

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 5 September 2024

Public Authority: London Borough of Merton

Address: Merton Civic Centre

London Road

Merton

SM4 5DX

Decision (including any steps ordered)

1. The complainant submitted a request to the London Borough of Merton (the council) for a cabinet paper in relation to a named car park.
2. The Commissioner's decision is that the council correctly relied upon regulation 12(5)(d)(confidentiality of proceedings) to withhold the requested information, and that the public interest favoured maintaining the exception. However, in failing to issue a proper refusal notice, within 20 working days, the council breached regulation 14(3) of the EIR.
3. The Commissioner does not require further steps, as a result of this decision notice.

Request and response

4. On 10 January 2024, the complainant wrote to the council and requested information in the following terms:

“A paper relating to St Marks Rd car park, Mitcham is going to Cabinet on 15th January 2024. <https://democracy.merton.gov.uk/ieListDo>
This paper is not available for the public to see.

The reason given is that it contains legal and financial details.

There will be other information in this paper which is not legal or financial details. I believe that it is in the public interest for this information to be published, and that the paper can be published with any relevant legal and financial details redacted.

Please:

- a) publish this paper on the agenda for Cabinet on 15 January 2024 - even if the decision to publish a redacted version is made after the meeting has taken place.
 - b) share the paper in your reply to this email.”
5. On 24 January 2024, the council provided its response, stating the information was exempt under paragraph 3 of Part 1 of Schedule 12A of the Local Government Act 1972.
 6. Upon receiving this response, the complainant asked the council to conduct an internal review on 24 January 2024. On 21 February 2024, the council provided its response and maintained its original position, citing regulation 12(5)(d) of the EIR as the appropriate exception.

Scope of the case

7. The complainant contacted the Commissioner on 21 March 2024 to complain about the way their request for information had been handled.
8. During the course of his investigation, the council confirmed that as well as withholding the information under regulation 12(5)(d), it was also applying 12(5)(e) to the requested information.
9. On 6 August 2024, the complainant informed the Commissioner that the withheld information had been published. The Commissioner tried to informally resolve the case, but the complainant wanted a decision notice to be served, to examine whether the council were correct to withhold the information at the time of the request.

10. Therefore, as both exceptions were applied to all of the withheld information, the Commissioner will first examine the application of regulation 12(5)(d).
11. Should regulation 12(5)(d) of the EIR not apply, the Commissioner will go on to consider the application of regulation 12(5)(e) to the withheld information.
12. The Commissioner therefore considers that the scope of his investigation is to firstly consider the application of regulation 12(5)(d) to the withheld information, at the time of the request.

Reasons for decision

Is the requested information environmental?

13. Regulation 2(1) of the EIR defines environmental information as being information 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)...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);
14. In this case, the Commissioner considers that the requested information falls under 2(1)(c) of the EIR.

Regulation 12(5)(d)-confidentiality of proceedings

15. Regulation 12(5)(d) of the EIR says that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.
16. The engagement of the exception rests on three conditions being met.
17. Firstly, the confidentiality referred to by a public authority must specifically relate to the confidentiality of proceedings. In his guidance¹, the Commissioner interprets 'proceedings' as possessing a certain formality. They will include, but are not limited to, formal meetings to consider matters that are within the authority's jurisdiction; situations where an authority is exercising its statutory decision-making powers; and legal proceedings.
18. The Commissioner has viewed the withheld information and is satisfied that the report contains, amongst other things, pre-planning application discussions. The Commissioner has previously acknowledged in a range of decisions (e.g. IC-115533-Y4T6², IC-206377-X4X4³) that such a process represents a 'proceeding' for the purposes of this exception. Therefore, the Commissioner is satisfied that the first criteria is met.

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https://ico.org.uk/media/fororganisations/documents/1626/eir_confidentiality_of_proceedings.pdf

² <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4022697/ic-115533-y4t6.pdf>

³ <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4024160/ic-206377-x4x4.pdf>

19. Secondly, this confidentiality must be provided by law. In submissions to the Commissioner, the council explained that the confidentiality of the meeting, to which the information requested relates to, is protected by law. It quoted Section 100A(4) of the Local Government Act 1972⁴ which states that a council may exclude items from a public meeting if there were to be a disclosure of information, if members of the public were present.
20. In the Commissioner's view, the common law of confidence will apply where the following two elements are satisfied. Firstly, the information has the necessary quality of confidence. This means that the information must not be accessible and be of importance to the confider and not trivial. Secondly, the information was communicated in circumstances importing an obligation of confidence. The Commissioner accepts that the second criteria is engaged as the withheld information has the quality of confidence, was not in the public domain at the time of the request and was communicated in circumstances importing an obligation of confidence.
21. Thirdly, it must be demonstrated that disclosure would have an adverse effect on the confidentiality of the proceedings.
22. In submissions to the Commissioner, the council stated that disclosure of the withheld material would "undermine the confidentiality provided in the Local Government Act 1972."
23. The council explained that disclosure of the information would "undermine the trust and confidence of commercial negotiations with the council particularly where such negotiations are ongoing"
24. It further explained that disclosure of the information would "undermine the council's negotiating position and ability to secure best value for the disposal of the land and optimising the best planning application being made."
25. In this case, the Commissioner considers that disclosure would have an adverse effect on the confidentiality of the process, as it would damage the general principle of confidentiality, and could discourage full engagement with the pre-application process.
26. The Commissioner notes that the complainant argued that they understood that the withheld contains "sensitive information however

⁴ <https://www.legislation.gov.uk/ukpga/1972/70/section/100A>

there will be other information in this paper which is not legal or financial details.”

27. However, in response to this, the council stated that after the redaction of the sensitive information, “information would amount to the title of the report and attendees which appears on the agenda for the 15 January 20224 Cabinet meeting and published on the council’s website.”
28. Considering all of the above, the Commissioner has decided that disclosure would have had an adverse effect on the confidentiality of proceedings, and therefore Regulation 12(5)(d) was engaged.
29. The Commissioner must next consider the balance of the public interest.

Public interest test

30. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions.

Public interest in disclosure

31. The Council accepts that there is a public interest in “ensuring transparency, promoting understanding of the conduct of the council business and facilitating accountability of the council.”
32. The complainant argues that “it is in the public interest for this information to be published.”

Public interest in maintaining the exception

33. The council stated that there is an inherent public interest in the council being able to “consider and speak freely about commercially sensitive financial information.”
34. The council further explained that there is a public interest in not undermining the confidentiality provided in the Local Government Act 1972 and that the public interest in transparency is best served by the Local Government Transparency Code⁵ which serves the public interest in a way that does not “undermine the confidentiality of the council’s cabinet proceedings.”

Balance of the public interest

⁵ <https://www.gov.uk/government/publications/local-government-transparency-code-2015>

35. The Commissioner accepts that it is very important for the public to have a voice in planning matters, and that there is a broad public interest in disclosing information that provides transparency around decisions made in respect of planning matters.
36. However, he also notes that under the local Government and Transparency Code, residents and members of the public are informed of and consulted on the details of any final formal planning application.
37. The Commissioner also accepts that there was a public interest in protecting confidential information, and that breaching an obligation of confidence undermines the relationship of trust between confider and confidant. For this reason, the grounds on which confidences can be breached are normally limited. Therefore, where the exception is engaged, the Commissioner accepts that there will always be some inherent public interest in maintaining it.
38. Furthermore, the Commissioner recognises that there was a considerable public interest in ensuring that the effectiveness of the planning application process was not undermined.
39. The Commissioner has therefore decided that, at the time of the request, the public interest in maintaining the application of regulation 12(5)(d) outweighed the public interest in disclosure.
40. As the Commissioner considers that 12(5)(d) applied, he has not gone on to consider the application of 12(5)(e).

Procedural matters

Regulation 14-refusal of request

41. If a request for environmental information is refused by a public authority, it should issue a requester with a refusal notice which complies with regulation 14.
42. Regulation 14(3)(a) of the EIR requires refusal notices to specify the reasons not to disclose the information requested, including any exception relied on under regulations 12(4), 12(5) or 13.
43. In this case, although the council cited the legislation for withholding the information (Local Government Act 1972), it failed to cite the specific exception under EIR that it was relying upon. The Commissioner has

therefore concluded that the council breached regulation 14(3) of the EIR.

Right of appeal

44. 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

45. 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.
46. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Deirdre Collins
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