

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

Decision notice

Date: 11 March 2022

Public Authority: London Borough of Brent
Address: Civic Centre
Engineers Way
Wembley Park
Wembley
HA9 0FJ

Decision (including any steps ordered)

1. The complainant requested information relating to a planning application. The Council provided some information and refused the remainder in reliance on the exceptions at regulation 12(4)(e) (internal communications) and regulation 13 (personal data) of the EIR.
2. The Commissioner's decision is that the Council was entitled to rely on the exception at regulation 12(4)(e). No steps are required.

Request and response

3. On 18 August 2020 the complainant requested the following information from the Council:

"1. Copies of all emails, memos, notes of telephone calls or other written communications, to or from Brent's Principal Heritage Officer [named individual], relating to the Heritage Impact Assessment of June 2020 on application 20/0345 or any aspect of the significance of the locally listed building at 1 Morland Gardens and how these matters would be presented in the Report to, or at the meeting of, Planning Committee; both

- a) to or from other Brent Council Officers; and
- b) to or from Brent councillors, or anyone acting on their behalf;

in the period from 16 June to 12 August 2020 inclusive.

2. Copies of all emails, or notes of any discussions, between or involving Officers of Brent's Planning Service, relating to:

- a) the contents of the Officer Report to Planning Committee;
- b) the Supplementary Information to Planning Committee; and,
- c) the presentation of the Planning Service case to Planning Committee [named individuals] on 12 August 2020 in support of the Officer recommendation to approve that application;

in respect of planning application 20/0345 (1 Morland Gardens), in the period from 1 July to 12 August 2020 inclusive."

- 4. The Council issued a refusal notice on 17 September 2020, citing the exception at regulation 12(4)(e) of the EIR.
- 5. The complainant requested an internal review on 24 September 2020 and the Council provided him with the outcome of that review on 28 October 2020. At this stage the Council disclosed some of the requested information but maintained its reliance on regulation 12(4)(e) in respect of the remainder. It also cited the exception at regulation 13 of the EIR in respect of some of the withheld information.

Scope of the case

- 6. On 19 November 2020 the complainant contacted the Commissioner to complain about the Council's decision. The complainant was of the view that his request ought to have been handled under FOIA rather than the EIR.
- 7. In any case the complainant also argued that the withheld information ought to have been disclosed to him.

Reasons for decision

Access regime

- 8. The Commissioner has first considered whether the Council was correct to handle the request under the EIR rather than FOIA.
- 9. FOIA and the EIR both provide rights of public access to information held by public authorities. The EIR applies only to "environmental information", which is defined at regulation 2(1). Regulation 2(1) states that environmental information will include, among other things, any recorded information on the following categories:

- "(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."*
10. The Commissioner is of the opinion that regulation 2(1) should be interpreted broadly, to include any information about, concerning or relating to the various factors, elements and other items stated. The information does not have to mention the environment or any environmental matter.
11. The complainant confirmed to the Commissioner that he had considered his published guidance on identifying environmental information.¹ The complainant argued that the withheld information related to the significance of a heritage asset, which did not fall within regulation 2(1)(a) or (b), therefore regulation 2(1)(c) would not apply.
12. The Commissioner acknowledges the complainant's argument but respectfully disagrees. The Commissioner observes that the planning application referred to in the request relates to a proposal to redevelop a site, including the demolition of existing buildings and erection of a new building. The Commissioner considers that the planning system in this context is a measure that is likely to affect the elements and factors of the environment. The withheld information in this case relates to the planning matter, and consequently the Commissioner finds that it is environmental information by virtue of regulation 2(1)(c) of the EIR.
13. In light of the above the Commissioner is satisfied that the EIR is the correct access regime in this case.

¹ <https://ico.org.uk/for-organisations/regulation-2-1-what-is-environmental-information/>

Regulation 12(4)(e): internal communications

14. Regulation 12(4)(e) of the EIR provides an exception from disclosure to the extent that the requested information comprises internal communications. The exception is class-based, which means that it is engaged if the information in question falls within its scope. There is no requirement to consider prejudice or adverse effect at this stage.
15. The Commissioner is satisfied that the withheld information falls under the description of "internal communications". This is because it comprises email correspondence between various Council employees. Accordingly the Commissioner is satisfied that the exception at regulation 12(4)(e) is engaged.
16. Regulation 12(1) of the EIR states that disclosure of environmental information may be refused if (a) an exception to disclosure applies and (b) if in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information. Regulation 2(2) further states that the public authority must apply a presumption in favour of disclosure when considering the public interest.

Public interest arguments in favour of disclosure

17. The Council recognised the general public interest in openness and transparency regarding its consideration of planning applications. It accepted that planning decisions and the process leading to those decisions should be as open and transparent as possible. It acknowledged that the public should be able to participate in the decision making process, and be satisfied that the final decision had been made openly and fully explained.
18. The complainant also identified arguments in favour of disclosure. He advised the Council, and the Commissioner, of his concerns that the Officer Report to Planning Committee, and the advice given by officers at the meeting, may have been misleading. The complainant was concerned that the Committee's majority decision approving the application may have been different if the facts and planning policy had, in his view, been presented fairly and accurately.
19. The complainant argued that refusing to disclose the information suggested that the Council had "something to hide", and that disclosure would provide reassurance for the public.

Public interest in favour of maintaining the exception

20. The Council's arguments in favour of maintaining the exemption focused on "safe space". The Council said this was necessary for the Council to carry out its functions away from outside pressure and interference and to have free and frank discussions without fear of these being disclosed.
21. The Council referred to the National Planning Policy Framework,² which emphasises the need to discuss and consider an application quickly. In the Council's opinion this means that officers need to be able to speak candidly, spark debate and ask questions in a timely manner.
22. The Council set out that if internal correspondence was routinely disclosed officers would be inhibited in their communication and may feel obliged to spend disproportionate time researching before making comments or asking questions. The Council considered that this would result in significant delays to consideration and determination of applications, as well as a reluctance of officers to ask questions or share views.
23. The Council considered that the public interest was adequately met by the publication of formal reports and recommendations, which represented the thoughts and views of the Council as the Local Planning Authority, rather than those of individual officers.
24. The Council maintained that the public interest in maintaining the exception was strengthened by the fact that in this particular case the application presented a number of challenging considerations, and represented a departure from planning policy. The application proposed to demolish a locally listed building and result in a building that was taller than many others in the local area. The Council considered that the circumstances of the case meant it was essential that officers had the safe space necessary to discuss and debate the merits and impacts of the proposal, and the level of weight that should be applied to either.
25. The Council confirmed that at the time of the request, the planning application had been approved, although it was subject to a six month appeal process.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1005759/NPPF_July_2021.pdf, paragraph 47

Balance of the public interest

26. The Commissioner considers that the underlying rationale for the exception at regulation 12(4)(e) is to protect a public authority's need for a private thinking space. He considers that the extent to which disclosure would have a detrimental impact on internal processes will be influenced by the particular information in question and the specific circumstances of the request.
27. The Commissioner has carefully considered the arguments put forward by the complainant and by the Council. He recognises the legitimate public interest in disclosing information that would inform the public about decisions concerning activities that may have an impact (whether positive or negative) on the environment. Accordingly he is mindful that access rights under the EIR are designed to support public access to environmental information, public participation in decision making and access to justice.
28. The Commissioner can confirm that he has inspected the requested information in this case. Since the Commissioner must be careful not to disclose information that would defeat the purpose of relying on an exception, he cannot include details of the requested information in this publicly available decision notice.
29. The Commissioner is of the opinion that the requested information would be of limited value in assisting the public's understanding of the Council's decision making process in this particular case. In the Commissioner's opinion it does not provide any significant additional insight into how the planning recommendation was made. Nor, more importantly, does it provide any evidence that the advice given by officers was misleading, which would itself be a strong argument in favour of disclosure.
30. The Commissioner has seen no evidence to suggest that disclosure of the withheld information would be likely to cause planning officers to make different decisions. Rather, he accepts that disclosure would have the effect of slowing down the Council's decision making process. Officers would be likely to take longer to draft internal correspondence in the knowledge that it would be examined and commented on by the public. The Commissioner notes the Council's argument that it is required to consider applications quickly as set out at paragraph 21 above. Therefore he considers there is a strong public interest in protecting the Council's ability to exchange correspondence in a private space.

31. The Commissioner acknowledges the complainant's argument that refusing to disclose the information suggested that the Council had "something to hide". However, it cannot be assumed that a refusal to disclose information is based on a desire to cover up wrongdoing. In the Commissioner's experience there are many cases where the withheld information may be relatively innocuous, but the act of disclosure would have a detrimental effect on the public authority's ability to conduct its business effectively. In any event, the Commissioner has not seen any evidence of wrongdoing, therefore the complainant's argument does not carry significant weight in this case.
32. The Commissioner further recognises that the complainant disagrees with the Council's decision to approve the planning application, and is opposed to the demolition of the locally listed building. Again, the Commissioner would emphasise that disclosure of the withheld information would not add to the public's understanding of the substantive decision, nor would it further public debate or effective challenge to the decision.
33. The Commissioner is mindful that a public authority is required to apply a presumption in favour of disclosure, and in any event the public interest in maintaining an exception must outweigh the public interest in disclosure. If the public interest is balanced then the information in question must be disclosed.
34. The Commissioner finds that the public interest in this case is not especially balanced. He is satisfied that there is a significant public interest in protecting the Council's ability to exchange internal communications in a "safe space", in the knowledge that the Council would (and did) publish relevant information in its recommendation and report. The Commissioner does not consider that the presumption in favour of disclosure changes this conclusion.
35. Consequently the Commissioner finds that the public interest in maintaining the exception at regulation 12(4)(e) does outweigh the public interest in disclosing the withheld information. The Commissioner has therefore not gone on to consider the exception at regulation 13.

Right of appeal

36. 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

37. 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.
38. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Sarah O'Cathain
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF