

GREATER LONDON AUTHORITY



Our Ref: MGLA020715-8917

7th January 2016

Dear ,

Freedom of Information Act request – Garden Bridge Guarantees

I write further to our correspondence over the past few months regarding your request for information that the GLA received on the 1st July 2015.

Your request asked for the release of the following information:

- (i) *any correspondence between the Garden Bridge Trust or TfL and Claire Hamilton, Tim Steer and Fiona Fletcher Smith of the GLA between 01/01/15 and 04/06/15 regarding the Operations and Management Business Plan for the proposed Garden Bridge, and/or information regarding on-going maintenance costs, operational costs and funding resources for the proposed Garden Bridge*
- (ii) *any correspondence between the PLA and Claire Hamilton, Tim Steer and Fiona Fletcher Smith of the GLA between 01/01/15 and 04/06/15 regarding the Garden Bridge.*

Before I continue, I would like to once again apologise for the length of time that it has taken us to provide you with our response to your request. I hope that this delay has not inconvenienced you unduly and I would like to thank you for your patience and understanding in this matter.

Although your request was made under the Freedom of Information Act 2000 (FoIA), because the subject matter of the request is a proposed development, it appears to us that the request could appropriately have been made under the Environmental Information Regulations 2004 (EIR), which we have therefore considered and primarily applied.

I can confirm that the GLA holds information relevant to your request and that we are able to release some of this information to you in response your request.

After careful consideration, we have decided that some of this information in-scope of your request is covered by exceptions to our duty to disclose information under regulation 5. In particular, we consider that the following exceptions apply to some of the information covered by your request:

- *Under regulation 12(4), a public authority may refuse to disclose information to the extent that;*
 - (d) *the request relates to material which is still in the course of completion, to unfinished documents, or incomplete data; or*

(e) the request involves the disclosure of internal communications.

- Under regulation 12(5), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.

Regulation 12(4)(d) – material which is still in the course of completion

Regulation 12(4)(d) is engaged when the request relates to material that is still in the course of completion, unfinished documents or incomplete data. If the information in question falls into one of these categories, then the exception is engaged.

This provision has been applied to withhold unfinished documents and information that relates to, or discuss the content of, those documents. Guidance published by the Information Commissioner clarifies:

“The fact that the exception refers to both material in the course of completion and unfinished documents implies that these terms are not necessarily synonymous. While a particular document may itself be finished, it may be part of material which is still in the course of completion. An example of this could be where a public authority is formulating and developing policy.”

This same guidance also clarifies that material which is still in the course of completion can include information created as part of the process of formulating and developing a policy, decision or recommendation.

In this regard, this regulation of the EIR acknowledges that public authorities should have the necessary space to think in private, to develop and explore the full range of options relevant to a particular policy or process in a “safe space”; protecting the integrity of the decision making process, and the free and frank exchange of ideas, options and suggestions that form part of that process.

To the extent that this EIR regulation also refers to ‘unfinished documents’, it has been engaged to withhold ‘draft’ documents or instances where work on a document ceased before it was finalised and there is no intention to finalise it.

The GLA notes the decision of the Information Tribunal in the case of *Secretary of State for Transport v the Information Commissioner* (EA/2008/0052, 5 May 2009)¹ where, in paragraphs 81 & 82) the Tribunal finds that the status of a ‘draft’ document “does not change simply because a final version exists” and that a draft document “..is, by its very name and giving words their logical meaning, an unfinished document”.

It is not necessary to demonstrate where disclosure might have any particular adverse effect in order to engage the exception, but any adverse effects of disclosure may be relevant to the public interest test considerations.

¹ ‘Secretary of State for Transport v the Information Commissioner’ (EA/2008/0052) - <http://www.informationtribunal.gov.uk/DBFiles/Decision/i307/Sec%20of%20State%20for%20Transport%20v%20IC%20%28EA-2008-0052%29%20-%20Decision%2005-05-09.pdf>

Regulation 12(4)(e) – internal communications

The underlying rationale behind the exception is that public authorities should have the necessary space to think in private. The original European Commission proposal for the Directive² explained the rationale as follows:

“It should also be acknowledged that public authorities should have the necessary space to think in private. To this end, public authorities will be entitled to refuse access if the request concerns [...] internal communications.”

This EIR provision has been applied to withhold a small number of internal email communications that contain free and frank discussions within the GLA.

Regulation 12(5)(b) – course of justice

This EIR exception has been engaged to withhold limited information that is subject to Legal Professional Privilege (LPP), to protect the advice provided by GLA legal advisors and confidential communications with them about that advice. Legal advice privilege is attached to confidential communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication.

The GLA considers that LPP is a key element of the administration of justice and part of the activities encompassed by the phrase “course of justice” in this EIR regulation. The disclosure of this information would be likely to prejudice the ability of the GLA to obtain advice on its legal rights and obligations.

The legal advice in this case refers to opinions based on a particular set of circumstances and could be used again in the future. We also consider that disclosure of this advice would undermine the important common law principle of legal professional privilege.

Public Interest Test considerations

In relying on these EIR exception provisions under regulations, the GLA is required to balance the public interest in order to decide whether the information should be withheld.

Under regulation 12(1)(b), the public authority can only withhold the information if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Furthermore, under regulation 12(2), it must apply a presumption in favour of disclosure.

It is important to note that the ‘public interest’ is not the same as what might be of interest to the public. In carrying out a PIT we consider the greater good or benefit to the community as a whole if the information is released or not. The ‘right to know’ must be balanced against the need to enable effective government, deliver efficient policies and proposals and to serve the best interests of the public.

The EIR are ‘applicant blind’. This means that we cannot, and do not, ask about the motives of anyone who asks for information. In providing a response to one person, we are expressing a willingness to provide the same response to anyone.

² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0402:FIN:EN:PDF>

There is an underlying rationale supporting the disclosure of environmental information, as outlined in Directive (2003/4/EC) which gave rise to the Environmental Information Regulations,

Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision making and, eventually, to a better environment.

In this case there is a strong public interest in the release of information that would inform and engage public debate on issues pertinent to the Garden Bridge. The release of the information covered by this exception would also therefore help reassure the public that we are considering the most appropriate options and advice regarding the planning application.

In relation to the information covered by the exceptions under regulations 12(4)(d) and (e), the GLA needs to have a “safe space” in which to have discussions and make effective decisions. Disclosure of the information concerned would be likely to prejudice this valuable private “thinking space” by inviting external comments and criticism prior to the development of a final policy.

We acknowledge that effective policy and decision making should be informed by engaging with the public and key stakeholders; however this engagement needs to be structured to be effective. Release of this information at this time would divert attention and resources away from the task at hand and towards responding to external thoughts whilst discussions are still ongoing.

This in turn would also be likely to have an adverse effect on the GLA’s ability to engage in free-flowing and honest exchanges of views in the future as it is likely that officials would become reluctant to explore all options - including unpopular or unlikely ideas - for fear of disclosure and negative publicity.

The best interests of the public – i.e. the public interest – is best served by ensuring that public authorities continue to deliberate robustly and comprehensively, considering all options and their potential impacts, in order for the best possible decisions to be taken.

There is also the consideration releasing incomplete or unfinished material into the public domain would distract public debate away from the substantive environmental issues that the information relates to. Instead debate could focus on secondary issues such as any deficiencies in the information or the differences between a draft and a final version. While this argument does not carry significant weight, it is nonetheless relevant.

In relation to the information subject to Legal Professional Privilege, we would also add that the public interest in maintaining this exception to disclosure is strong due to the fundamental importance of the general principle of upholding the administration of justice and this common law principle.

The GLA acknowledges that disclosure would promote accountability and transparency in its decision making and ensure that the GLA is seen to be acting appropriately and with probity, and that planning principles are being applied fairly and equally. This is especially the case where the GLA’s actions have a direct effect on the environment.

However, we also consider that it is in the public interest that decisions made by the GLA are made in a fully informed legal context. The GLA requires legal advice for the effective performance of its operations and that advice must be given by lawyers who are fully apprised

of the factual background, and disclosure of that advice could materially prejudice the GLA's ability to protect and defend its legal interests.

Again, there is significant importance in maintaining the principle behind LPP in safeguarding the openness of communications between a client and his or her lawyer to ensure access to full and frank legal advice.

After considering all the considerations pertinent to the circumstances of this request, we consider that the balance of the public interest favours maintaining the disclosure-exception provisions under regulations 12(4)(d), 12(4)(e) and 12(5)(b) at this time.

If you have any further questions relating to this matter, please contact me, quoting the reference at the top of this letter.

Yours sincerely

A handwritten signature in black ink, appearing to be 'I. Lister', written in a cursive style.

Ian Lister
Information Governance Manager

If you are unhappy with the way the GLA has handled your request, you may complain using the GLA's FOI complaints and internal review procedure, available at:

<http://www.london.gov.uk/about-us/greater-london-authority-gla/sharing-our-information/freedom-information>