

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

Decision notice

Date: X

Public Authority: London Borough of Southwark
Address: PO Box 64529
London
SE1P 5LX

Decision (including any steps ordered)

1. The complainant has requested that London Southwark Council (“the public authority”) provide him with information about vacant land in London.
2. The public authority denied holding some of the requested information. It released some of the requested information it did hold but withheld the remainder by relying on the following exceptions;
 - Regulation 5(1) – (Information not held)
 - Regulation 12(3) - (Personal data of a person other than the applicant)
 - Regulation 12(5)(b) – (The course of justice, etc)
 - Regulation 12(4)(e) – (Internal communications).
3. The Commissioner’s decision is that the
 - Public authority has not complied with its obligations under regulation 5(1).
 - Regulation 12(5)(b) was engaged and the public interest favoured maintaining the exception.

- Regulation 12(4)(e) was not engaged for some information but where it was the public interest favoured maintaining the exception.
 - The public authority was entitled to rely on regulation 12(3) of the EIR to withhold requested information.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
- The public authority is required to carry out further searches aimed at identifying all the information it holds falling within the scope of the request, and to issue the complainant with a new response as required by the EIR.
 - Disclose the requested information that had been withheld under regulation 12(4)(e) where the Commissioner found the exception not to be engaged.
5. The public authority must take these steps within 30 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.

Request and response

6. On 9 October 2023, the complainant wrote to the public authority and made the following request for information under the EIR :
- “Empty Land At 105 Pages Walk London (ref 23/AP/1602)
- All the Council's communications with both Atitlan and Strettons relating to their instructions to produce Financial Viability reports (assessments or reviews) and any other comments on the matter of our application under appeal. Internal emails by which the officers concerned were directed to procure the reports of the two external parties (and on what terms and for what purposes) should also be disclosed. So should the internal emails by which it was agreed that Shiva should be directed to engage Strettons directly at its own expense”.
7. The public authority responded 10 October 2023 and provided some information within the scope of the request but refused to provide the

remainder. To withhold information it relied on the following EIR exceptions;

- Regulation 5(1) – (Information not held)
 - Regulation 12(3) - (personal data of a person other than the applicant)
 - Regulation 12(4)(e) – internal communications.
 - Regulation 12(5)(b) – (The course of justice, etc)
8. On the 29 December 2023, the complainant asked for an internal review. The public authority did not conduct an internal review.

Scope of the case

9. The complainant contacted the Commissioner on 6 March 2024 to complain about the way his request for information had been handled.
10. The complainant does not challenge the usage of regulation 12(3) to withhold the personal data of the public authority's junior employees.
11. In response to the Commissioner's queries about its use of the exceptions the public authority essentially referred him back to its refusal letter to the complainant dated 10 October 2023.
12. On 25 October 2024, the public authority provided the complainant with the "Rebuttal Notes" on the grounds that they were now "releasable with the passage of time".
13. The Commissioner considers that the scope of his investigation is to determine whether the public authority was entitled to rely on the exceptions it has cited to withhold requested information.

Reasons for decision

14. Regulation 5(1) states that: "a public authority that holds environmental information shall make it available on request."
15. The complainant made it clear in his request for internal review that he believed that the public authority had not disclosed all the requested information it held.
16. 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 authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, he will consider any reason it is inherently likely or unlikely that information is not held.

17. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
18. In order to determine whether further requested information was held the Commissioner wrote to the public authority seeking answers to his queries to determine the issue. The public authority's reply is as outlined in paragraph 11 above and did not address the queries raised by the Commissioner.
19. The Commissioner's decision is that the public authority, on the balance of probabilities, likely holds further information falling within the scope of the request. This belief is due to the public authority's failure to provide its submission on the issue and thus not rebutting the complainant's assertion that it holds further information.
20. The Commissioner requires the public authority to carry out further searches aimed at identifying all of the information it holds falling within the scope of the request, and to issue the complainant with a new response as required by the EIR. All information thus located that falls within the scope of the request should either be disclosed to the complainant or an appropriate refusal notice should be provided.

"Empty Land At 105 Pages Walk London (ref 23/AP/1602)

- All the Council's communications with both Atitlan and Strettons relating to their instructions to produce Financial Viability reports (assessments or reviews) and any other comments on the matter of our application under appeal".
21. The public authority relied on the following exceptions to withhold information in scope of this part of the request.
 - Regulation 12(3)
 - Regulation 12(5)(b)

Regulation 12(5)(b)

22. Regulation 12(5)(b) of the EIR states that information is exempt if disclosure would adversely affect 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 a criminal or disciplinary nature.
23. Regulation 12(5)(b) is a broad exception; the purpose of the exception is to ensure that there should be no disruption to the administration of justice.
24. As the public authority explained to the complainant the content of an appendix titled "Rebuttal Notes" is withheld in accordance with regulation 12(5)(b).
25. In reliance on the exception the public authority explained that the rebuttal statement was compiled for a planning hearing remained confidential, scheduled to take place on 25th and 26th June 2024.

and

"The above exception is applied in this instance as this information contains material in preparation for council's to the appeal proceedings and therefore entitles the council to withhold the information, which contains expert's advice that has been sought by the council solely for the purpose of those proceeding; and where the disclosure of this information would affect the authority's ability to a fair trial. Such disclosure in to the public domain, at this moment in time, could have a negative impact on the enquiry itself. In addition, it could undermine the credibility of the expert's advice and weaken the council's position the appeal".

26. Having viewed the withheld information the Commissioner accepts disclosure could stymie the public authority's ability to conduct the process in hand. The Commissioner therefore considers the exception to be engaged.
27. Regulation 12(1)(b) requires that where the exception under regulation 12(5)(b) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. The Commissioner is mindful that regulation 12(2) requires public authorities to apply a presumption in favour of disclosure.
28. The public authority considered the following public interest factors in favour of release:
 - Transparency

- Providing the public in the local area with the opportunity to challenge the council on its policies and activities relating to the issue; and

raising the profile of the issue in order to encourage public debate.

29. The public authority considered the following public interest factors in favour of withholding:

- Disclosure into the public domain, at this moment in time, could have a negative impact on the enquiry itself. In addition, it could undermine the credibility of the expert's advice and weaken the council's position the appeal.

30. In balancing the opposing public interest factors in this case, the Commissioner acknowledges that there will always be a general public interest in transparency and accountability to understand more clearly why particular decisions have been made, and certain processes followed by the public authority. However he believes that the counter veiling arguments for maintaining the exception, in particular not undermining the planning appeal process, outweigh the factors for not releasing the information.

31. 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. As stated in the Upper Tribunal decision *Vesco v Information Commissioner (SGIA/44/2019)*¹ "If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes:

(1) to provide the default position in the event that the interests are equally balanced and

(2) to inform any decision that may be taken under the regulations" (paragraph 19).

32. As covered above, in this case, the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation

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https://assets.publishing.service.gov.uk/media/5d9dc592e5274a595bf5dabf/SGIA_44_2019i.pdf

12(2), is that the exception provided by regulation 12(5)(b) was applied correctly.

“Internal emails by which the officers concerned were directed to procure the reports of the two external parties (and on what terms and for what purposes) should also be disclosed. So should the internal emails by which it was agreed that Shiva should be directed to engage Strettons directly at its own expense”.

Regulation 12(4) (e) – internal communications

33. Regulation 12(4)(e) provides that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. The exception is subject to the public interest test. A public authority can only withhold the information if the public interest in maintaining the exception outweighs the public interest in disclosing the information. Regulation 12(2) provides that a public authority must apply a presumption in favour of disclosure. As the Commissioner’s guidance on this exception explains, a wide range of internal documents will be caught by the exception.
34. The public authority submitted as follows.

“The above exception is engaged as the information requested would require disclosure of internal communications which contain advice, exchange of views between senior officers in discussing proposals and the implications of their decision making in private. The disclosure of such internal communications would have a detrimental effect on the standing of those officers as the deliberations/discussions need to be discussed with honesty and openness. Such disclosure would not be in the public interest as it would cause confusion at a later date, discredit the council’s decision making process and any advice pertinent to the conduct of their work. Furthermore, disclosure of correspondence could result in officers not being able to deliberate and exchange views free from any external scrutiny and prejudice. Such lack of availability to discuss things openly would result in decreased efficiency of the planning process and ultimately is not in the public interest.
35. The public authority has provided the Commissioner with a copy of the information it had withheld by virtue of regulation 12(4)(e). One supplied email clearly emanated from an outside agency and therefore is not a communication internal to the public authority. The exception as regards this information does not engage the exception and should therefore be released to the complainant.
36. The other information, withheld under this exception, are emails between public authority staff they are thus “internal communications”

and the exception is engaged. The Commissioner next considered the public interest test.

Public interest test

Commissioner's Reasonings

37. The Commissioner recognises the general public interest in promoting accountability and transparency of a public authority and its acts or omissions. However in this case the Commissioner is persuaded, for the reasons given by the public authority, the public interests favours maintaining the exception. Having regard to the information and the timing of the request there were on-going issues the public authority were attending to which strongly warrant the protection afforded by maintaining the exception.
38. As referenced above 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
39. In this case the Commissioner's view is that the balance of the public interest marginally favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(e) was applied correctly.

Regulation 12(3) and 13: Third party personal data

40. Regulation 12(3) of EIR states that:

“To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13”
41. Regulation 13 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.
42. In this case the relevant condition is contained in regulation 13(2A). 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').
43. 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(2A) of the EIR cannot apply.

44. 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.
45. The public authority submitted as follows.

"Personal data is redacted in accordance with Regulation 12(3) of EIR 2004, where we have a duty to protect the identity of third party individuals and our junior employees up to the director level, who might be identified through our records. Regulation 12(3) is an absolute exception and not subject to the public interest test"

46. The complainant does not take issue with the public authority withholding the personal data of its junior employees.

Commissioner's Reasonings

47. Having inspected the information, the Commissioner is satisfied that it is the personal data of individuals. Namely their names and contact details.
48. As the Commissioner is satisfied that all of this withheld information is personal data, the next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles.
49. The Commissioner has focussed here on principle (a), which states: "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."
50. 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.
51. The Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.
52. 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 sakes, as well as case specific interests.

53. 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.
54. The Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.
55. The Commissioner considers that the complainant is pursuing a legitimate interest in transparency regarding how the public authority is acting in respect of the disposal of vacant land. He will, therefore, next consider the question of necessity.
56. "Necessary" means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and therefore disclosure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
57. In this case the Commissioner does not consider that the disclosure of the redacted personal information under the EIR is necessary to meet these legitimate interests. That is knowledge of the personal information in question is not needed for the desired transparency.
58. In this case, as disclosure of the information under the EIR is not necessary to meet the legitimate interests, there is therefore no legal basis for the Council to disclose this information and to do so would be in breach of principle (a). The Commissioner's decision is therefore that the Council is entitled to rely on regulation 13 of the EIR to withhold the redacted names and contact details.

Procedural matters

Regulation 11 – reconsideration (internal review)

59. In the relation to the duty to carry out internal reviews the relevant sections of regulation 11 of the EIR state:

"(3) The public authority shall on receipt of the representations and free of charge— (a) consider them and any supporting evidence produced by the applicant; and (b) decide if it has complied with the requirement.

(4) A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations.”

60. In this case the complainant requested an internal review on 29 December 2023. The public authority failed to carry out an internal review.
61. The Commissioner therefore finds that the Council has breached regulation 11 of the EIR by failing to carry out an internal review within the statutory time limit of 40 working days.

Right of appeal

62. 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

63. 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.
64. 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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