

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

**Date:** 19 April 2018

**Public Authority:** Royal Borough of Greenwich  
**Address:** Town Hall  
Wellington Street  
Woolwich  
London  
SE18 6PWX

**Decision (including any steps ordered)**

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1. The complainant has requested information from the Royal Borough of Greenwich ("the Council") regarding a gate at his property.
2. The Commissioner's decision is that the Council has correctly applied the exception at regulation 12(5)(b) (course of justice) of the EIR to one part of the request, and does not hold any information relating to two parts of the request.
3. The Commissioner does not require the public authority to take any steps.

**Request and response**

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4. On 14 November 2016, the complainant wrote to the Council and requested information in the following terms:

- 1) *"What is the name of the Head of Legal Services you write to me on behalf of, so I might address that person directly?"*
- 2) *Who is the author of this letter and on what occasions did that individual visit the site, in person, to fully inform and corroborate your/their claims in your letter?"*
- 3) *Please supply copies of any and all surveyors report(s) for the site that you have relied on in this claim, including those from RBG staff, appointed surveyors and independent surveyors, such that any such report(s) have thus far informed your legal position on the matter?"*
- 4) *One must ask, for the benefit of logic: why do you believe there would be references in my deed to a requirement upon me in favour of the Council to grant access to its own land if, as you claim, the gate is a "Council gate"? (This is the central question that will require your further very careful analysis of my deed, the plan and what is on the ground). I think you will arrive (either tacitly or not) at the same conclusion as [named individual] – let's see.*
- 5) *Please supply any and all evidence of the consents received, dates, times, purposes and authorised persons in charge that relate to any site visits to your land by RBG officers, staff or contractors that you hold, along with any documentary proof that the access way you claim had been used was indeed used (to the express exclusion of the original and historic wayleave route across my land to your land) , for any and all such occasions going back to 1st January 1958, with a particular focus on the period since the 1979 transfer. Your answers are requested to comply with the Code of Conduct with regards Powers of Entry, paying particular attention to Sections 7, 8, 10, 11, 14, 17, 20.1, 21 and 22.*
- 6) *Please supply any and all documentary evidence you have to support your claim that "The council's gate abuts one of the boundaries of your property" - a) that it is your gate and b) that said gate is, as you appear to claim, on your land*
- 7) *Please supply me with any and all handover notes and briefing notes and minutes of meetings regarding RBG's decision to prepare to commence legal proceedings against me in relation to your claims*
- 8) *Please supply any evidence to support your assertion that the padlock to the site has been changed by the Council at various times, including dates, personnel and any dated records you have relied on when making this statement, paying particular attention to Sections 7, 8, 10, 11, 14, 17, 20.1, 21 and 22 of the Code of Conduct –*

*Powers of entry. I only know of one (contested) change of my padlock where no notice of entry was served or consented to, an illegal action which has been reversed by the rightful owner of the gate ([redacted location]).*

- 9) *Given that I have never denied access to appropriate parties as is reasonably required under the terms of my deed, and given your inference that your aim is to secure ongoing river maintenance, what additional benefits (additional to the benefits the council has always enjoyed and continues to enjoy) do you aim to achieve if the disputed gate were to become in your ownership, both now and in the future?*
  - 10) *Why did [named Council officer] feel the need to approach my neighbour at [redacted address] with an offer that would involve creating a viable "unrestricted" access to your land across my neighbour's land via my neighbours gate to create a new but unrestricted" access onto the highway?*
  - 11) *Given that the extent of your disputed boundary claim appears now limited to one boundary length I have with your land, and given a planning decision is pending and court proceedings in relation to unlawful access and usage have not yet even commenced, please refer me to any and all correspondence that supports your claim that I believe your land is "landlocked"*
  - 12) *Please supply any and all evidence upon which you may later rely that I have ever taken construction equipment over Council land. Please supply any and all evidence upon which you may later rely that I have ever trespassed on Council land."*
5. The Council responded to the request under the Environmental Information Regulations ("the EIR") on 20 January 2017. It provided some information falling within the scope of the request, and also stated that some was not held, or was accessible at the Land Registry. At that stage, the Council also stated that it wished to withhold information relating to questions 10 and 12 under regulation 13 of the EIR - Third party personal data.
  6. The complainant requested an internal review on 24 January 2017. The outcome of the internal review was provided to the complainant on 23 February 2017. The Council upheld its position, with the exception of question 5 where it clarified that no information was held.

## Scope of the case

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7. The complainant contacted the Commissioner on 24 February 2017 to complain about the way his request for information had been handled.
8. During the course of the investigation, the Council has clarified its position on a number of matters and it has now been agreed by both parties that the complainant has been provided with everything which the Council holds (if anything) with regard to questions 1, 2, 4, 5, 6, 9, 11 and 12. It has been agreed that question 10 is not a request for recorded information such that it could be considered under the EIR.
9. The complainant has confirmed during the course of the investigation that he wishes the Commissioner to continue to investigate what recorded information was held at the date of his request with regard to questions 3, 7 and 8, and whether he may now be provided with it.
10. The Council has clarified its position with regard to these three questions during the course of the investigation.
11. It has stated that it does not hold anything falling within the scope of question 3 other than title deeds.
12. With regard to questions 7 and 8, the Council has revised its position, stating that it wishes to withhold information relating to these two parts of the request under regulation 12(5)(b) of the EIR – Adversely affect the course of justice.
13. The complainant accordingly has asked the Commissioner to focus her investigation on what was held in respect of question 3, and on the Council's application of the exception at regulation 12(5)(b) to any information held in respect of questions 7 and 8.
14. The Commissioner considers that the scope of the case has been to investigate what is held by the Council in respect of questions 3, 7 and 8. She will investigate whether the complainant has been provided with, or has access to, everything that is held by the Council in respect of question 3. She will consider whether the Council is correct to have withheld any information held relating to questions 7 and 8 under the exception at regulation 12(5)(b) of the EIR.

## Reasons for decision

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### Background to the case

15. By way of background, the parties have explained that the complainant's requests relate to a piece of land in the Council's ownership adjacent to his home. It has been the complainant's view that the gate providing access to the land is on his land.
16. The Council proposed to transfer the land and, at the time of the request, the ownership of the gate was in dispute.
17. The Council wrote to the complainant on 10 November 2016 setting out what, in its view, was the legal position regarding the ownership of the gate. This letter led to the complainant's requests for information.

### Regulation 5(1) – duty to make environmental information available on request

#### Question 3 - Information held/not held

18. Regulation 5(1) of the EIR says that a public authority that holds environmental information shall make it available on request.
19. With regard to question 3, the Council originally responded that it did not hold any surveyors' reports and that its position was based on "*the title deeds*." The complainant then requested clarification as to which deeds the Council was referring to.
20. Following the Commissioner's involvement in this case, the Council provided the Land Registry reference numbers to four registers of title to the Commissioner, which the Commissioner provided to the complainant. The Commissioner notes that these registers of title are publicly available at the Land Registry.
21. The complainant returned to the Commissioner and queried whether further information may be held. Specifically, he queried whether the following types of survey report may be held: RBG staff site visit reports, appointed Surveyor's reports, Independent Surveyor's reports and the resulting surveyor's 'Valuation Report' as derived from the inputs of all site visit reports.
22. The Council upheld its position that no further information was held. It explained that a site visit was, in fact, carried out shortly after the date

of the complainant's request, but that no site report had been written up.

23. The Commissioner has asked the Council what searches were carried out for information falling within the scope of this request.
24. The Council explained that searches have been carried out by members of its legal team on the Council's case management system. The Senior Valuer has also carried out a search of the system, but found no information.
25. The Commissioner is aware that the situation regarding the transfer of the piece of land remains ongoing, and that the Council necessarily has ready access to relevant documents.
26. The Council has also recently been the subject of an investigation by the Local Government Ombudsman which required it to access and consider the documents it holds in this case.
27. The Commissioner is therefore satisfied that adequate and appropriately targeted searches for information falling within the scope of question 3 have been carried out.
28. She has determined that, on the balance of probabilities, no information is held falling within the scope of this request other than the four deeds to which the complainant already has access.

### **Regulation 12(5) (b) – adversely affect the course of justice**

#### Questions 7 & 8 – the nature of the withheld information

29. The Council has withheld information relating to questions 7 and 8 under this exception.
30. In order to consider whether the information has been withheld correctly under regulation 12(5)(b) of the EIR, the Commissioner has considered the withheld information in detail.
31. The Commissioner has first considered whether any of it comprises the personal data of the complainant.
32. Regulation 5(3) of the EIR states that regulation 5(1) – the duty to make environmental information available on request – does not apply where the information is the personal data of the applicant (that is, the complainant). The Council would be, rather, required to consider whether to provide it to him under the provisions of the Data Protection Act 1998 ("the DPA").

33. The DPA defines personal data as:

*"data which relate to a living individual who can be identified—*

*(a) from those data, or*

*(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

*and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."*

34. The Commissioner has determined that, in this case, some of the withheld information either directly identifies the complainant or otherwise relates to him. Accordingly, that information is the personal data of the complainant.
35. The remainder of the withheld information does not comprise the personal data of the complainant.
36. Under the EIR, the Commissioner is only able to consider whether or not the Council has correctly withheld under regulation 12(5)(b) of the EIR such information as is not the personal data of the complainant.
37. She will conduct a separate investigation into the withholding of the information which is his personal data, which will not form part of this decision notice.
38. The remainder of this notice will therefore consider the withheld information that is not the complainant's personal data.

Information which is not the complainant's personal data

39. In the wording of the EIR, under regulation 12(5)(b), a public authority can refuse to disclose information to the extent that 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 of a criminal or disciplinary nature.*

40. The Commissioner's guidance<sup>1</sup> notes that this exception is broad in nature, explaining that it can, potentially, be widely applied to information held in relation to the administration of the course of justice. This may include legally privileged information; information gathered in relation to law enforcement, investigations and proceedings; and, as stated in the wording of the exception, information whose disclosure would adversely affect the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
41. In addition, the requirement necessary for the exception to be engaged was addressed in the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037), when the Information Tribunal highlighted that there must be an 'adverse' effect resulting from disclosure of the information, as indicated by the wording of the exception.
42. The Commissioner's guidance also notes that, in accordance with the Tribunal decision of *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the interpretation of the word 'would' (in *would adversely affect*) is 'more probable than not'.

### **Is the exception engaged?**

43. The Council has not claimed that the withheld information under consideration in this notice is legally privileged in itself. Its arguments, rather, focus on the information having been gathered to inform its view on the legal ownership of the gate, and on the likelihood that disclosure of the information would (at the date of the request) adversely affect its ability to conduct an inquiry.
44. The Council has argued that all of the withheld information was collected with the sole or dominant purpose of obtaining legal advice should it prove necessary.
45. It has explained that at various times over a period of approximately two years prior to the date of the request, it had considered that there may have been a possibility of entering into litigation against the complainant. The Council has provided evidence of this to the Commissioner.

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1625/course\\_of\\_justice\\_and\\_inquiries\\_exception\\_eir\\_guidance.pdf](https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf)



46. The Council explains that it gathered certain information relating to the land adjacent to the complainant's home, and access to that land. Much of this information is already in the public domain, such as title deeds. However, it also gathered the information which is under consideration in this notice. It would not be appropriate for the Commissioner to detail exactly what is held, since this forms part of her considerations as to the consequences of disclosure.
47. The Council has argued that an adverse effect would occur because disclosure of the information would unbalance the level playing field between itself and the complainant.
48. The Council has also argued that disclosure of the information "*would affect the Council's ability to defend itself if it faced a legal challenge or issued proceedings in connection with the matter*" and has argued that it "*should not have to reveal its hand in advance.*"
49. The Council has explained that the issues in this case are still 'live' and has also informed the Commissioner that the issues between the Council and the complainant were very recently addressed by the Local Government Ombudsman. The Council has also advised the Commissioner that the piece of land in question has not yet been transferred.
50. The Council's view is that, in summary, disclosure of the information "*would undermine the general principle of the administration of justice.*"
51. The Commissioner has considered the withheld information in this case.
52. She is satisfied that the Council has provided evidence that it believed that there was a possibility, prior to the date of the request, that litigation might be entered into against the complainant, and accepts that the withheld information was gathered with a view to establishing the Council's legal position.
53. She is satisfied therefore that the information relates to the course of justice, and specifically to the ability of the public authority to conduct legal proceedings.
54. She also agrees that the situation remains 'live' which strengthens the potential application of the exception to the information.
55. The Commissioner is satisfied that the disclosure of the information would have an adverse effect on the ability of the Council to pursue its investigations and to engage with due legal process.

56. She has therefore determined that the exception at regulation 12(5)(b) of the EIR is engaged, and has gone on to consider the public interest test.

### **The balance of the public interest**

57. Regulation 12(4)(b) is a qualified exemption and is, therefore, subject to the public interest test at regulation 12(1)(b), which states that information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

### **Arguments in favour of maintaining the exception**

58. Previous ICO decision notices have determined that, other than in exceptional circumstances, there is a strong public interest in a public authority withholding information which relates to the administration of the course of justice. It has been determined in previous cases that disclosure of such information would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege.
59. A public authority has a right to gather information, and to freely obtain views, as to its legal rights and obligations. Previous ICO decision notices have determined that to disclose information which has been gathered for such purposes would adversely affect the ability of the public authority to conduct investigations pursuant to the relevant legislation. This has been found to be especially the case where the nature of the subject matter is 'live.'
60. The Commissioner has also determined in previous cases that it is important that, if an authority is faced with a legal challenge to its position, it can defend its position properly and fairly without the other side being put at an advantage by not having to disclose its own legal advice in advance.

### **Arguments in favour of disclosing the information**

61. There is always a public interest in a public authority conducting its affairs in a transparent manner. Some weight must always be attached to the general principles of achieving accountability and transparency. This in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities. This is particularly so in relation to planning information.

62. The complainant has explained that his concerns stem not only from his own situation but from his awareness of the Council's duty to obtain the best consideration that is reasonably obtainable when disposing of land, as specified in the Local Government Act 1972 ("the 1972 Act").
63. He has argued therefore that there is a public interest in the disclosure of the information since the Council is unable to conclude its proposed transfer *"until the boundary dispute is either agreed between the parties or decided by a Court."*
64. He considers that it is not only of mutual benefit to establish the ownership of the gate providing access to the land, but, since matters have stalled regarding its disposal, of wider public interest.
65. The complainant has asked the Commissioner to take into account the legal considerations surrounding the land and access to the land in order to *"level up the position."*

### **The balance of the public interest**

66. The Commissioner is required to determine whether the public interest in the information being withheld outweighs the public interest in its disclosure. She is concerned only with the information itself and its value.
67. In this case, the Commissioner is aware that the Local Government Ombudsman has found that, during the course of events which led to the making of this request, the Council acted *"against both the Council's own guidance and the requirements of the 1972 Act."* The finding was in relation to the way in which the Council had marketed the land for sale.
68. This can be seen to lend some weight to the complainant's view that the Council should be transparent when it comes to information which it holds in relation to the ownership of, and access to, the land.
69. The Commissioner is also aware that the Council has an obligation to be accountable in matters of land disposal.
70. However, the Commissioner considers that in this case, the withheld information in itself is specific to what essentially remains a private dispute between the complainant and the Council over access to the land adjacent to his house. The question of access affects only a very limited pool of people.

71. She notes that the complainant's wider concerns about the Council's conduct have already been addressed by the Local Government Ombudsman.
72. The Commissioner considers that, even though the withheld information in this case is not legally privileged as such, the concerns addressed by *Kirkaldie v Information Commissioner & Thanet District Council* (EA/2006/0001, 4 July 2006) are still relevant. In that case, the First-tier Tribunal (Information Rights) stated that: "*The purpose of this exception is reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation.*"
73. The Commissioner has determined that in this case that there is a risk of prejudice to the organisation with regard to the administration of justice.
74. She considers that the balance of the public interest lies with the exception being maintained. She is therefore satisfied that the Council has correctly withheld the information under regulation 12(5)(b) and does not require it to take any steps.

## Right of appeal

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75. 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: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

76. 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.
77. 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 .....**

**Alun Johnson**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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