

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 26 September 2024

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

Decision (including any steps ordered)

1. The complainant submitted a request for correspondence between Merton Council and the Inspectors appointed for the Public Examination of the draft Local Plan. Merton Council (the Council) refused to provide the information requested citing regulation 12(4)(d) of the EIR.
2. The Council later also relied upon regulations 12(4)(b) and 6(1)(b) of the EIR to withhold the information.
3. The Commissioner's decision is that the Council was entitled to rely on regulation 12(4)(b) to withhold the information in scope of the request and that the public interest favours maintaining the exception.
4. The Commissioner does not require the public authority to take any steps as a result of this decision.

Request and response

5. On 16 March 2024, the complainant wrote to the Council requesting information in the following terms:

“Please provide a copy of all correspondence between Merton Council and the Inspectors appointed for the Public Examination of the draft Local Plan since the date of the last public hearing in October 2022. This request includes but is not limited to correspondence conducted through the Programme Officer.”
6. The Council responded on 26 March 2024 citing regulation 12(4)(d) to withhold information in scope of the request and advised the complainant that: “Once the Planning Inspectors have completed their final report it will be published by the Council. At this time, the Council will also decide whether or not to adopt the Council's Local Plan, which legally must take on board all the recommendations in the Inspectors' final report.”
7. The complainant wrote to the Council on 26 March 2024 setting out their arguments and requested an internal review.
8. The Council conducted its internal review on 10 May 2024. It upheld its reliance on regulation 12(4)(d) for the withheld information.

Scope of the case

9. The complainant contacted the Commissioner on 10 May 2024 to complain about the way their request for information had been handled.
10. They wrote: “I consider it to be in the public interest to disclose this information. It is unreasonable to be expected to comment on Modifications to the Local Plan that arise as result of the work of the Inspectors and not have access to the reasoning which lies behind the changes. By the time the final report of the Public Examination has been published the Local Plan will be finalised.

There is a requirement for Local Plans to be evidence based. The same needs to be true of the modifications which arise from the Inspectors. Currently there is no evidence provided to explain and justify the changes being made. Hence the wish to have the information requested to understand the rationale for the changes proposed.”

11. During the Commissioners investigation the Council cited regulations 12(4)(b) and 6(1) were also engaged due to the voluminous nature of the information requested and that part of the information was previously published and already in the public domain.
12. The Commissioner has therefore, in this instance considered whether the Council is entitled to rely on regulation 12(4)(b) to refuse to provide the requested information.

Reasons for decision

Is the requested information environmental?

13. As the request is for information relating to the draft Local Plan, the Commissioner agrees that the requested information is likely to be environmental as per regulation 2(1)(c) and 2(1)(d)¹ and therefore, the Council was right to handle the request under the EIR.

Regulation 12(4)(b) – manifestly unreasonable requests

14. Regulation 12(4)(b) states that a public authority can refuse to disclose information in response to any request that is manifestly unreasonable.
15. The Council is relying on regulation 12(4)(b) on the grounds of burden. When refusing a request on the grounds of burden, the Commissioner expects a public authority to provide a reasonable estimate as to how long compliance with the request would take. This estimate should be based on the quickest method of retrieving any relevant information. In most cases, this estimate requires the public authority to conduct a sampling exercise.
16. The Freedom of Information and Data Protection (Appropriate Limit and Fees) sets out an appropriate limit for responding to requests for information under FOIA. The limit for local authorities, such as the Council, is £450, calculated at £25 per hour. This applies a time limit of 18 hours. Where the authority estimates that responding to a request will exceed this limit, section 12(1) of the FOIA provides an exclusion from the obligation to comply with the request.

¹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/regulation-2-1-what-is-environmental-information/>

17. Although there is no equivalent limit within the EIR, in considering the application of Regulation 12(4)(b) the Commissioner considers that public authorities may use these figures as an indication of what Parliament considers to be a reasonable burden to respond to EIR requests. However, the public authority must then balance the cost calculated to respond to the request against the public value of the information which would be disclosed before concluding whether the exception is applicable.
18. The Council stated that: "The information request covers a 16-month period during which time there was ongoing correspondence on the Local Plan. The Council's search identified four key officers who will have correspondence within the scope of the information request and 10 other officers, two of whom have since left the council.

The search of one key officer inbox identified more than 1,000 results within the scope of the FOI. It is estimated that 35% of the emails have an attachment. On the assumption that it would take between 30 – 45 seconds to skim read locate and retrieve information within the scope of the FOI the Council estimates that it would take 8.3 – 12.5 hours to collate the information from this one inbox. It would take further Council time and resources to redact personal data under Regulation 13 EIR and other information subject to EIR exceptions from emails and their attachments. Overall, the Council estimates it would take between 35.3 – 93.5 hours to skim read, locate, and retrieve information from the inboxes of the 14 officers with whom the Inspectors have corresponded."

19. The Commissioner considers that the Council has carried out reasonable searches to locate information falling within the scope of the request and has demonstrated why the cost limit would be exceeded.
20. The Commissioner therefore concludes that regulation 12(4)(b) is engaged; this is because he is satisfied that responding to the request would create an unreasonable burden upon the Council and hence the request was manifestly unreasonable.

Public interest test

21. Regulation 12(4)(b) is subject to the public interest test. This means that, even though the Commissioner accepts that the request was manifestly unreasonable and so regulation 12(4)(b) was engaged, the Commissioner must consider whether the public interest in the maintenance of the exception outweighs the public interest in disclosure of the information.

22. The Council has confirmed that compiling a response to the request would be a significant diversion of resources which would not be in the public interest as it may disrupt other decision making or other workloads. It is not in the public interest to divert officer's attention from their core work in order to respond to a request made by one individual which may have limited wider public interest."
23. The Commissioner accepts that there is a general public interest in this issue and that local residents will have their own interest in knowing how the Council is carrying out its duties and to use its resources to the greatest effect for the community as a whole. However, given the Council has committed to publishing information at a later date as part of its statutory requirements and having considered both the complainant's and Council's arguments the Commissioner is not convinced that providing this information would substantially add to any public interest argument outside of that of the complainant and local residents.
24. Therefore, taking into consideration the significant burden that responding would place on the Council, the Commissioner considers that the public interest in the maintenance of the exception outweighs the public interest in disclosure.

Regulation 9 – Advice and assistance

25. Regulation 9(1) states that a public authority has a duty to provide advice and assistance to a requestor, in so far as it would be reasonable to expect the authority to do so.
26. As stated in the Commissioner's [guidance](#), in cases where a public authority refuses a request under regulation 12(4)(b) as manifestly unreasonable because of burden or cost, the Commissioner normally expects it to provide the requestor with reasonable advice and assistance to help them submit a less burdensome request.
27. In this case, the Commissioner considers that given the specific wording of the request it would be difficult to refine it further. Therefore, the Commissioner has concluded that there is no easy way for the Council to suggest how the complainant could refine their request in such a way that it would be able to provide the information requested.
28. Considering the above, the Commissioner finds that the Council has complied with its obligations under regulation 9(1) of the EIR in its handling of the request.

Right of appeal

29. 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

30. 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.
31. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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