

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 4 July 2024

Public Authority: London Borough of Barnet
Address: Hendon Town Hall
The Burroughs
Hendon
London
NW4 4BG

Decision (including any steps ordered)

1. The complainant has submitted a request to the London Borough of Barnet (the council) for information relating to the validity and enforcement of a historic Deed of Agreement.
2. The Commissioner's decision is that regulation 12(5)(b)(the course of justice) is engaged. However, he finds that the public interest in maintaining the exception does not outweigh the public interest in disclosure. He also finds that the council breached regulations 14(3) and 11(4) of the EIR in its handling of the complainant's request.
3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
4. Disclose the requested information, with any personal data redacted in accordance with his [guidance](#)¹.

¹ [Section 40 and Regulation 13 – personal information | ICO](#)

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 10 March 2023, the complainant wrote to the council and requested information in the following terms:

"1. The brief from Barnet Council to their legal department concerning the validity and enforceability of the Deed of Agreement made 11 March 1927 between (i) The County Council of The Administrative County of Middlesex and (ii) the Hendon Urban District Council.

2. The brief on this issue from Barnet Council's legal department to [redacted], c. 2004 - 2005.

3. The advice of [redacted], c. 2004 - 2005 in response to Barnet Council's brief.

4. The letter sent by email dated 15 July 2013 from [redacted] at Legal Services to Barnet and Harrow Councils Ref: PKC/EBA-EC_009797 to [redacted] & [redacted].

5. The email dated 4 September 2013 from [redacted] to [redacted] and [redacted] and the following attachments:

a) the attachments shown in yellow:

From: [redacted] Sent: 04 September 2013 18:19

*Attachments: FW Hendon Football Club Site - Covenants (77.3 KB); 743631 - 15.07.13 Letter to [redacted] and [redacted] - 15 07 2013 16 09 40.PDF; 774697 - 20 08 13 - Sealed Deed of Release - 22 08 2013 15 57 22.PDF

b) the email referred to in the third paragraph, from [redacted] on behalf of Barnet Council

c) a transcript of the telephone conference between [redacted] and [redacted], also referred to in the third paragraph

d) the advice from Counsel, [redacted], referred to in the fourth paragraph."

7. A response was provided on 6 April 2023, in which the council applied section 42 to all the information requested.
8. Upon receiving this response, the complainant submitted an internal review request on 30 May 2023.
9. The council provided its internal review response on 26 September 2023, in which it overturned its original decision, and instead considered the request under the EIR. The council applied regulation 12(5)(b) to the withheld information. The council also disclosed some information in relation to questions 4, 5a and 5b under the Data Protection Act 2018.

Background

10. In the mid 2000s, Hendon Football Club's ground, known locally as Claremont Road, was put on the market to be sold for housing. The development stalled as there was a deed of covenant preventing the stadium and associated buildings from being used for any other purpose than football or being returned to park land.
11. In 2012 the land was sold to a property developer. Houses were built on the site and in 2016 buyers moved into the new homes in Claremont Village.

Reasons for decision

Is the requested information environmental?

12. Regulation 2(1) of the EIR defines environmental information as being 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)...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 Commissioner considers that, the requested information falls under regulation 2(1)(c).

Regulation 12(5)(b)-the course of justice

14. Regulation 12(5)(b) allows a public authority to 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 ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
15. The council has maintains that the withheld information is legal advice and is subject to LPP. The advice relates to covenants and commitments made in the 1920's and whether they applied to the council in the present date, and to provide a steer in the council's case to an adjudicating land tribunal.
16. The Commissioner's guidance² confirms that information that is subject to Legal Professional Privilege (LPP) falls within the scope of regulation 12(5)(b). The guidance goes on to note that the Upper Tribunal accepts that an adverse effect on the course of justice can result from the undermining of the general principles of legal professional privilege and of the administration of justice.

² <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-12-5-b-the-course-of-justice-and-inquiries-exception/>

17. The Commissioner has viewed the withheld information and is satisfied that it constitutes confidential communications between a client and professional legal advisor, made for the dominant purpose of providing legal advice on specific legal concerns. He therefore considers the information to be covered by LPP on the basis of advice privilege.
18. Information will only be privileged so long as it is held confidentially. Therefore, the Commissioner has gone on to consider whether the right to claim LPP to this information has been lost because of previous disclosures to the world at large, which would mean that the information in question can no longer be said to be confidential.
19. In submissions to the Commissioner, the council explained that it had consulted with the Head of Service for Estates, and that they have confirmed that at no point has the privilege attached to the information been waived. It further explained that the information "has been restricted to a limited number of individuals on a need-to-know basis and not shared further."
20. In light of the above, it is the Commissioner's view that there has been no loss of privilege in respect of the legal advice in question, and that this information is covered by LPP.
21. The exception at regulation 12(5)(b) is only engaged if it is shown that the relevant information would, if disclosed, have an adverse effect on the course of justice.
22. The council considers that there would be an adverse effect on the course of justice as it is "firmly of the opinion that the advice remains live and relevant despite the passage of time since it was issued."
23. The council further explained that "subject specialists in the council take the view that that the ten-year period since the advice was issued is not that lengthy in terms of estates matters and related legal advice."
24. The complainant argues that the information cannot be considered live as it is "20 years old" and that there is not a "scintilla of probability that any litigation could occur now or in the future, nor could there be any retrospective action."
25. Furthermore, the complainant argues that the council has "grossly exaggerated the weight that LPP may reasonably be attached to this request" and that "the council is not seeking advice now in 2023." Regardless of the differences between the complainant and council's description of the age of the information, it is still more than a decade ago.

26. However, the Commissioner would agree with the council in that as the questions remain relevant regarding the specific piece of land, then the Commissioner's established view, that disclosure of information, subject to LPP, will have an adverse effect on the course of justice.
27. Furthermore, the Commissioner has also referred to the decision of the Upper Tribunal in *DCLG v Information Commissioner & WR* [2012] UKUT 103 (AAC) (28 March 2012), case number GIA/2545/2011³, which confirmed that in considering whether information subject to LPP engaged the exception, it was relevant to take into account any adverse effect upon LPP (such as the confidence in the efficacy of LPP) and the administration of justice generally, and not simply the effect on the particular case.
28. As the withheld information in this case is subject to LPP, the exception at regulation 12(5)(b) is engaged. The Commissioner will now go onto consider the public interest test.

Public interest test

29. 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.
30. The Commissioner is mindful that Regulation 12(2) requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions.
31. In submissions to the Commissioner, the Council has referred to the public interest test reasons provided in a previous decision notice⁴, as it has reviewed them and continues to maintain them. The previous decision notice, from 2009, concerned a similar request for information.

Public interest in disclosure

32. The complainant has stated that there is a high public interest in the disclosure of the information because of the amount of money involved. They argued that the development involved "many thousands of staff hours and over 30 outside agencies at a huge expense to the taxpayer".

³ <https://administrativeappeals.decisions.tribunals.gov.uk/Aspx/view.aspx?id=3477>

⁴ <https://indigooffice.sharepoint.com/sites/CRMDocuments/231106/IC-268468-Y8R9/f9c7399a-11e5-ee11-b85d-0022483ec3f4/Previous%20DN%20FS50223362.pdf>

33. The complainant further argued that “prime development land was sold off market” and that disclosure of the legal advice is crucial to understand the decision-making process of the council to sell public open spaces.
34. The council acknowledges that the “decision making processes of public functions should be transparent and open to scrutiny in order to inform the public debate.”

Public interest in maintaining the exception

35. The council maintains that disclosure of the requested information “may give rise to legal challenges by those unhappy with the course of action adopted based on that advice.”
36. The council further states that disclosure of the information would deter public authorities from “being frank and candid” with their legal adviser when obtaining legal advice. This could then lead to a reluctance to seek advice at all.

The balance of the public interest

37. LPP is a fundamental principle of justice, and it is the Commissioner’s well-established view that the preservation of that principle carries a strong public interest.
38. The Commissioner notes that there is a significant interest in understanding the legal issues surrounding the overriding of a covenant that had benefited people within the council’s jurisdiction and beyond.
39. However, the Commissioner is also conscious of the weight invested in legal professional privilege, particularly the breaching of a trust between a legal adviser and their client, which may go on to undermine the possibility of a frank discussion between the parties.
40. Nevertheless, the Commissioner has been swayed by the compelling public interest in this case. In 2009, the Commissioner ruled in favour of upholding the exception, as the proposal to develop on the land was very much still a live issue.
41. However, given there are no judicial proceedings regarding the development of the former Hendon Football Club ground, as all the homes have now been built, sold and occupied, it is difficult to see how disclosure would have an adverse effect on such proceedings.

42. The Commissioner feels that, in this case, knowing why decisions were made would be in the spirit of the Aarhus Convention⁵, which underpinned the EIR, in that the public should be able to participate in decision-making and access to justice in environmental information. The principle behind the law is that giving the public access to environmental information will encourage greater awareness of issues that affect the environment.
43. Greater awareness helps increase public participation in decision-making; it makes public bodies more accountable and transparent and it builds public confidence and trust in them. Given the importance of green spaces to local communities, as well as the need for adequate housing, in this case the Commissioner now considers that disclosure of the withheld information would help people better understand the decision, based on the legal advice that was received.
44. Therefore, the Commissioner's decision is that the exception provided by Regulation 12(5)(b) is engaged but the public interest lies in disclosure.

Procedural matters

45. As the council issued its refusal under FOIA and not the EIR, it breached regulation 14(3) of the EIR, which states that a public authority must state, no later than 20 working days after it received the request, which exceptions it is relying on.
46. Under the requirements of regulation 11, a public authority is obliged to respond to a request for an internal review within 40 working days. In failing to carry out an internal review within 40 working days, the council breached regulation 11 of the EIR.

⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A128140&qid=1659457532271>

Right of appeal

47. 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

48. 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.
49. 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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