

Freedom of Information Act 2000 (Section 50)
Environmental Information Regulations 2004

Decision Notice

Date: 27 April 2010

Public Authority: London Borough of Tower Hamlets
Address: Town Hall
Mulberry Place
5 Clove Crescent
E14 2BG

Summary

The complainant requested information relating to a particular development. The London Borough of Tower Hamlets ("the Council") refused to provide any information citing section 22 of the Freedom of Information Act 2000 ("the FOIA"). The Information Commissioner ("the Commissioner") decided that the Council should have handled the requests under the Environmental Information Regulations 2004 ("the EIR"). In relation to request 1, the Council refused to accept that the complainant's interpretation of the request was objectively reasonable however the Commissioner disagreed. Regarding request 2, the Council stated that it wished to withhold information but it did not cite exceptions or provide adequate supporting arguments. The Commissioner also decided that it was likely that further information was held on the Council's behalf by a consultant. Regarding request 3, the Commissioner determined that information relating to request 2 also fell within the scope of request 3. In addition, the Commissioner found that some other information was held by the Council and this information was not excepted under regulation 12(4)(d). He also found that further information was held on its behalf by an external company and this information was not excepted under regulation 12(4)(e) or 12(4)(d). Further, he was not satisfied that no other relevant information was held on the Council's behalf by the external company. The Commissioner found that the Council breached regulations 5(1), 5(2), 14(2) and 14(3). He has ordered steps in relation to all of the requests.

The Commissioner's Role

1. The EIR were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Commissioner. In effect, the enforcement provisions of Part 4 of the FOIA are imported into the EIR.

Background

2. These requests concern the Blackwall Reach regeneration area. In 2007, the Council drew up a "Development Framework" which set out plans to redevelop the area, which had become run-down, by working in partnership with English Partnerships (which became part of the Homes and Communities Agency on 1 December 2008. For clarity, the Commissioner has referred only to "English Partnerships" throughout this Notice). The plans included the creation of new homes, a range of local shops, a variety of commercial premises, and new recreational facilities.

The Request

3. On 29 January 2008, the complainant's solicitors wrote to the Council and requested information on behalf of the complainant in the following terms:

"We are aware that the London Borough of Tower Hamlets ("LBTH") has been consulting on the Blackwall Reach Draft Development Framework in conjunction with English Partnerships and request disclosure of the following information from LBTH under the Freedom of Information Act 2000:

1. *All information and documents relating to the funding arrangements for the Regeneration Project including anything which relates to arrangements for English Partnerships/LBTH to acquire the Regeneration Area by means of compulsory purchase.*
2. *Details of any negotiations with developers to pursue the development, including any information or evidence of such agreements or discussions.*

3. *Details of correspondence or discussions with landowners, stakeholders or other persons with an interest in the Regeneration Area.*
4. On 22 February 2008, the Council replied and stated that it considered that section 22 of the FOIA applied and that the public interest in withholding the information outweighed the public interest in disclosing it. It explained that the exemption applied because it had stated its intention to publish the requested information in the form of cabinet reports later in the year. It added that the public interest was best served by withholding the information and provided some rationale.
5. On 25 March 2008, the complainant's solicitors wrote to request an internal review. They stated that they believed that at least some of the information should be considered under the EIR because it related to regeneration works. They also stated that it was inconceivable that every piece of information requested will be published in a cabinet report in due course. They asked the Council to confirm when it was going to publish information relevant to the requests and they also asked it to disclose any information which was not exempt or excepted. They also stated that the public interest test had not been adequately explained.
6. On 18 April 2008, the Council replied. It stated that it did not agree that the EIR applied. It added that it did not need to specify when the information was going to be published or state in what form it would be published. It explained that a cabinet report would contain some information however it also stated that since the request, other documents pertaining to Blackwall Reach had been placed on the Council's website. It stated that under the FOIA, the complainant had a right to access information rather than documents. It stated that it considered it may be appropriate for the complainant to check what information had been placed into the public domain by the Council or English Partnerships since the original request. It invited the complainant to specify whether any information was missing once this had been checked. It also advised that some information may be exempt under section 43(2) of the FOIA.

The Investigation

Scope of the case

7. On 16 May 2008, the complainant's solicitors contacted the Commissioner to complain about the way the requests for information

had been handled. They asked the Commissioner to consider whether the Council had responded to the requests properly.

8. For clarity, during the Commissioner's investigation the Council stated that it considered a limited amount of information relating to request 1 concerning funding arrangements was contained in a draft Development Framework dated August 2007. The Commissioner has not considered the disclosure of this information as part of this Notice because it is already publicly available on the internet.

Chronology

9. Responding to initial enquiries from the Commissioner, on 20 June 2008 the Council wrote to explain that it had instructed officers to prepare the information being withheld. It stated that officers had been asked to confirm whether any of the information had now been published. It stated that if that was the case it would direct the Commissioner to the publication.
10. On 28 July 2008, the Council sent another letter to the Commissioner. It stated that it had now published a cabinet report dated 5 March 2008 on its website and the completed "Development Framework". It also stated that it was aware that additional information had been obtained from another request made by the complainant to English Partnerships. It referred to the fact that it had asked the complainant to confirm what information was outstanding but the complainant had not replied.
11. On 6 March 2009, the Commissioner wrote to the complainant's solicitors. He referred to the information specified in the Council's letter dated 28 July 2008 and he asked them to state whether the complainant now possessed the information required.
12. On 2 April 2009, the complainant's solicitors wrote to the Commissioner. They stated that the complainant was still of the view that the information requested had not been provided. They added that the cabinet report dated March 2008 and the Development Framework had been considered prior to making the complaint to the Commissioner. They explained that the complainant was provided with very little information by English Partnerships. They also stated that they did not consider that all the information could be exempt.
13. On 20 April 2009, the Commissioner wrote to the Council. He explained that the complainant's solicitors had changed and that the complainant wished to pursue the complaint because it did not consider that the information requested had been provided. The Commissioner asked the

Council to state clearly in relation to each request whether it held information of the description specified by the request.

14. The Council responded on 28 May 2009 and made the following comments in respect of each request:
 - Request 1 - It had not located any information specifically relating to the funding arrangements or compulsory purchase. It then added that "The Housing Needs Strategy does not specifically refer to funding, and the only other material (other than the draft development framework documents which fed into the actual development framework) was covered by the Cabinet Papers and therefore exempt, at the time, under section 22".
 - Request 2 - At the time of the request there had not been any discussions with developers.
 - Request 3 – It was still investigating whether it held any relevant information. It stated that it would send another response addressing request 3 in due course.
15. On 1 June 2009, the Commissioner replied to the Council. In relation to request 1, the Commissioner asked the Council to clarify whether its position was that information falling within the scope of this request was held. He also asked the Council to respond to his questions regarding request 3.
16. On 22 June 2009, the Council supplied the Commissioner with a copy of its response. It stated that this had been sent on 11 June 2009. The Council stated that it was still awaiting confirmation regarding paper files however it had concluded its analysis of the electronic files. It stated that it had enclosed the information that was considered exempt. The Council provided the following documents along with its response but unfortunately did not specify which, if any, of the requests the documents related to:
 - Blackwall Reach draft Development Framework dated August 2007 (as noted in the Scope section of this Notice, this document is publicly available)
 - Blackwall Reach final draft Development Framework dated February 2008
 - Blackwall Reach presentation to the Leaders Advisory Board dated 23 January 2008
 - Blackwall Reach "LVG Names".

It also made the following comments that the Commissioner was able to attribute to specific requests:

- Request 1 – The cabinet report from March 2008 contained information about compulsory purchase. The arrangements referred to by the complainant had not been developed at the time of the request.
 - Request 3 – The cabinet report from March 2008 contained details of the consultation activity.
17. On 22 June 2009, the Council sent another email to the Commissioner in which it stated that it seemed clear that it had not held much of the information requested by the complainant and it made the following additional comments:
- Request 1 – The Council does not have any additional information or documents available beyond those already supplied.
 - Request 2 – The only negotiations with private developers were with Ballymore Properties (“Ballymore”), formerly a land-owner in the proposed development. The Council does not hold any information relating to these discussions.
 - Request 3 – The Council’s correspondence or discussions with landowners, stakeholders or other persons with an interest in the Regeneration Area have been primarily focused on secure tenants and leaseholders in residential blocks. Public information on the project proposals can be found at the “Project Shop”.
18. On 8 July 2009, the Commissioner wrote to the Council explaining that it was, regrettably, still unclear what information the Council actually held at the time of the request relating to request 1 and 3. The Commissioner asked for the Council’s clarification. Regarding the documentation provided on 22 June 2009, the Commissioner pointed out that the final draft Development Framework post-dated the request and was therefore not relevant. He also queried the relevance of the document entitled “LVG names”.
19. The Council replied on 22 July 2009. In relation to the document entitled “LVG names”, the Council explained that it was not sure what this information was and therefore must conclude that it does not relate to any of the requests. It also made the following comments:
- Request 1 – The only information held regarding the first request was the draft development framework and other material included in the “cabinet papers”. At that stage, there had been “precious little”

discussion about funding arrangements and nothing about compulsory purchase as an option and it would therefore be impossible to “disassemble” the cabinet report into specific documents.

- Request 3 – The cabinet report from March 2008 summarised the responses to the consultation activity. The Council did not however hold specific information relating to this request.
20. On 28 July 2009, the Commissioner telephoned the Council to discuss its responses to his enquiries concerning request 1. He explained that the Council had suggested that it held some information relating to this request but it was not clear what information was held. Regarding funding arrangements, the Council indicated that it understood that the complainant wanted information about arrangements that were in place such as information about funding sources and the amount of the funding. It explained that this information was not likely to be held as the project was in its early stages at the time of the request. The Council commented that there was a very brief reference to funding in the draft development framework. Regarding compulsory purchase arrangements, the Council explained that it did not believe it held any information. It commented that compulsory purchase had been referred to as an option in the March 2008 cabinet report. The Commissioner asked the Council to check what information it held and he would contact the complainant in the meantime.
 21. The Commissioner wrote to the complainant's solicitors on 11 August 2009 and he also discussed the case with them during a telephone conversation on 27 August 2009. He provided an update on the Council's position although he explained that it was still not entirely clear what information was held by the Council. Regarding request 1, the Council's solicitors agreed to consult the complainant. Regarding request 2, they explained that they would be surprised if the Council did not hold any information concerning discussions with developers. They also commented in relation to request 3 that they thought some consultation responses were available on the Council's website but that the complainant would wish to be provided with any that were not already publicly available.
 22. On 4 September 2009, the Commissioner wrote to the Council. He asked a number of questions to investigate further what information the Council actually held.
 23. The Council replied to the Commissioner on 5 October 2009 and made the following comments:

- Request 1 –It did not hold any information at the time relating to funding arrangements because there were no arrangements with English Partnerships. It was too early for the Council to hold this information. It could not have held any information relating to compulsory purchase arrangements because it had only just sought approval to enter into discussions about whether or not this would be necessary.
 - Request 2 –There was some information relating to discussions with Ballymore and the Council is consulting with English Partnerships to try to establish what information was held.
 - Request 3 – There was extensive coverage of the consultation exercise in the March 2008 cabinet report, especially in the Appendices. The consultation occurred between August 2007 and November 2007.
24. On 6 October 2010, the complainant's solicitors replied. They stated that the complainant found it difficult to accept that no further information was held. They also stated that the Council's original application of section 22 suggested that all the information requested was held.
25. The Commissioner telephoned the complainant's solicitors on 27 October 2009. He explained that it appeared that the Council had interpreted request 1 as being for information held about arrangements that were actually in place. He explained that the Council had stated that no arrangements were in place and it therefore did not hold the information requested. The complainant's solicitors explained that the request had been intended to cover information about proposed or contemplated arrangements and not just limited to arrangements that had actually been put in place.
26. On 4 November 2009, the Commissioner wrote to the Council explaining that it appeared that it had interpreted the request more narrowly than had been intended by the complainant. He asked the Council to consider whether it held the information requested by the complainant based on the broader reading described in the above paragraph. He also asked further questions regarding requests 2 and 3. He explained that he had noted that some information falling within the scope of request 3 was contained within the presentation dated 23 January 2008 that had been provided to the Commissioner on 22 June 2009. He asked the Council whether it considered that this information was excepted under the EIR.

27. On 20 November 2009, the Council provided its “interim response”. It stated that it had attached a copy of “the Part II (exempt) Cabinet Report” from 5 March 2008. It also made the following comments:
- Request 1 – The Council rejects the Commissioner’s view that the information would relate to “theoretical” funding arrangements. Regarding compulsory purchase arrangements, the Council does not agree that the request covers “possible arrangements”. It is clearly concerned with specific arrangements which the complainant incorrectly thought existed.
 - Request 2 – Information relating to discussions with Ballymore properties revolved around the disposal of the St Matthias site to English Partnerships. English Partnerships were purchasing land owned by Ballymore. The Council advised on 22 June 2009 that it did not hold information in this regard at the time of the request. There was however mention of the disposal of the site in the exempt cabinet report dated 5 March 2008. This information would have been exempt under regulation 12(5)(e).
 - Request 3 – It is obvious that the Council held this information. However, English Partnerships conducted the consultation activity and therefore the Council was merely a recipient of information from them. The Council was not obligated to pass this request on to English Partnerships. As the Council intended to publish the information held, it was excepted under regulation 12(4)(e). The information was also in draft format and was therefore excepted under regulation 12(4)(d). The public interest would not be served by the premature “leaking” of information outside of the appropriate context that would be provided by the full report. Regarding information about the consultation contained in the presentation dated 23 January 2008, the Council stated that this information was excepted under regulation 12(4)(d) as the presentation was “in development” for the cabinet meeting in March 2008.
28. On 4 December 2009, the Council sent an email to the Commissioner in which it stated that officers had reviewed their “shared drives” and had located additional information relating to Ballymore. The Council stated that it considered this information was exempt either because it is “commercial in nature, or that it would be presented at some point in the future”. This information consisted of the following:
- Letter to the Corporate Director of the Council dated 23 January 2008
 - Backwall Reach Proposed Landowners Development Agreement – Heads of Terms dated 20 December 2007

- Press preparation notes which the Council stated were possibly publicly available already
 - Recommendations from draft cabinet report (that later became the cabinet report dated March 2008).
29. On 26 January 2010, the Commissioner replied to the Council. He asked further questions to help him to consider precisely what information was held by the Council.
30. On 16 February 2010, the Council replied to the Commissioner's questions. In relation to request 2, the Council indicated that it wished to maintain that no further information was held. However, it pointed out that the Council had employed some consultants, who it referred to as "CBRE Consultants". Regarding request 3, the Council explained that the consultation had been conducted by an external company. It stated that because of this, the Council did not, at the time of the request, hold the consultation responses. It confirmed that it held no other information relating to this request.
31. On 23 February 2010, the Commissioner wrote to the Council pointing out that under regulation 3(2), information is held if it is held by another person on behalf of the authority. The Commissioner asked some questions designed to help him to consider whether CBRE Consultants or the external company who conducted the consultation held information on behalf of the Council. He also pointed out that although the Council had previously indicated that it was obvious that it held the consultation responses, it now appeared to be saying that this information was not held. He asked for further clarification.
32. The Council replied on 9 March 2010. It stated that it was investigating whether the consultants held information on their behalf, expressing the view that this was possible. It also stated that it wished to confirm that it did not hold the consultation responses at the time of the request given that the consultation period had continued past the 23 January 2008 and that it did not consider that the external company, Scott Wilson PLC ("Scott Wilson"), held information on its behalf because the company was commissioned by English Partnerships. It explained that the Council had joined the consultation in November 2007.
33. On 12 March 2010, the Commissioner telephoned the Council. He pointed out that in an email dated 5 October 2010, the Council had stated that the consultation period was from August 2007 until November 2007. This was not consistent with the statement in the Council's letter that the consultation period extended past the date of the request (which the Council had incorrectly stated as being on 23

- January 2008 rather than 29 January 2008). The Council stated that it was now not sure whether it actually held the consultation responses and it would need to check.
34. The Council sent an email to the Commissioner on 12 March 2010. It stated that English Partnerships commissioned the consultation but added that it was clearly the case that "material" was given to the Council as it published "the consultation document" in the appendices to the March 2008 cabinet report. It stated that it would investigate what information it held at the time of the request.
 35. On 16 and 17 March 2010, the Commissioner sent two emails to the Council seeking clarity regarding whether the consultation responses were held by the Council. He also pointed out that in a press release dated 7 November 2007 available on English Partnerships' website, English Partnerships had issued a statement that the consultation was commissioned by itself and the Council. He asked the Council to clarify whether it had in fact commissioned the consultation with English Partnerships and if that was the case, whether it would wish to maintain that no information was held on its behalf.
 36. On 17 March 2010, the Council emailed the Commissioner. It referred to a "draft participation report" but it was not clear that this fell within the scope of any of the requests. It failed to specifically address the question of whether or not it held the consultation responses. On the subject of the date discrepancy relating to the consultation period, the Council stated that from December 2007 until March 2008 community engagement continued with meetings, information circulated to residents and enquiries responded to. Regarding the Commissioner's request for clarification over who commissioned the consultation, the Council confirmed that the consultation had been commissioned by English Partnerships and the Council had joined as a partner in November 2007. The Council did not address the question raised over whether it wished to maintain that the information was not held on its behalf. It simply asserted that it had not said that no other party held the consultation responses.
 37. On 18 March 2010, the Commissioner telephoned the Council and asked it to confirm whether it held the consultation responses. At this point, the Council stated that it had never held the consultation responses. The Commissioner also discussed the question of whether information was held on the Council's behalf. The Council confirmed to the Commissioner that it accepted that Scott Wilson held the consultation responses on its behalf at the time of the request.

Analysis

Substantive Procedural Matters

Was the information “environmental”?

38. The Council handled the requests under the FOIA. However, the Commissioner considers that it is clear that all of the requests should have been handled under the EIR. All the requests clearly relate to a substantial development which would have had a significant impact of the environment. In view of this, the information falls within the scope of regulation 2(1)(c) because it is information concerning a plan affecting the land.

Request 1 – Was the complainant’s interpretation “objectively reasonable”?

39. As described in the chronology section, a disagreement arose during the Commissioner’s investigation concerning the correct interpretation of request 1. The Council argued that it was clear that the scope of the request was limited only to arrangements that were actually in place at the time of the request. However, when the Commissioner checked this, it was clear that the complainant had intended the request to cover information relating to any arrangements concerning funding or compulsory purchase even if they were not in place at the time of the request.
40. A request for information should be read objectively. Having considered the wording of the request, the Commissioner’s view is that the Council’s interpretation (that the request was limited to information concerning arrangements that were in place) was not an objective reading of the request, but that the complainant’s interpretation was an objective reading. In the absence of any limiting wording such as “...in place at the time”, the Commissioner considers that the request should be read broadly.

Request 2 – What information was held and was any more information held on the balance of probabilities?

41. The Council initially stated that at the time of the request, it had not had any discussions with developers. In subsequent correspondence to the Commissioner, it conceded that it had in fact had discussions with a private developer known as Ballymore however it stated that it did not hold any information relating to these discussions. When questioned further, the Council appeared to confirm that it did hold

some information and it was consulting with English Partnerships about this. Following further questioning, the Council appeared to contradict itself, stating that it had already advised the Commissioner that it did not hold this information at the time of the request. Following this, the Council wrote to the Commissioner stating that it had now located information relating to discussions with Ballymore but this information was exempted (This information is listed in paragraph 28 of this Notice). Finally, the Council referred to the involvement of a consultant.

42. The Commissioner accepts that on the balance of probabilities, the Council itself did not hold any more information relating to this request. The Council has assured the Commissioner that it has conducted thorough searches and consulted a variety of officers about the request including officers from its Development and Renewal Department and Legal and Democratic Services. It confirmed that it had searched electronically and elaborated that it had searched shared areas and those areas of existing staff and those no longer with the Council. It also confirmed that it had searched all paper files held in connection with the redevelopment. The Council was unable to confirm whether it had destroyed or deleted any relevant information because it does not keep detailed records. It stated that it was only able to ask for destruction certificates in relation to boxes of information. The Council stated that if any information had been destroyed or deleted, this would not have been in contravention of its Records Management Policy.
43. Regarding the involvement of the consultant, CBRE, the Commissioner has decided that on the balance of probabilities it is likely that further information was held by the consultant on behalf of the Council. The Council has stated that it did not have a formal contract with the consultant but it has stated that it is "possible" that it held information on its behalf. When inspecting the withheld information provided by the Council in relation to this request, the Commissioner also noted that it contained a reference to CBRE negotiating with Ballymore on behalf of the Council over several months.

Request 3 – What information was held and was the information held on the balance of probabilities?

44. When the Commissioner asked the Council to state whether it held this information it referred to information summarised in the cabinet report from March 2008. Under further questioning, the Council stated that public information could be found at the "Project Shop". The Council then stated that it did not hold relevant information at the time of the request. When the Commissioner pointed out that it appeared that some relevant information was held in the presentation dated 23

January 2008, the Council stated that this information was excepted under regulation 12(4)(d). It also stated that it was obvious that the Council held consultation responses and that English Partnerships had provided this information to it. It stated that it felt this information was exempt under regulation 12(4)(e) and 12(4)(d). Despite this, the Council went on to state that as the consultation had been conducted by Scott Wilson, the consultation responses were not held. It later transpired that the Council had never held the actual consultation responses but it did accept that this information was held on its behalf by Scott Wilson.

45. For clarity, the wording of this request specified that it related to "landowners". As Ballymore was a landowner, the Commissioner's view is that the information identified as falling within the scope of request 2 concerning Ballymore would also fall within the scope of request 3. However, as this information was being considered specifically under request 2, the questions posed by the Commissioner and the responses provided by the Council only concerned the identification of other information than was already covered by the scope of request 2.
46. The Commissioner accepts that, on the balance of probabilities, no further information other than that contained in the presentation and falling within the scope of request 2 was held by the Council itself, based on the information set out in paragraph 42 of this Notice. Whilst the Commissioner might have expected further information to have been held for a development of this size and nature, he has accepted the Council's assurances that it has undertaken comprehensive searches of all relevant areas. In reaching his final conclusion on this point he has also taken account of the involvement of third parties, which may have led to some ambiguity over responsibility for holding records, or to records being held by those third parties rather than by the Council itself.
47. Regarding the involvement of Scott Wilson, as noted above, the Council has conceded that the consultation responses were held on its behalf by Scott Wilson. However, the Commissioner is not satisfied that on the balance of probabilities further relevant information (other than the consultation responses) was not held on the Council's behalf by Scott Wilson.

Exceptions

Request 2

48. When the Commissioner wrote to the Council on 4 November 2010, he stated that if the Council located further relevant information that it

was not willing to disclose, it should cite a valid exception under the EIR and provide full rationale for its application, including relevant public interest arguments. Despite this, the Council simply stated that the information it had located was excepted either because it is “commercial in nature, or that it would be presented at some point in the future”. The Council did not cite any exceptions and it made no attempt to provide any arguments supporting exceptions or to address any associated public interest tests. In view of the Council’s failure to present proper rationale for withholding the information, the Commissioner decided that he could not support the Council in withholding this information.

Request 3

Regulation 12(4)(e) and 12(4)(d)

49. As previously explained, the Commissioner’s view is that the information concerning Ballymore relating to request 2 would also fall within the scope of request 3. His comments regarding the withholding of this information have already been set out above. The comments below therefore only concern other information that was identified as falling within the scope of request 3.
50. When the Council initially believed that it held the consultation responses, it stated that it would wish to rely on the exceptions under 12(4)(e) and 12(4)(d). Both exceptions are qualified by a public interest test.
51. Regulation 12(4)(e) provides that a public authority may refuse to disclose environmental information to the extent that the request involves the disclosure of internal communications. The Council asserted that this regulation applied because it intended to publish the information. It added that the public interest would not be served by the “premature leaking” of this information outside of the Council’s established procedures and without the overall context of the cabinet report.
52. At the time when regulation 12(4)(e) was relied upon, the Council’s position was that this information was held by it and was not held on its behalf. As set out in this Notice, this position changed and it was finally clarified that the consultation responses had never been held by the Council but were held on its behalf by Scott Wilson. In view of this, it was not entirely clear whether the Council would still wish to rely on this exception or even if it had cited this regulation in error and had actually meant to cite regulation 12(4)(d). In the event that the Council was seeking to rely on this exception to withhold the

consultation responses and would still wish to do so, the Commissioner would like to make clear that his view is that this exception is not engaged in respect of the consultation responses. The consultation responses would clearly not comprise of an “internal communication” for the purposes of the EIR.

53. The Council also relied upon the exception under regulation 12(4)(d) in respect of the consultation responses. This exception applies in circumstances where the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data. It stated that this applied because the information “would not be in draft format pending the publication in March 2008”. Its public interest arguments were the same as described above for regulation 12(4)(e). The Commissioner assumes that the Council meant to say that the information *was* in draft format. However, the Commissioner did not agree that the consultation responses themselves were drafts or that the consultation responses should not be considered as separate items of information in their own right. He also notes that the full consultation responses have not, in fact been published. He therefore does not accept that this exception was engaged.
54. The Council also applied regulation 12(4)(d) to withhold relevant information contained within a presentation dated 23 January 2008. It stated that the presentation was to the Leaders Advisory Board whose purpose is to shape proposals and presentations for Cabinet. It therefore argued that in view of this, the presentation was “technically in development”. It stated that its public interest arguments were the same as already described. However, there is nothing to indicate that the presentation itself was a draft document or that the presentation should not be considered as a separate item of information in its own right. It seems to have been the Council's position throughout the case that it was under no obligation to supply information concerning the development until the cabinet report had been published in March 2008. The Commissioner does not accept that the exception can be interpreted as broadly as this.
55. As the Commissioner did not accept that the exceptions were engaged, he did not go on to consider the application of the public interest test.

Procedural Requirements

56. In relation to request 2 and 3, the Council claimed that information it held was excepted under the EIR. In view of this, it breached regulation 14(2) for failing to issue a valid refusal notice under the EIR within 20 working days of the request. It also breached regulation 14(3) for failing to specify the reasons not to disclose the information

under the EIR by the date of its internal review. As the Commissioner found that the information was not excepted for the reasons claimed by the Council, he considers that the Council also breached regulation 5(2) for failing to provide environmental information within 20 working days of the request and regulation 5(1) for failing to provide it by the date of its internal review.

The Decision

57. The Commissioner's decision is that the public authority dealt with the following elements of the requests in accordance with the EIR:
- In relation to request 2, the Commissioner is satisfied that other than the information identified by the Council (listed in paragraph 28 of this Notice) and any information held on the Council's behalf by the consultants, CBRE, no further information was held.
 - In relation to request 3, the Commissioner was satisfied that other than (i) information relating to Ballymore falling within the scope of request 2 (ii) relevant details in the presentation dated 23 January 2008 (iii) the consultation responses held on the Council's behalf by Scott Wilson (iv) and any other relevant information held on the Council's behalf by Scott Wilson, no further information was held.
58. However, the Commissioner considers that the public authority did not deal with the following elements of the requests in accordance with the requirements of the EIR:
- In relation to request 1, the Commissioner considers that the Council was wrong to claim that the complainant's reading of the request was not an objective one.
 - In relation to request 2, the Commissioner considers that the Council breached regulation 5(1), 5(2), 14(2) and 14(3). He also considers that on the balance of probabilities, further information was held on behalf of the Council by CBRE.
 - In relation to request 3, the Commissioner considers that the Council breached regulation 5(1), 5(2), 14(2) and 14(3). He was also not satisfied that on the balance of probabilities, further information (other than the consultation responses) was not held on the Council's behalf by Scott Wilson.

Steps Required

59. The Commissioner requires the public authority to take the following steps to ensure compliance with the EIR:

Request 1

- The Council should undertake searches to ascertain whether it held any information falling within the broader reading of request 1. As described in this Notice, the Council should not limit its searches to information concerning arrangements that were in place at the time. It should include information concerning arrangements that were proposed or contemplated. If no information was held at the time of the request based on this broader reading, the Council should provide the complainant with a refusal notice citing the exception under regulation 12(4)(a). If information was held and the Council is willing to provide it, it should provide it to the complainant. If it is not willing to provide the information, the Council should provide a refusal notice to the complainant in accordance with regulation 14(1).

Request 2 and Request 3 – Information relating to Ballymore

- The Council has identified that it held some relevant information relating to discussions with Ballymore (listed in bullet points at paragraph 28 of this Notice). It should provide this to the complainant. It should also consult with CBRE to ascertain whether CBRE did in fact hold further information falling within the scope of this request. If no further information was held by CBRE, the Council should contact the complainant to confirm this. If information was held by CBRE and the Council is willing to provide it, it should provide it to the complainant. If it is not willing to provide it, it should issue a valid refusal notice in accordance with regulation 14(1).

Request 3

- The Council should provide the relevant withheld information from the presentation to the complainant. It should also obtain the consultation responses from Scott Wilson and provide these to the complainant ensuring that it makes any redactions that may be appropriate to protect personal data in accordance with regulation 13(1) of the EIR. If it makes any redactions for personal data reasons, it should provide the complainant with a refusal notice in accordance with regulation 14(1).

- Also in relation to request 3, the Council should consult with Scott Wilson to ascertain whether Scott Wilson held any information on the Council's behalf relevant to this request other than the consultation responses. If no further relevant information was held, the Council should contact the complainant to confirm this. If further relevant information was held by Scott Wilson and the Council is willing to provide it, it should provide it to the complainant. If it is not willing to provide it, it should issue a valid refusal notice in accordance with regulation 14(1).
 - If information falling within the scope of any of the requests was held at the time of the request but is no longer held, the Council should explain this to the complainant.
60. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

61. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

62. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
63. The Commissioner was very concerned throughout this case about the Council's handling of the requests and the Commissioner's subsequent investigation. He has explained his concerns below.
64. It became apparent during the Commissioner's investigation that when the Council initially responded to the requests, it had given no or little consideration to the question of whether it actually held the information that had been requested in accordance with the legislation, relying instead on the fact that it was going to publish a cabinet report in March 2008 dealing with the redevelopment. The Council also failed to recognise that it was dealing with a request for environmental information, even when this was suggested by the complainant's solicitors during the internal review process.

65. As the Commissioner's investigation progressed, the Commissioner was very concerned by the way serious delays were caused by the Council, mainly as a result of its failure to provide clear and accurate responses to the Commissioner regarding what information was held at the time of the request. Given that the legislation requires public authorities to state whether information is held within 20 working days of a request, it was not acceptable that the Commissioner had to revisit the issue of what information was held on multiple occasions from the start of his investigation in April 2009 until March 2010. The Commissioner is also concerned that the Council did not appear to have adequate procedures in place to deal with the ownership and retention of records when working jointly with third parties.
66. The above concerns may suggest that the Council has not provided adequate training to appropriate staff members and/or that there are record management issues that the Council needs to address. The Commissioner trusts that the Council will carefully consider these problems and make appropriate improvements in the future. Useful material, including guidance on records management and the EIR (including previous Decision Notices) is available on the Commissioner's website at www.ico.gov.uk.

Right of Appeal

67. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

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

Dated the 27th day of April 2010

Signed

**Lisa Adshead
Group Manager**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form 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);

Regulation 3 - Application

Regulation 3(2) For the purposes of these Regulations, environmental information is held by a public authority if the information –

- (a) is in the authority's possession and has been produced or received by the authority; or
- (b) is held by another person on behalf of the authority.

Regulation 5 - Duty to make available environmental information on request

Regulation 5(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

Regulation 5(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 12(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

- (a) an exception to disclosure applies under paragraphs (4) or (5);
and
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Regulation 12(2) A public authority shall apply a presumption in favour of disclosure.

Regulation 12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (a) it does not hold that information when an applicant's request is received;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

Regulation 14 - Refusal to disclose information

Regulation 14(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

Regulation 14(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 14(3) The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13;
and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).