

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 10 April 2024

Public Authority: London Borough of Havering
Address: Town Hall
Main Road
Romford
MR1 3BB

Decision (including any steps ordered)

1. The complainant has requested information concerning an area of land known as Arnold's Fields in Rainham, East London.
2. London Borough of Havering (the Council) confirmed that they held some information within scope of the request and provided the complainant with some documents but did not specify which of the three parts of his request these related to. In their original response the Council advised that some of the requested information was exempt from disclosure under regulations 12(4)(b)(adversely affect the course of justice), 12(4)(e)(internal communications) and 13(1)(third party personal data) of the Environmental Information Regulations 2004 (EIR) but did not explain what information these exceptions were being applied to. At internal review, the Council advised that regulation 12(5)(e)(commercial confidentiality) applied to some of the information held but did not specify such information.
3. During the course of the Commissioner's investigation the Council withdrew their reliance on regulations 12(4)(e) and 12(5)(e) and made clear, through marked up copies of the information held, which particular information was exempt under regulations 12(4)(b) and 13(1). The Council also disclosed further information to the complainant, with redactions for the aforementioned exceptions.

4. The Commissioner's decision is that the Council correctly applied regulations 12(4)(b) and 13(1) to the relevant information and that the public interest balance favours maintaining the exceptions to such information.
5. However, the Commissioner has decided that, on the balance of probabilities, the Council has not identified all the information that it holds within the scope of the complainant's request. The Council has not conducted adequate searches to determine whether they hold further information beyond that already disclosed to the complainant.
6. The Commissioner has also found that the Council breached regulations 5(2) and 11(4) in their handling of the complainant's request.
7. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the request, following further, wider and more thorough searches informed by the Commissioner's findings and observations set out in paragraphs 89-109.
8. The Council 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 Act and may be dealt with as a contempt of court.

Background

9. Arnold's Fields is privately owned land off Launderers Lane, Rainham. The site was formerly a gravel extraction site. Significant volumes of waste were subsequently deposited there without appropriate authorisation. Due to the combustible nature of some types of waste, the site now catches fire, especially during hot weather. Residents complain about the nuisance caused by smoke, dust and odour from the fires and are concerned about potential health impacts. Havering Council has commissioned an investigation of potential health risks to inform future decisions about the site (as taken from the Council's website in February 2024¹).

¹ [Response to fires at Arnolds Field, Launderers Lane | The London Borough Of Havering](#)

Request and response

10. On 1 December 2022, the complainant wrote to London Borough of Havering (the Council) and requested information in the following terms:

'I am writing to you under the Freedom of Information Act 2000 to request the following information. Please may you provide me with:

1. List of any enforcement action taken with regards to the land known as Arnold's Fields at Launders Lane, Rainham. Please provide approximate dates, what enforcement action was taken against what suspected activity, whether this resulted in a prosecution, between 1998 and today's date.
 2. List of all reports received from the public, local authorities or other public bodies with regards to the land known as Arnold's Fields at Launders Lane, Rainham. Please provide the date, content of those reports between 1998 and today's date.
 3. Copies of any email or other written communications or minutes of any meetings held between Havering Council and the Environment Agency or other government bodies such as the London Fire Brigade, with regard to the land known as Arnold's Fields at Launders Lane, Rainham, between 2017 and today's date'.
11. Having not received a response to his request from the Council, the complainant contacted the Commissioner on 20 January 2023. The Commissioner wrote to the Council on 27 January 2023 and asked the Council to provide the outstanding response.
12. The Council subsequently provided the complainant with a belated response to his request on 10 February 2023. As the information requested was environmental in nature, the Council correctly processed the request under the Environmental Information Regulations 2004 (EIR) rather the FOIA.
13. The Council advised that they were applying regulation 13(1)(third party personal data) to part of the requested information but failed to specify which part of the information. The Council stated that the disclosure of the information 'would lead to the unfair identification of an individual' and that this would breach the Data Protection Act 2018.
14. The Council advised that they were applying regulation 12(4)(e)(internal communications) to some of the requested information but failed to specify which part of the information. The Council contended that if the information to which they had applied this exception were disclosed, 'it would inhibit the discussion or debate between officers and officials. This is based on the judgement that if officers/officials believed that if

certain discussions during these meetings would be publicly disclosed, they might not speak freely on similar issues in future. To ensure effective conduct of Council business, it is important that officers/officials be able to exchange views and provide/receive advice frankly'.

15. In respect of the public interest test, the Council stated that whilst there were public interest arguments in favour of disclosing the information (which the Council did not specify), there was a need for all parties to have free and frank internal discussions and debates/protecting 'internal thinking space' of the organisation.
16. The Council advised that regulation 12(5)(b)(adversely affect the course of justice) applied to part of the information within scope of the request but again failed to specify which part. The Council stated that the exception applied to, 'advice given by Lawyers, Legal Advisors and Barristers to their clients, who have a general expectation that their conversations and advice will remain confidential'. In respect of the public interest test, the Council stated that whilst disclosing the requested information would promote openness and transparency, there was a strong public interest in protecting the confidentiality of communications between lawyers/barristers and their clients and as such, the public interest weighed in favour of withholding the information.
17. The Council apologised for not being able to meet his request and advised the complainant that he had the right to an internal review if he was dissatisfied with the decision. The response also provided document attachments but did not explain to which part of the request these related. The documents were an Enforcement Notice and a Stop Notice pertaining to the land at Arnold's Fields, dated 29 July and 13 October 2004, respectively, and a Site Investigation Report on Arnold's Fields, dated March 2012.
18. The complainant requested an internal review on 10 February 2023. He explained that he was requesting a review for the following reasons:
 - '1. The refusal does not address each of the questions separately.
 2. The refusal fails to confirm or deny which requested information is held.
 3. The exceptions cited do not refer specifically to which information they are refusing disclosure of.
 4. The immediate and long-term high levels of risk posed to human health by the site, Launder's Lane, mean that the weight to the public interest argument is very high. This has not been taken into account in my view.

5. Consideration has not been given to the partial disclosure of some documentation or the redaction of that information'.

19. On the same date and outside the information request process, the complainant emailed the Council's Communications Team and referenced the Council's response to his request which he had received. He noted that the response, 'does provide the attached document which shows that in 2012 a survey was undertaken of the grounds that found some quite concerning toxins and identifies the site as a risk to human health'. The complainant stated that his understanding was that, in summary, the following action had been taken in respect of the land in the last 18 years:

'Council – 2004 enforcement notice to stop dumping on the site and restore to specifications of the planning application.

Police – Prosecution in 2012 for cannabis and guns on site.

EA (Environment Agency) – 2018/19 – Prosecution of three people with no apparent link to the owners for fly-tipping offences in 2014'.

20. The complainant queried:

'Given the outstanding notice (if it is still outstanding) why wasn't any enforcement brought against whoever took ownership in the following years, to the extent that the site became a storage location for drugs and guns by 2012?

The EA prosecution (that concluded three years ago) doesn't appear to be linked to the new owner and related to offences years before in 2014. The new owner has been in possession of the site since 2017. Has any action been taken against them? If not, why not? Is five years not long enough to be able to reach a resolution?

Residents are concerned about the ongoing health impacts of air pollution, does the Council view the current situation as a health emergency?'

21. The Council provided the complainant with their internal review on 22 May 2023. They apologised for the delay in providing the review, stating that they were currently dealing with a large number of requests.
22. The review confirmed that the EIR exceptions 'applied to the entire request' and found that they had been correctly applied to the same. After further consideration, the Council advised that they were applying further exceptions to the request.

23. The Council advised that regulation 12(5)(e)(commercial confidentiality) was being applied to part of the requested information but failed to specify which part. By way of explanation, the Council advised that, 'the requested information forms part of data of a commercial nature where confidentiality is provided by law and if released would prejudice the commercial interests of both the Council and third parties'.
24. In respect of the public interest test, the Council stated that whilst it was in the public interest for them to be transparent regarding the Council's commercial dealings, they also had a duty to protect the commercial interests of not only the Council but of third parties, 'and to release commercially sensitive information would prejudice this as well as cause reputational damage'. The Council contended that the public interest in maintaining the exception outweighed the public interest in disclosure of the information.
25. The Council confirmed that regulation 12(5)(b)(adverse effect on the course of justice) applied to the request, but did not specify which part. They stated that they were applying this exception because of, 'anticipated legal proceedings'. In respect of the public interest, the Council explained that, 'due to anticipated legal proceedings, putting the requested information into the public domain would jeopardise said proceedings and as such the public interest test weighs in favour of withholding the information'.

Scope of the case

26. The complainant contacted the Commissioner on 22 May 2023 to complain about the way his request for information had been handled.
27. The complainant advised that he was dissatisfied with the Council's response to his request because of the following reasons:
 - '1) The Council's original response does not confirm which information is held. Their refusal cites a number of exceptions but does not explain which information they apply to.
 - 2) The internal review does not respond directly to any of the concerns raised, and simply cites even more exceptions.
 - 3) I am concerned about the failure to follow basic procedures with FOIs, such as confirming whether the information requested is held, and the Council being obstructive by refusing to address issues raised in my request for a review'.

28. The complainant also contended that redactions should have been considered by the Council as 'not all of the information requested can reasonably be said to fall under the cited exceptions'.
29. During the course of the Commissioner's investigation the Council withdrew their reliance on regulations 12(4)(e) and 12(5)(e). The Council explained that they had mistakenly applied regulation 12(4)(e) to *external* Council email correspondence with participants, and that upon reconsideration, they were of the view that the information originally withheld under regulation 12(5)(e) did not have the necessary legitimate economic interests for that exception to apply.
30. During the course of the Commissioner's investigation, on 2 October 2023, the Council also disclosed some further documents held to the complainant, and confirmed that some information had been redacted due to it being exempt under regulations 12(5)(b) and 13(1). These documents included a report dated 4 August 2023, listing a chronological history of complaints received about the land at Lauanders Lane. Although 4 August 2023 post-dates the complainant's request, it is clear from this document that its contents were individual logs of information received about Arnold's Fields, all of which pre-date the complainant's request. The Commissioner therefore considers that this information was held by the Council at the time of the request and that it is within scope of his investigation in this case.
31. Another of the disclosed redacted documents was a brief 2 page email chain between the Council and the London Fire Service concerning fires at Arnold's Fields. This email chain started on 17 November 2022 and ended on 16 December 2022. Although this latter date post-dates the complainant's request, the Commissioner has included this document in the scope of his investigation because the later emails refer back to emails which the Council held at the time of the request.
32. The remaining documents held by the Council within scope of the request and disclosed to the complainant with redactions, were the notes of two Council meetings, held on 1 August 2022 and 17 November 2022, to discuss the Lauanders Lane Fire Issue.
33. The complainant informed the Commissioner that he had concerns about the revised response provided. He noted that it had not been clarified which of the documents disclosed related to which of the three separate parts of his request and there had been no covering letter explaining this. The complainant advised that, 'this is an issue raised repeatedly with regards to the nature of Havering Council's response, which does not confirm whether information is held, which information is held, and categorically explain whether some is being refused publication and if so for what reason'.

34. The complainant stated that:

'Firstly, the first documents are copies of stop notices which appear to be the response to part 1. I cannot see any 'list of enforcement action taken', including dates, action taken, result. I am also aware (including through the minutes of the meeting) that other enforcement action existed including various stages of appeal by the landowner against the council's enforcement notice. The council was also involved in Environment Agency prosecution and possibly other enforcement visits or action. Why are these not mentioned? Most importantly, why is there no sign of the requested list?'

35. The complainant advised that he did not agree with the level of redactions applied by the Council for third party personal data. The complainant referenced the Commissioner's guidance which stated that with regard to professional roles there should be an expectation in favour of disclosure for individuals in public facing positions. The complainant stated that there was a significant public interest in the requested information being clear, given the nature of the topic.

36. The complainant noted that the 4 August 2023 report appeared to have been printed and scanned in misalignment, cutting out part of the page and meaning that some of the information was not visible. The complainant also noted that there was no explanation of what the report was, it appearing to be, 'a list of communications and reports related to the site'.

37. With regard to the revised response to part 3 of his request, the complainant noted that:

'The Council appears not to have categorically confirmed or denied the existence of the requested communications between bodies such as the Environment Agency, the UKHSA or local NHS. All of which it is known to have communicated with about the site. Furthermore, the extent of communications with LFB appears to be extremely limited, to the point that it would not be credible to claim that this is the extent of the entirety of its communications with LFB about the site, given the widely know context'.

38. Therefore, for clarity, the withheld information within scope of the Commissioner's investigation in this case is the following:

- a) Enforcement and Stop notices dated 29 July and 13 October 2004 (minor redactions for regulation 13(1));
- b) Report of 4 August 2023 (minor redactions for regulation 13(1));
- c) Email chain between 17 November and 16 December 2022 (minor redactions for regulation 13(1));

d) Notes of Council meetings dated 1 August and 17 November 2022 (redactions for regulation 13(1) and regulation 12(5)(b).

39. The Commissioner considers that the scope of his investigation is to determine whether the Council have correctly applied the residual exceptions to the relevant withheld information and to determine, on the balance of probabilities, whether the Council have identified all the relevant information held within scope of the complainant's request.

Reasons for decision

Regulation 12(5)(b)

40. Regulation 12(5)(b) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of the public authority to conduct an inquiry of a criminal or disciplinary nature.
41. The exception is broad in coverage, and includes any adverse effect on 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 or investigation of a criminal or disciplinary nature. The Commissioner considers that the exception is relevant to planning decisions and to planning enforcement or similar activities which a public authority may carry out. By 'adversely affect', this means that there must be an identifiable harm or negative impact on the interests identified in the exception. The threshold for establishing adverse effect is high, since it is necessary to establish that disclosure *would* have an adverse effect.
42. In this case the Council have applied this exception to some of the (redacted) information contained in the notes of the Council meeting of 17 November 2022.
43. In submissions to the Commissioner, the Council stated that they had applied regulation 12(5)(b) to those parts of the meeting notes where either the Council's Solicitor had been providing advice to participants or detailing advice from Counsel, or participants at the meeting had been discussing matters relating to that advice. The Council confirmed that the legal advice had been given for the main purpose of litigation. The Council contended that disclosure of the withheld information 'would undermine the Council's ongoing investigation into contaminants on the land in question and future legal proceedings'. The Council contended that disclosure would have an adverse effect because it would inform potential defendants of the Council's future course of action.

44. Having had sight of the specific withheld information, the Commissioner is satisfied that it comprises or relates to confidential legal advice about proposed or contemplated litigation. The information therefore attracts legal professional privilege on the basis of litigation privilege. The Commissioner is satisfied that disclosure of the information would have an adverse effect on the course of justice and consequently, regulation 12(5)(b) is engaged to the same. The Commissioner will now go on to consider the public interest test.

Public interest test

45. 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.
46. The Council did not address any public arguments attached to this specific information in their submissions to the Commissioner but as previously noted, they had done so in their original response to the complainant of 10 February 2023. The Council recognised that disclosing the information would promote openness and transparency, but they considered that this public interest was outweighed by the strong public interest in protecting the confidentiality of communications between lawyers and their clients.
47. In his request for an internal review, the complainant contended that the public interest in disclosure of the requested information (in its entirety) was 'very high', due to the immediate and long-term levels of risk posed to human health by Arnold's Fields.
48. The Commissioner recognises and entirely accepts that the complainant's request concerns an issue of very significant and important local public interest, namely, the health and safety (both in terms of pollution and fire) risks posed to residents and the community by the state of the land at Arnold's Fields. Indeed, that public interest is evident from some of the information disclosed to the complainant by the Council in this case. For example, at the Council meeting of 1 August 2022, it was noted that, 'over 200 residents attended a public meeting last week. There is massive concern for public health'.
49. The Commissioner recognises and considers that there is a strong public interest in transparency, openness and accountability both as to the Council's historical approach to this land, in terms of managing or reducing the risks and taking appropriate action against those responsible for the state of the land, and the Council's current and future intentions in respect of the same.
50. However, the Commissioner considers that it would clearly not be in the public interest if the Council's current investigations and intended or anticipated litigation in respect of the land were to be undermined or

adversely affected by any action. The Commissioner considers and accepts that the disclosure of the specific information to which regulation 12(5)(b) is engaged, at the time of the request, would have seriously undermined and prejudiced the Council's investigations into contaminants on the land and the litigation options open to the Council.

51. The Commissioner considers that the primary public interest in this case is in the Council taking effective and successful steps to both establish the levels of pollution (and other risks) posed by the land, and (if necessary) bring litigation against the individuals/parties responsible for the land being in such a state. The disclosure of the legally privileged and confidential information would not assist these objectives but would make them significantly more difficult and probably more costly. Consequently, the Commissioner is satisfied that, at the time of the request, the public interest balance favoured maintaining regulation 12(5)(b) to the respective parts of the information held.
52. Whilst the Commissioner has been informed by the presumption in favour of disclosure, he is satisfied that, for the reasons given above, the exception has been applied correctly by the Council.
53. However, the Commissioner would note that the majority of the information contained in the notes of the meetings of 1 August and 17 November 2022, did not attract regulation 12(5)(b), and provides considerable and informative detail of the Council's dealings with the land over the years. The information therefore carries a significant and important public interest weight in terms of transparency and accountability. It is therefore disappointing and not satisfactory that the Council only disclosed this information during the course of the Commissioner's investigation, rather than at an earlier stage in the process. The Commissioner would note that the complainant himself, in his request for an internal review, suggested that the Council should adopt a redacted approach to the information which he had requested, but the Council failed to do so, only later doing so because of the Commissioner's intervention.

Regulation 13(1)(third party personal data)

54. Regulation 13(1) of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.
55. In this case the relevant condition is contained in regulation 13(2A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles') as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').

56. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then regulation 13 of the EIR cannot apply.
57. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.
58. The only information to which the Council have applied regulation 13(1) in this case, are the names of various individuals (or identifying information such as email addresses) referenced in the information, most of these being in the notes of the two aforementioned Council meetings. As Section 3(2) of the DPA defines personal data as 'any information relating to an identified or identifiable living individual', the Commissioner is satisfied that all of the relevant withheld information constitutes personal data.
59. The fact that information constitutes the personal data of an identifiable living individual(s) does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

60. Article 5(1)(a) of the UK GDPR states that:

'Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject'.

61. In the case of an EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
62. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

63. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that, 'processing shall be lawful only if and to the extent that at least one of the' conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
64. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

'Processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection or personal data, in particular where the data subject is a child'.

65. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the EIR, it is necessary to consider the following three-part test:
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
66. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

67. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sake, as well as case specific interests.
68. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
69. In submissions to the Commissioner, the Council did not address the legitimate interests but advised that they had applied the regulation 13(1) exception to the personal details of Council officers and officers/staff of other organisations that were below Deputy Director/Commissioner level, and do not have a public facing role. The Council also applied the exception to the personal information of members of the public.
70. During his investigation, having had sight of the redacted notes of the Council meetings, the Commissioner noted that the names of two director level roles (Director of Public Realm and Director of Neighbourhoods) had been redacted and queried these redactions with the Council. The Council explained that these names had been redacted

because the occupants of both these roles had since left the Council.

The Commissioner also queried why the name of the Borough Commander of London Fire Service had been redacted, given the senior and public facing nature of his role. The Commissioner advised the Council that the two directors were still accountable for the roles they had undertaken at the Council, despite their having since left the Council. The Council subsequently disclosed these three names to the complainant on 15 February 2024.

71. In this case the Commissioner considers that the complainant's request concerns an issue of very significant and important local public interest, that being the health and safety risks posed to residents and the nearby community by the state of the land at Arnold's Fields. The Commissioner therefore considers that there is a legitimate interest in disclosure of information which would help inform the local community and promote transparency and accountability of the Council's approach to the risk management. The Commissioner recognises that the complainant's legitimate interest would be served by disclosure of the withheld information and has therefore gone on to consider the necessity test.

Is disclosure necessary?

72. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
73. In this case the Commissioner considers that disclosure of the residual withheld names and contact details is not necessary to meet the legitimate interest in disclosure. That legitimate interest is contained in the substantive information contained within the documents which are in scope of the request, all of which (except that information exempt under regulation 12(5)(b)) has been disclosed by the Council. The Commissioner considers that the Council have taken an appropriate and proportionate approach to transparency and accountability by disclosing the names of those individuals at Director level (or the equivalent) in public facing roles and that the disclosure of the other names withheld under regulation 13(1) is not necessary to meet the legitimate interests.
74. As the Commissioner has decided that in this case the disclosure to the world at large of the residual third party data information is not necessary to meet the legitimate interests in disclosure, he has not gone on to conduct the balancing test. As disclosure of the specific information is not necessary, there is no lawful basis for this processing

and it is unlawful. It therefore does not meet the requirements of principle (a).

75. The Commissioner has therefore decided that the Council were entitled to withhold the relevant information under regulation 13(1) of the EIR.

Regulation 12(4)(e) – determining whether information is held

76. The Council did not apply regulation 12(4)(a)(information not held at the time when the applicant's request is received) in this case. However, as the complainant has questioned the amount of relevant information held by the Council, the Commissioner has proceeded to investigate and determine this issue within this exception.
77. Under regulation 5(1) of the EIR and subject to a number of EIR provisions, a public authority that holds environmental information shall make it available on request.
78. Regulation 5(2) provides that information shall be made available as soon as possible and no later than 20 working days after the date of receipt of the request.
79. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information 'to the extent that it does not hold that information when an applicant's request is received'.
80. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the public authority to check that the information is not held and he will consider any other reasons offered by the public authority to explain why the information is not held. The Commissioner will also consider any reason why it is inherently likely or unlikely that information is not held.
81. If the public authority does not hold recorded information that falls within the scope of the request, the Commissioner cannot require the public authority to take any further action.
82. In submissions to the Commissioner, the Council advised that 'four separate search requests' had been made of the following Council departments: Chief Executive's Office; Planning Department; Public Health Department and Legal Department, as these were considered to be the relevant departments that could hold information relevant to the complainant's request. The key word searches used were 'Arnold's Fields' and 'Launders Lane'.
83. The Council advised that:

'For each search request made, confirmation was received from each of the aforementioned Council departments that the totality of the information held being relevant to the request (whether physical or digital) had been passed to the Complaints Compliance and Governance Team charged with responding to public information requests'.

84. The Council confirmed that searches by the relevant departments involved a review of all electronic records/correspondence relating to the site and where applicable, hardcopy files held.

85. The Council advised the Commissioner that:

'The Council has provided a copy of all enforcement action relating to the site that it holds, being copies of extant enforcement/stop notices. The fact that the notices subsist means that any subsequent appeal(s) against the notices would have been dismissed. The Commissioner will note that the enforcement/stop notices are dated 2004, some 19 years ago. The Council's Legal Department retains its files for a maximum of 12 years (6 being the general file retention period). Any records of appeal decisions would have been destroyed at the time of file destruction'.

86. The Council stated that it remained open to the complainant to approach the Planning Inspectorate directly to secure a copy of any existing appeal decisions. The Council stated that there is no reason for the Council to conceal any information relating to failed appeals against enforcement action.

87. The Council advised that, 'repeated information searches have revealed no information relating to an Environment Agency prosecution'. They stated that it remained open to the complainant to approach the Environment Agency directly to secure further information relating to this. They stated that, 'there is no reason for the Council to conceal any information relating to prosecution proceedings brought by another authority'.

88. The Council advised the Commissioner that:

'Relevant Council Departments have conducted four separate search requests for information relating to the existence of communications between bodies such as the Environment Agency, the UKHSA or local NHS. As no such information has been revealed following completion of the searches, it can be assumed that the Council does not hold the information. A combination of the passage of time and staff turnover are probable reasons for the lack of information held'.

89. The Commissioner acknowledges that the Council have carried out searches for further (beyond that identified and disclosed to the complainant) information falling within the scope of the request but

have not located any such information. This is a concern, since some of the information disclosed to the complainant suggests that it is highly likely that further relevant information will have been held by the Council at least at some point in time.

90. For example, in the notes of the Council meeting of 1 August 2022, it is stated at points that:

'In the past few years, there have been a number of call outs to the Emergency Planning team at LBH to Launders Lane.

There was one larger incident, which LBH, the Environment Agency (EA) and LFB (London Fire Brigade) tackled in 2018, prior to Covid and at a cost in collaboration with EA of £15,000 for heavy plant to support the LFB response.

At this point, EA led an investigation which resulted in prosecution of those responsible in 2017/18.

The Council is working with LFB.

In 2017, prosecution of further dumping. How did this come about?

To look into Court Order being in place following prosecution in 2017/18'.

91. Similarly, in the notes of the Council meeting of 17 November 2022, it is stated at points that:

'Further information from London Fire Brigade on a specialist for any future significant fires.

LFB has provided information about their history of attendance at fires at Launders Lane to enable Imperial College to look at what exposure has been in the past, using best of the information we have.

Monitors from Imperial College measure particulates and nitrogen oxides which are a proxy for air quality. The Council has gone through a bidding process and taken advice from UK Health Security Agency (UKHSA) and Environment Agency (EA). Out of five specialist contractors, we received three bids and scored them accordingly. There were two very strong bids and LBH will be offering contract to one of them.

Drafting specification and input from EA or UKHSA. ACTION – to follow up with Water Monitoring team at the EA'.

92. The Commissioner considers that it is highly likely that the above situations and the Council's liaison with the external bodies concerned will have generated more email communications and/or other written

communications between 2017 and the date of the complainant's request (part 3 of the complainant's request) than the one email chain disclosed by the Council from late 2022.

93. Either all such email and/or written communications were deleted prior to receipt of the complainant's request on 1 December 2022 (a position which seems highly unlikely and would raise serious questions about the Council's record and retention procedures) or else the Council have not carried out sufficiently thorough and comprehensive searches to identify and retrieve such relevant recorded information.
94. The Commissioner's doubts about the adequacy of the Council's checks and searches carried out are strengthened and supported by the fact that the Commissioner has established that the Council **does** hold further relevant information within the scope of the complainant's request.
95. Specifically, in part 1 of his request, the complainant requested, 'list of any enforcement action taken with regards to the land known as Arnold's Fields at Launders Lane, Rainham'. In submissions to the Commissioner the Council advised that, 'all enforcement action taken by the Council between the relevant dates (1998 and 2022) is set out below':

- Planning Enforcement Notice dated 13 October 2004 (effective date 12 November 2004) for the following breach of planning control:

The disposition of materials of on the land not in compliance with planning permission P0941.00 [more particularly described in the attached planning enforcement notice in Appendix 1]

Issue of the planning enforcement notice has not resulted in prosecution.

- Planning Stop Notice dated 13 October 2004 (effective date 13 October 2004) for the following breach of planning control:

The importation of waste materials and the depositing of such materials on the land [more particularly described in the attached planning enforcement notice in Appendix 1].

Issue of the planning stop notice has not resulted in prosecution.

- Planning Enforcement Notice dated 29 July 2004 (effective date 31 August 2004) for the following breach of planning control:

The disposition of materials of on the land not in compliance with planning permission P0941.00 [more particularly described in the attached planning enforcement notice in Appendix 1].

Issue of the planning enforcement notice has not resulted in prosecution.

96. However, a search by the Commissioner of the Council's website, using the search term, 'Arnold's Fields', quickly identified and retrieved the following information:

- The Agenda of a Special Meeting of the South Hornchurch & Rainham Area Committee, dated 29 November 2006². This document includes a detailed account (running to over two pages) of the enforcement history and action taken in respect of of Arnold's Fields from January 1999 until 2006.
- The Agenda of a Meeting of the South Hornchurch & Rainham Area Committee, dated 17 April 2008³. This document includes an account (less detailed than the one from 2006 at 1 page in length) of the enforcement history and action taken in respect of Arnold's Fields from 1999 until 2008.
- Document recording Council Member's Questions, dated 20 July 2011⁴. One councillor is recorded saying to the Cabinet Member for Individuals:

'The situation at Arnold's Field landfill site in Launderers Lane Rainham is a disgrace. The earth is being piled higher and higher to the sides to enable more waste to be dumped in the middle and there are real fears that this is toxic waste, because of the criminal activities already uncovered at the site. What action is being taken to remove the present operators from Arnold's Field?'

- Document recording Council Member's Questions, dated 18 July 2012⁵. One councillor is recorded saying to the Cabinet Member for Environment (page 92):

² [061129agenda.PDF \(havering.gov.uk\)](#)

³ [080417agenda.PDF \(havering.gov.uk\)](#)

⁴ [questions \(havering.gov.uk\)](#)

⁵ [public reports pack 18th-jul-2012 19.30 council.pdf \(havering.gov.uk\)](#)

'Please provide an update on what action is being taken to prevent illegal dumping on Arnold's Field and to restore the land as a green space amenity for local residents?'

The Cabinet Member for Environment responds by detailing the enforcement action taken in respect of the land up to that date.

- Minutes of a Meeting of the Places Overview & Scrutiny Sub-Committee, dated 4 October 2022⁶. The minutes refer to:

The London Fire Brigades position on responding to fires at Launders Lane.

The forthcoming Launders Lane Actions from the August and early September meetings held to listen to residents' concerns and identify appropriate actions.

- Breach of Condition Notice, dated 16 May 2002 (breach of conditions imposed on a grant of planning permission regarding the land at Arnold's Field) issued by the Council to North London Developments Limited⁷.
- Minutes of Council Meeting of 26 November 2014⁸. These minutes record that (page 90C) that a councillor posed the following question to the Cabinet Member for Environment:

'There have been further reports of fly-tipping at Arnold's Field by people who open and close the gates with a key and more recently that the gates have been left open for many days. Please provide an update on the situation at Arnold's Field and give assurances that action is being taken to secure the site and deter further fly-tipping'.

The Cabinet Member responded that he sympathised with the concern about fly-tipping and stated:

'This is private land, and it's a site that we have been concerned about for some time. The Environment Agency is leading on tackling the issues being seen at this site, including fly-tipping, and we are supporting the agency in every way we can. Last month, we created barriers using 60 tonnes of soil outside both

⁶ [For enquiries on this agenda please contact \(havering.gov.uk\)](https://www.havering.gov.uk)

⁷ [48 Langham Road - Breach of condition notice - 16 May 2002 \(havering.gov.uk\)](https://www.havering.gov.uk)

⁸ [141126 minutes print version for use with agenda.pdf \(havering.gov.uk\)](https://www.havering.gov.uk)

gateways to the field. They're fairly high and are aimed at preventing people from driving any vehicle over them to get into the site. We are also planning some small-scale landscaping to soften the harshness of the barriers and hopefully act as a further deterrent. In addition, we will be reinstalling several concrete blocks in front of the barriers. A CCTV system is being installed in the area to monitor truck movements, which will be managed by the Council and will help to catch further fly tippers'.

97. The Commissioner notes that the information in the above bullet points is within scope of parts 1 and 2 of the complainant's request, being either a list of enforcement action taken with regard to the land known as Arnold's Fields, or reports received from the public (including councillors) with regard to the land between 1998 and 1 December 2022.
98. The Commissioner notes and acknowledges that most of this information was referenced in the notes of the Council meetings of 1 August and 17 November 2022, as disclosed to the complainant by the Council (with redactions) on 2 October 2023. However, the fact remains that the information in the bullet points above was held by the Council at the time of the complainant's request and the Council's checks and searches failed to identify and retrieve it.
99. The Commissioner acknowledges that the Council carried out four separate searches for the information requested by the complainant, and the four departments which carried out the searches (Chief Executive's Office/Planning Department/Public Health Department/Legal Department) were those considered most likely to hold relevant information. However, given that the complainant's request (although wide in scope) related to one specific matter, Arnold's Fields, it should have been quickly apparent to those departments and to the Council's Complaints Compliance and Governance Team, that a keyword search of the Council's website would quickly reveal whether, and to what extent, the Council held relevant information (at least relevant electronic information). This obvious search strategy clearly was not done, otherwise it would have identified and retrieved the information discovered by the Commissioner.
100. In submissions to the Commissioner, the Council confirmed that they held relevant information within scope of each part of the complainant's request. In respect of the PDF bundle of documents provided to the complainant (during the Commissioner's investigation), the Council stated that pages 1 to 16 of the bundle related to part 1 of the request and were, 'the entirety of the enforcement action undertaken by the Council and to which the Council has records'. The Council stated that they do not hold a list of enforcement action undertaken and they do, 'not hold any further information relating to further enforcement action

either undertaken by the Council or the Environment Agency'. As the Commissioner has found and demonstrated above, that is not correct.

101. The Council stated that pages 17 to 22 of the bundle related to part 2 of the complainant's request and that, 'this is the entirety of reports received from members of the public or other bodies about the land at Arnold's Fields, Launder's Lane'. As the Commissioner has found and demonstrated above, that is not correct.
102. The Council stated that pages 23 to 37 of the bundle related to part 3 of the request and that these are, 'the entirety of the written communications or meeting minutes held between the Council and other bodies'. However, as noted in paragraph 89 above, the Commissioner considers that given the Council's working and liaising with the external bodies detailed in the minutes of the Council meetings of 1 August and 17 November 2022, it is highly likely that the Council will hold further relevant emails beyond the one email chain identified by the Council and disclosed to the complainant.
103. The Commissioner is of this view because Arnold's Fields has clearly been a significant and long-standing issue for the Council for many years. The redacted notes of the Council meetings of 1 August and 17 November 2022 attest to the significant amount of engagement and liaison with external bodies/organisations (e.g. Environment Agency and London Fire Brigade) which the Council has had over the years. The Commissioner acknowledges and appreciates that not all emails will be retained indefinitely and will be deleted in accordance with retention periods or when an employee leaves the Council. However, with an ongoing issue of the significance and importance of Arnold's Fields, it would be expected that some such email communications would be retained and saved in shared folders or central records, for the benefit of the Council's ongoing management of the issue. If this were not the case, then the Council would effectively have no organisational memory. That would raise very serious concerns about their record keeping and retention procedures.
104. In light of the above, the Commissioner is not satisfied that, on the balance of probabilities, the Council has complied with their obligation under regulation 5(1) of the EIR. The Council must now issue a fresh response to **all** parts of the complainant's request. It must determine, by carrying out comprehensive and thorough checks and searches (including the email mailboxes of all Council staff tasked with communicating and liaising with the external bodies having an interest/involvement in Arnold's Fields) whether any further relevant information is held and, if so, disclose it to the complainant or issue a valid refusal notice.

105. If the Council, having carried out those further checks and searches, still wishes to maintain that they do not hold any further information, the Commissioner will expect the Council to be able to provide details of the further searches that they have undertaken, **with reference to each separate part of the request.**
106. Where, as in this case, a requester submits a multi-part request, the Council is required to clearly confirm, whether they hold **relevant** information pertaining to **each individual** part of the request. It is not acceptable for a public authority to simply confirm that they hold information requested. They must clearly confirm what information they hold (or whether they do not hold such information) by reference to each separate part of the request.
107. In this case the Council, in the internal review, wrongly stated that the exceptions applied 'to the entire request', when in actual fact regulations 12(5)(b) and 13(1) only applied to some of the information within scope of the request, and regulations 12(4)(e) and 12(5)(e) did not apply to any of the information, having been misapplied to the same. The Council's failure to make clear what information they held in respect of each part of the complainant's request, and which exceptions applied to which specific information, caused unhelpful uncertainty and confusion to the process, and increased the likelihood of a complaint to the Commissioner.
108. However, the main concern which the Commissioner has of the Council's handling of the complainant's request, is the fact that the searches and checks carried out by the Council for relevant recorded information held were demonstrably inadequate and not sufficiently thorough or comprehensive. Whilst it is not unreasonable for the Council's Complaints Compliance and Governance Team to refer a request to the department or departments of the Council which it is thought most likely to hold relevant information, and ask them to carry out proper checks and searches, the Complaints Compliance and Governance Team must understand and appreciate that information requests under the EIR (or FOIA) apply to **all** recorded information held by the Council as a whole.
109. The failure to employ an obvious and time efficient search strategy such as a key word search of the Council's website, is a concern, and shows how significant amounts of relevant recorded information can be overlooked. Whilst the Commissioner does not consider that there is evidence in this case indicating an intention by the Council to block or conceal information within scope of the complainant's request (i.e. a regulation 19 offence, equivalent to a section 77 offence under FOIA 2000), the outcome for the complainant is the same in that he was not provided with (or directed to) all of the information which he asked for and which is held by the Council. The Commissioner therefore expects the Council to employ more robust and effective checks and searches in

respect of all future requests received, being clear to requesters about what information they do and do not hold, with reference to each part of the request.

Procedural matters

110. Regulation 5(2) of the EIR states that information shall be made available as soon as possible and no later than 20 working days after the date of receipt of the request.
111. In this case the complainant submitted his request on 1 December 2022 and the Council provided their substantive response on 10 February 2023. The Commissioner therefore finds that the Council breached regulation 5(2) of the EIR.
112. Regulation 11(4) of the EIR provides that a public authority shall notify a requester of the outcome of its internal review as soon as possible and no later than 40 working days after receiving an internal review request.
113. In this case the complainant requested an internal review on 10 February 2023 and this was not provided by the Council until 22 May 2023. The Commissioner therefore finds that the Council breached regulation 11(4) of the EIR.

Right of appeal

114. 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

115. 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.

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

Gerrard Tracey
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