saying this, the Commissioner is surprised by some of the activities included in the sampling exercise – which includes, for example, the task of acknowledging a file retrieval request – and the corresponding time allocated to these activities. Overall, however, he considers that the information obtained from the sampling exercise lends weight to the Council's view that section 12(1) of FOIA is engaged.

28. The Commissioner has also noted the Council's assertion that, in addition to the specific processes linked to locating and retrieving the relevant home ownership files, it would incur an extra £296 file retrieval cost from the storage company used by the Council. This is because the Council's storage company makes a charge for each collection trip made and a smaller charge for each file retrieved.

29. There may be occasions when a public authority is entitled to include in its estimate costs other than those directly related to staff time. As the Commissioner's guidance states at paragraph 18, the key is whether it would be reasonable to include those charges. The guidance gives at paragraph 20 the following example of where this may be the case:

20. If a public authority uses off-site storage, it will depend on the terms of the contract between the public authority and the contractor as to whether the costs of locating, retrieving and transporting the information from deep storage can be included in the estimate. Public authorities should note that the Commissioner may want to see the contract in order to be satisfied that such costs can be correctly included.

30. The Commissioner has found that the costs limit in section 12(1) of FOIA would be exceeded even if this file recovery cost was not included. He has not therefore had to analyse whether it would be reasonable to include the charge. That said, the Commissioner considers it likely that the Council would be entitled to include some, if not all, of the £296 fee as part of the estimate; thereby further adding to the estimated costs of complying with the request.

31. Where a public authority refuses a request under section 12(1) of FOIA, it must then have regard to section 16 of FOIA, which states that it shall be the duty of a public authority to provide advice and assistance so far as it would be reasonable to expect the authority to do so. In terms of the advice and assistance that may be provided, paragraph 14 of the Code of Practice issued under section 45 of FOIA (the section 45 Code of Practice) states that where a public authority is not obliged to comply with a request because of the appropriate costs limit, then it:

[...] should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee.

32. Should a public authority satisfy the requirements of the section 45 Code of Practice, it shall be deemed to have complied with section 16 of FOIA.
33. The Commissioner's guidance on section 12 explains at paragraph 59 that in cases where it is reasonable to provide advice and assistance, the minimum a public authority should do in order to satisfy section 16 is: either indicate if it is not able to provide any information at all within the appropriate limit; or, provide advice and assistance to enable the requester to make a refined request.
34. By its failure to address the requirement to provide advice and assistance in its responses to the complainant, the Council breached section 16 of FOIA. The Commissioner has therefore asked the Council as part of his investigation to consider how the duty in section 16 of FOIA could have been exercised. In reply, the Council stated that it "could have indicated the estimated cost of answering the request as asked and suggested to the complainant that if she were able to stipulate a shorter time period or to have asked the council to review up to 36 cases from a particular period, the council would endeavour to provide the information requested." The Commissioner has gone on to consider whether this explanation now discharges the section 16 obligations to provide advice and assistance.
35. The Commissioner's guidance states that, as far as reasonably possible, a public authority should inform the requester of what information can be provided within the appropriate limit. This is important for two reasons: firstly, because a failure to do so may result in a breach of section 16. Secondly, because doing so is more useful than just advising the requester to 'narrow' the request or be more specific in focus. Advising requesters to narrow their requests without indicating what information a public authority is potentially able to provide within the limit, will often just result in requester's making new requests that will still exceed the appropriate limit. When considering the application of section 16 though, it is also necessary to bear in mind that the requirement to provide advice and assistance is qualified by the words 'only in so far as it would be reasonable to do so'.
36. The Commissioner is satisfied that the advice and assistance given by the Council does not simply recommend that the complainant narrow her request but has offered a way in which the complainant could refine

her request so as potentially to bring it within the costs threshold. By offering this guidance, the Commissioner considers that the Council has appropriately engaged with the request by tailoring its advice and assistance. Consequently, while the Council did breach section 16 of FOIA, the Commissioner does not now require it to take any further steps.

Requests 7 and 10 – relevance of information provided

37. The Council has provided the complainant with a number of documents it considered were pertinent to the requests and, with regard to request 10, also stated that the essential information had already been supplied in response to another request.
38. In respect of request 7, the Council included a copy of its 'Service Charge Collection and Arrears Recovery Procedure Note' dated July 2015 and a report of the Arrears Working Party. With reference to request 10, the Council had provided its 'Leaseholder repayment options – assistance for leaseholders in respect of service charges for major works' and 'Leasehold Service Charge Loans' reports which were approved by the then Executive on 22 October 2002 and 4 May 2004 respectively.
39. The complainant has argued, however, that there must be more up-to-date information that should have been released. For request 7, the complainant has stated that the report supplied "was an old report and does not give any information concerning the current day to day procedures." For request 10, the complainant considers that the information released "answers in respect of 2004 and not 2014."
40. The Council maintains that the correct and most up-to-date versions of the reports have been supplied and, to put its response in context, has informed the Commissioner of the following:
 - Other than in respect of the situation referred to below, the Council has not reviewed the reports or policies in question.
 - The Council was not aware of any plans to update the reports or policies.
 - The Council continued to refer to the information provided in response to the requests.
41. In relation to request 7, the Council has pointed out that the information had only been produced relatively recently and, in respect of the Procedure note, concerns current day-to-day processes. Concerning request 10, the Council has provided the following explanation:

For request (10), the council provided its 'Leaseholder repayment options – assistance for leaseholders in respect of service charges for major works' 22nd October 2002' and 'Leasehold Service Charge Loans' reports which were approved by the then Executive on 22 October 2002 and 4 May 2004 respectively. Since that date, the only policy amendment that has been formally approved was in November 2009 when the relevant cabinet member considered and approved a report on 'Home Ownership – Equity Shares & Equity Loans 2009/10'. This agreed the implementation of equity shares and equity loans schemes but did not deal with interest free loans. There have been no further formal changes to policy, although a report was drafted in May 2011 which proposed amendments to the interest free payment scheme available to resident leaseholders for major work service charges. These would have extended the 36 month interest free period to a new term of 48 months in 'exceptional circumstances' and would have applied to resident leaseholders only. The report was never formally considered or approved, but, notwithstanding this, 48 month interest free repayment periods have been given to resident leaseholders for invoices over £7,200 – and this option has been included in leaflets to leaseholders.

42. The Commissioner understands from this that by 2014, the year specified in the request, the Council's policy on the repayment of service charges for major works was to offer to resident leaseholders an interest free loan over a period of 36 months, or 48 months in exceptional circumstances. The complainant has been informed of this explanation but maintains that the request has not been answered. In this regard, she appears to be arguing that the information received does not include information covering the introduction of interest free loans in 2014.
43. The complainant has not specifically explained in what way she considers that 2014 marked either a change in, or a fundamentally new, approach to the provision of interest free loans. The Commissioner is also not aware from his own research of any evidence that indicates such a shift occurred in that year or even that the policy on interest free loans in existence in 2014 was not conveyed in the information provided.
44. For this reason, the Commissioner has concluded that in relation to request 10 the Council does not hold any further information that records "the decision making process in relation to the Council's action to introduce interest free loans in 2014". He is also satisfied, based on the Council's explanation, that the information relevant to request 7 has been supplied.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

46. 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.
47. 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

Alun Johnson
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