

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 17 October 2024

Public Authority: London Councils
Address: 59½ Southwark Street
London
SE1 0AL

Decision (including any steps ordered)

1. The complainant has requested, from London Councils (LC), information regarding the selection of a site for a proposed new secure children's home in London. LC provided a link to published information, but refused to disclose other information, citing regulation 12(4)(d) of the EIR (material still in the course of completion, unfinished documents or incomplete data) as its basis for doing so. During the Commissioner's investigation, LC applied an additional exception – namely regulation 12(5)(d) (confidentiality of proceedings) – to the withheld information.
2. The Commissioner's decision is that regulation 12(4)(d) is engaged and the public interest favours withholding the information; he also finds that LC has breached regulation 11(4) as its internal review was late by two days.
3. The Commissioner doesn't require any steps.

Request and response

4. On 24 January 2024, the complainant wrote to LC and requested information in the following terms:
 - “1. Please provide information regarding all the sites investigated for the proposed Pan London Secure Children's Home ... and the reasons for their acceptance ... or rejection.
 2. Please provide information regarding the criteria of suitability for the sites adopted for this search.
 3. Please provide information regarding any limitations which might apply or did apply when conducting the search for sites, such as for example ownership of a site, and whether consideration was given to acquiring sites for this project”.
5. LC responded on 21 February 2024. For the second and third parts of the request, it provided a link¹. For the first part of the request, it withheld information on the basis of regulation 12(4)(d), as it “relates to unfinished documents”.
6. Following an internal review, LC wrote to the complainant on 25 April 2024. It maintained its reliance on regulation 12(4)(d), and stated that the requested information “relates to material which is still in the course of completion; unfinished documents; or incomplete data”.

Scope of the case

7. The complainant contacted the Commissioner on 25 April 2024 to complain about the way their request for information had been handled.
 8. They complained about the time taken by LC to provide its substantive internal review response (in total, it was 42 working days).
 9. They also challenged LC’s reliance on regulation 12(4)(d).
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¹ <https://londonschbuild.co.uk/site-and-context/>

10. The Commissioner contacted LC for submissions, and in its response LC has applied an additional exception, regulation 12(5)(d), to the withheld information.
11. The Commissioner considers that the scope of this case is to decide whether LC was correct to refuse to disclose information within scope of the first part of the request, under either (or, if necessary, both) of the exceptions LC has cited; he'll also consider relevant procedural matters.

Reasons for decision

Is the requested information environmental?

12. Regulation 2(1) of the EIR defines environmental information as being:
 - "... any 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) and (b) 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) ...”.

13. In this case the complainant requested information about the selection of a site for a proposed development. The Commissioner considers that the requested information is information falling within scope of regulation 2(1)(c) of the EIR.
14. Consequently, the Commissioner has assessed this case under the EIR.

Regulation 12(4)(d)

15. Regulation 12(4)(d) provides that a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
16. The exception can therefore be split into three possible limbs.
17. At internal review stage LC mentioned all three limbs (see paragraph 6 above).
18. In its submissions to the Commissioner, LC confirmed that it's applying all three limbs.
19. The Commissioner will first consider whether the exception is engaged, under any of the three limbs; if it is, he'll move on to consider the public interest test.
20. The Commissioner's website² provides detailed guidance on the exception, the three possible limbs and relevant considerations for each.

LC's position

21. In its original response, LC said:

² <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-124d-eir/>

"The information requested is being compiled as part of a sequential assessment ... We can confirm that, as part of the site selection process for the proposed development, around 450 sites within London were identified initially, of which 70 were longlisted ... The final sequential assessment ... will contain details about the sites that have been reviewed in accordance with the site selection criteria ... The sequential assessment is currently in draft as it is still being developed pending its publication as part of a future planning application".

22. At internal review, LC said that the requested information "is the basis for the sequential assessment which is still being prepared" and that the final sequential assessment:

"will contain information about the sites investigated for the proposed development including the detailed analysis that is still being completed in order to finalise the sequential assessment for submission as part of the planning application".

Complainant's position

23. The complainant, in their internal review request, said:

"... the organisation making the assessment has declared it has arrived at a decision ... Making such a declaration is a clear statement that this part of their assessment is complete. The information being asked for has been used and its use by the promoters of the project has reached a conclusion".

24. They also said:

"I have not asked for all the assessments the promoters are carrying out or are still carrying out. I have asked for the information regarding the sites which has led to their acceptance or rejection. This has already resulted in a decision, that one site is 'the only suitable location' ... My request concerns the decisions to accept or reject sites ...".

25. The Commissioner understands that the complainant was referring to published statements, where a Thames Water Depot site was said to be the “only suitable location”³.

Commissioner’s position

26. The Commissioner is satisfied, based on the information available to him, that the requested information relates to “material which is still in the course of completion” and “unfinished documents”.
27. In the first part of the request, the complainant requested information about the sites investigated for the proposed development and why they were chosen or rejected.
28. The Commissioner considers that the ‘sequential assessment’ being drafted for publication is ‘material which is still in the course of completion’ and (being a draft document) an ‘unfinished document’.
29. The complainant has argued that they haven’t asked for the assessment itself. However, they’ve asked for information that relates to (and as LC put it, “is the basis for”) the assessment that’s being prepared. The “information regarding the sites which has led to their acceptance or rejection”, that the complainant wants, relates to the “sequential assessment which is still being prepared ... for submission as part of the planning application”.
30. The complainant has argued that a decision has been made, a site selected, and to that extent the “assessment is complete”. However, even if a site has been named as the “only suitable location”, the requested information still relates to material which is still in the course of completion, and an unfinished document.
31. The Commissioner considered whether the requested information is a separate, independent and complete piece of work in its own right, because as his guidance explains, such information will not engage the exception. In this instance, however, the Commissioner is satisfied that it isn’t. He accepts LC’s argument that the information was gathered and

³ <https://londonschbuild.co.uk/alternative-use-of-site-land-ownership/>;
<https://www.londoncouncils.gov.uk/test-newsroom/2024/plans-underway-develop-and-build-new-secure-childrens-home-london>

is being compiled as part of the sequential assessment that's being developed.

32. As he has determined that the exception is engaged, the Commissioner will now consider the public interest test.

Public interest test – LC's position

33. LC told the complainant that:

"complying with the request would lead to a misunderstanding and misinterpretation of the information being requested as it will be reviewed without the context of the detailed analysis that is still being undertaken ...".

34. At internal review, LC accepted there are public interest arguments in favour of disclosing the requested information at the time of the request, ahead of formal public consultation on the planning application, for greater transparency.

35. However, it concluded that the public interest in withholding the information has greater weight. It argued that the effort required to deal with the envisaged misunderstanding and misinterpretation resulting from disclosure would be so great that it would hinder LC's work relating to the requested information.

36. LC also emphasised that in this case, the requested information will be published as part of a planning application for the proposed development, which will be subject to formal public consultation.

37. In its submissions to the Commissioner, it added:

"[LC] and the public authorities that are collaborating to deliver the ... project are entitled to a 'safe space' to develop and submit a strong planning application for this much-needed facility without being hindered by excessive levels of external comment or media involvement before a planning application has even been submitted".

Public interest test – complainant's position

38. The complaint has said that the project, which seeks to access a piece of Metropolitan Open Land, is of concern to local people; and explained that in this case members of the public have raised funds for an

alternative project. They said that the new secure children's home project will render the efforts and planning, in relation to the alternative project, redundant.

39. They argued that as part of the planning application process, there will only be a short time for members of the public to check information and query the site selection.
40. In their view, disclosing the information will inform public debate and allow the public to check legal obligations were met when the sites were assessed.
41. The complainant disputes that disclosing the requested information will lead to misunderstandings and misinterpretations. They also said that misunderstandings are more likely if members of the public aren't able to check the site options that were available; argued that caveats could be provided with any disclosed information, to explain that further assessments are being carried out; and said that any misunderstandings could be corrected when the final assessment is presented as part of the planning application.
42. The complainant considers that the public is entitled to know why the Thames Water Depot site is the 'only suitable location' for the project.

Public interest test – Commissioner's position

43. The Commissioner has carefully considered the arguments of both parties, and he finds that the public interest favours withholding the information.
44. He appreciates the complainant's concerns about the implications of the proposed development for the alternative project the complainant has referenced (see paragraph 38 above); and their desire for time to check information about the sites considered. He also recognises that there's a public interest in the disclosure of information that provides transparency around decisions made in respect of planning matters.

45. However, as he's previously noted (in decision notices relating to requests for information about pre-application planning advice⁴), he's conscious that the pre-application process isn't designed to enable interested parties, including the public, to comment on proposals by applicants. Rather, once a planning application has been submitted, the planning process itself provides such an opportunity.
46. In the Commissioner's view, the fact that there's opportunity for public engagement later on in the planning process (but still prior to a local authority's decision on a particular application) significantly reduces the public interest in the disclosure of pre-application planning information.
47. Furthermore, whilst the Commissioner recognises why the complainant requested the information, the public interest test under the EIR involves consideration of the broader public interest, including the public interest in preserving the integrity of the planning application process.
48. The Commissioner notes that at the time of the request, no planning application had been submitted. Disclosure of the withheld information at that time, therefore, would have increased the likelihood of disruption to the planning application process.
49. The Commissioner considers that LC's safe space arguments have weight, given the timing of the request in relation to the planning application process, as well as the unfinished nature of the document in question.
50. On balance, the Commissioner's decision, whilst informed by the presumption in favour of disclosure under regulation 12(2), is that LC was correct to rely on regulation 12(4)(d) to withhold the information.
51. Given this finding, the Commissioner hasn't gone on to consider whether regulation 12(5)(d) applies.

⁴ Eg <https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4030410/ic-292887-z7j4.pdf>

Procedural matters

52. Regulation 11(4) of the EIR provides that a public authority has 40 working days to provide an internal review outcome.
53. The complainant requested an internal review on 22 February 2024, and LC took 42 working days to provide its substantive internal review response (there were three bank holidays in March and April 2024).
54. The Commissioner therefore finds that LC has breached regulation 11(4) as its internal review was late by two days.

Right of appeal

55. 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

56. 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.
57. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Daniel Kennedy
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF