

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

Decision Notice

Date: 26 March 2019

Public Authority: London Borough of Merton
Address: Merton Civic Centre
London Road
Morden
SM4 5DX

Decision (including any steps ordered)

1. The complainant has requested information regarding a specific planning application. The London Borough of Merton (the Council) originally refused the request on the basis of the exception at regulation 13 of the EIR (personal data). It subsequently cited further exceptions: regulation 12(4)(b) (manifestly unreasonable request), regulation 12(4)(d) (material in the course of completion) and regulation 12(4)(e) (internal communications).
2. The Commissioner's decision is that the Council has failed to demonstrate that any of the exceptions cited are engaged with respect to the requested information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information to the complainant. However, the Commissioner does not require the public authority to disclose information that is the personal data of third parties.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

Request and response

5. On 15 January 2018 the complainant submitted the following request to the Council in respect of a specific planning application:

"We require a full copy of the Council's file held in connection with this planning application, in particular all emails, memorandums, correspondence, attendance notes and any other associated documentation that sets out the nature of any discussions and any correspondence between the Council and the applicant and agent.

We also require copies of all emails, memorandums, correspondence, attendance notes and any other associated documentation relating to correspondence between the Council's departments and officers.

We do not require copies of the documents available to the public on the Planning Explorer pages of the Council's website."

6. The Council responded to the request on 12 February 2018, advising that it had been handled under the EIR. The Council stated that the requested information was exempt on the basis of regulation 13 of the EIR. This applies where the disclosure of personal data relating to third parties would contravene data protection legislation.
7. The complainant requested an internal review on 13 March 2018. The complainant clarified that they did not wish to receive information that was "*biographical in a significant sense*", or any "*genuinely personal information*". However the complainant did not accept that all of the requested information was personal data.
8. The Council provided the outcome of the internal review on 31 May 2018. At this stage the Council stated that all of the requested information was accessible on its planning portal. Therefore the Council stated that the information was exempt from disclosure under section 21 FOIA and regulation 12(4)(b) EIR. The Council also considered that the exceptions at regulation 12(4)(e) and 12(4)(d) were also likely to apply.

Scope of the case

9. The complainant contacted the Commissioner on 15 June 2018 to complain about the way their request for information had been handled. The complainant argued that the Council's Planning Explorer Portal did not contain all of the requested information. In addition the complainant disputed the Council's application of the exceptions cited, although they confirmed to the Commissioner that they were content to exclude the

personal data of junior members of staff. In light of this, and the complainant's comments at paragraph 7 above, the Commissioner has excluded from the scope of the case the names and contact details of junior members of Council staff, as well as names and contact details of individuals in line with the redacted information published on the Planning Explorer Portal.

10. The Commissioner asked the Council to clarify whether it had withheld any information that was not personal data. The Council subsequently confirmed to the Commissioner that it had withheld some information from the complainant. The Council provided the Commissioner with a copy of the withheld information. The Council also provided the Commissioner with a brief schedule describing the withheld information.
11. The schedule provided by the Council indicated that the complainant was "party to" some of the information, although it did not specify which documents it considered this applied to. The schedule also suggested that some of the information was not exempt and could be disclosed to the complainant. However the Council did not disclose any information at this stage.

Reasons for decision

Regulation 12(4)(b): manifestly unreasonable request

12. Regulation 12(4)(b) of the EIR states that a public authority is not obliged to comply with a request to the extent that the request is manifestly unreasonable.
13. The Council cited regulation 12(4)(b) in its internal review letter:
"In respect of the EIR, it is manifestly unreasonable (Regulation 12(4)(b)) that the Council should disclose documents where they are all obviously accessible on the Council's planning explorer portal."
14. If the request had been for information available via the portal, the Council would have been entitled to rely on regulation 6(1)(b), which says that a public authority is not required to make information available in a particular form or format where the information is already publicly available and easily accessible to the applicant in another form or format.
15. However, the wording of the request specifically excluded information accessible via the Planning Explorer Portal. The Commissioner finds that regulation 12(4)(b) is not engaged because it will only apply where a public authority is refusing to disclose information in response to a

request. To the extent that the Council has published information via its Planning Explorer Portal, it has not refused to disclose this information.

Regulation 12(4)(d): material in the course of completion

16. The Council cited regulation 12(4)(d) in its internal review letter on the basis that:

"The planning file may include discussions that will involve negotiations with officers in this context and are therefore exempt."

17. The Commissioner asked the Council to provide a more detailed explanation as to how this exception was engaged. The Commissioner also asked the Council to provide details of the public interest test it was required to conduct in respect of the exception.
18. The Council did not provide any specific arguments in respect of regulation 12(4)(d). The schedule of withheld information made brief references to some activities being unfinished. However, despite the Commissioner's clear instruction the Council failed to explain how the exception applied to any of the information.
19. The Commissioner cannot be satisfied, on the basis of the information provided by the Council, that the Council was entitled to rely on the exception at regulation 12(4)(d). Therefore the Commissioner finds that the exception is not engaged and is not required to consider the public interest test.

Regulation 12(4)(e): internal communications

20. Regulation 12(4)(e) provides an exception to environmental information that comprises internal communications. Again, the Commissioner asked the Council to clarify which information it considered fell within the scope of the exception.
21. The schedule provided by the Council described some of the withheld information as internal communications. Having inspected the withheld information the Commissioner accepts that some documents as identified by the Council are internal communications. Accordingly the Commissioner is satisfied that these documents engage the exception at regulation 12(4)(e) and she is required to consider the public interest.
22. Again, the Commissioner asked the Council for details of its public interest considerations. This should include the arguments identified in favour of disclosure, and specific arguments in favour of maintaining the exception. The public authority should then balance the competing arguments and decide where the public interest lies. Regulation 12(2) of

the EIR explicitly requires that the authority apply a presumption in favour of disclosure.

23. The Council set out its arguments in one paragraph. It acknowledged that disclosure of the information in question would provide clarity to both parties, but stated that it would also allow them both to adjust their positions, thus delaying the decision making process. The Council said it could be argued that the public interest favoured non-disclosure in order to allow decision makers to reach a conclusion without entering into ongoing disclosure.
24. The Commissioner is not satisfied that the Council has demonstrated an adequate consideration of the public interest. Its consideration appears to have focused on the interests of the interested parties, ie the planning applicant and the objectors to the applicant. The authority has apparently failed to consider the wider public interest, since disclosure is to the public at large rather than just the complainant. The Commissioner finds that the public interest arguments are too generic, and fail to have regard to the actual withheld information. For this reason the Commissioner finds that the public interest in maintaining the exception at regulation 12(4)(e) does not outweigh the public interest in disclosure of the information in question.

Regulation 13: personal data of third parties

25. The Council's refusal notice cited regulation 13 on the basis that the requested information was personal data. When requesting an internal review, the complainant pointed out that it was unlikely that all of the requested information comprised personal data. The Council's internal review letter reiterated that regulation 13 applied "*as personal information is included throughout the papers on this application.*"
26. As set out above the Commissioner notes that the complainant was content to exclude from the scope of the request information that was "*biographical in a significant sense*", as well as details of junior staff.
27. Therefore the Commissioner finds that the Council should redact this personal data from the information to be disclosed as set out above. However she would add that the Council ought to have been clearer about what it considered to be personal data in this case.

Other Matters

28. Although the Council did respond to the Commissioner's enquiries, its submission was unfortunately wholly inadequate. This is particularly disappointing given that the Commissioner issued four decision notices involving this public authority in 2018 alone. The Commissioner expects experienced public authorities such as London Borough Councils to understand the importance of demonstrating that they have handled information requests in accordance with the legislation.
29. Furthermore, the Commissioner's case officers remind public authorities at the outset of each investigation that the Commissioner's decision is based on the information they provide. The Commissioner cannot, and will not, speculate or construct arguments for public authorities. If a public authority fails to make its case to the Commissioner she is likely to uphold a complaint and potentially order the disclosure of information that the public authority would prefer to withhold. The authority must then consider expending further time, resources and public money on an appeal to the First-tier Tribunal, which may have been avoidable had the authority provided sufficient detail to the Commissioner's case officer. The Commissioner considers this to be an inefficient use of limited resources, particularly in the context of increased demands on public authorities.
30. The Commissioner would strongly encourage public authorities to ensure that they engage effectively with her case officers. If there is any doubt as to what information, or what level of explanatory detail, is required then the authority should contact the case officer for clarification as soon as possible, rather than provide an inadequate submission.

Right of appeal

31. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

32. 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.
33. 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

Sarah O’Cathain
Senior Case Officer
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF