

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

**Date:** 27 September 2012

**Public Authority:** London Borough of Camden  
**Address:** Camden Town Hall  
Judd Street  
London  
WC1H 9LP

**Decision (including any steps ordered)**

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1. The complainant has requested information regarding the site evaluation conducted by Mouchel consultants for the North London Waste Plan. The Commissioner's decision is that the London Borough of Camden has correctly applied the exception where the public authority may refuse to disclose information to the extent that it relates to material still in the course of completion, to unfinished documents or to incomplete data. However, he has decided that in all the circumstances of the case, the public interest in maintaining the exception does not outweigh the public interest in disclosing the information. In addition, the Commissioner has found that the exception where public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications is not engaged.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the requested information.
3. The public authority must take these steps within 35 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.

## Background

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4. The North London Waste Plan ('the NLWP') sets out the planning framework for waste management in the London Boroughs of Barnet, Camden, Enfield, Hackney, Haringey, Islington and Waltham Forest for the next 15 years up to 2027. It identifies sites for waste management use and sets out policies for determining waste planning applications. It is managed by the London Borough of Camden on behalf of the other Boroughs.
5. The NLWP has been through various stages. The proposed timetable for plan development is shown below:
  - Preparatory work on issues and options – 2007
  - Consult on issues and options – Jan/Feb 2008
  - Consult on draft plan (preferred options) – 14 Oct - 24 Nov 2009
  - Representations on submission version - 27 May - 8 July 2011
  - Submit to Government for examination – February 2012
  - Hearing – Summer 2012
  - Report from planning inspector – Oct 2012
  - Adoption of plan – Jan 2013
6. The council has confirmed that the version of the North London Waste Plan which has been submitted for examination by an independent Planning Inspector identifies three main sites by name for future waste provision over the next 15 years. One is the existing Edmonton EcoPark site. The other two are proposed new sites at Pinkham Way and Geron Way. The seven boroughs have the final say on the plan in that the final stage in the plan is for each of the boroughs to formally adopt it. This is after the Planning Inspector has finished the examination by submitting his formal report on the soundness of the plan to the boroughs. While the Inspector's report is no longer binding on the boroughs, the Inspector's report carries considerable weight because he could well say that, unless certain modifications are made, the plan will not be sound and would therefore be unlawful.
7. The seven boroughs are putting these sites forward because they consider they are the most suitable and deliverable sites. However the Inspector has before him representations from other organisations saying that the proposed sites are neither suitable nor deliverable for a

variety of reasons and asking the Inspector to withdraw the sites from the Plan. It is part of the Inspector's role during the examination of the Plan to consider the opposing arguments and make recommendations on whether the sites should stay in the Plan or be excluded from the final version.

## **Request and response**

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8. On 27 November 2011 the complainant made the following request for information which referred to explanatory text preceding the request:
  1. "A copy of "Mouchel's terms of reference" (see (a) above)
  2. A copy of the document which deals with "the basis of the evaluation" (see (b) above)
  3. A copy of the first "the evaluation criteria" document (see (c) above)
  4. A copy of the last "the evaluation criteria" document (see (c) above)
  5. A copy of "the first Mouchel report" (see (d) above)
  6. A copy of the minutes of any meeting held to moderate "the first Mouchel report" or such documents that show how Camden wishes to moderate "the first Mouchel report" (see (d) above)
  7. A copy of "the moderated Mouchel report" (see (e) above)"
9. The London Borough of Camden ('the council') responded on 13 January 2012 and provided information in relation to points 1, 2, 4 and 7 but refused to provide the information in relation to points 3, 5 and 6 citing the exceptions at Regulation 12(4)(e) and 12(4)(d) as the basis for doing so. The council also stated that "In addition the information requested was incorporated in the two final reports".
10. An internal review was requested on 11 March 2012 in relation to points 3 and 5. The council responded on 18 April 2012 maintaining its original position.

## **Scope of the case**

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11. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
12. The Commissioner has considered whether the council is entitled to rely on the exceptions at Regulation 12(4)(e) and 12(4)(d) as a basis for refusing to provide the information requested at points 3 and 5. The Commissioner has not considered the application of the exceptions cited in relation to the information requested at point 6.

## Reasons for decision

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13. The disputed information consists of a site evaluation criteria document and a preferred options document relating to waste management sites.
14. The council has decided that the requested information represents environmental information and therefore the appropriate access-regime is the EIR rather than FOIA.
15. The complainant has not indicated that he disagrees with the council's decision to process the requests under the EIR. Similarly, the Commissioner is satisfied that the EIR applies. This is because the requested information is on a measure, namely waste management, that is likely to affect the state of the elements of the environment as well as being designed to protect those elements. As such, it would fall within the definition of environmental information set out at regulation 2(1)(c) of the EIR.

### Regulation 12(4)(d) – unfinished documents

16. Regulation 12(4)(d) of the EIR states that a public authority may refuse to disclose information to the extent that it relates to material still in the course of completion, to unfinished documents or to incomplete data.
17. The council has explained that the information requested at point 3 is the earliest record of a site evaluation criteria and it was produced as a first draft for discussion with the different boroughs involved. This was a working document sent out for comment and to generate discussion. Seven boroughs took part in the process and as a result a lot of comments were made. These comments were added to produce further reports until the document was finalised in November 2008 after 4 further iterations. Some of the information in the document was finally incorporated into the published Preferred Options Technical Report October 2009.
18. In relation to the information requested at point 5, the council explained that the document was produced for comment by the different boroughs that are involved with this decision and provided details relating to the evolving nature of the document. It stated that an amended version of this list was set out in Section 7 - Appendix 2 in the Preferred Options Technical Report October 2009. The complainant has submitted that the information requested at point 5 was complete on presentation by Mouchel and that it cannot be suggested that the document is unfinished as the original version is finished in the sense that it represents a snapshot of the independent assessment at a given moment in the project.

19. However, in line with the decision of the Tribunal in *Secretary of State for Transport v the Information Commissioner*<sup>1</sup>, it is the view of the Commissioner that drafts are unfinished documents for the purposes of regulation 12(4)(d), and remain unfinished even upon completion of a final version. The Commissioner is therefore satisfied that the exception is engaged in respect of the withheld information at both point 3 and point 5 and, as required by regulation 12(1)(b) of the EIR, has proceeded to consider the public interest associated with disclosure.

### **The public interest test**

20. The effect of regulation 12(1)(b) is that all the exceptions in the EIR are subject to a public interest test. This means that a public authority can refuse to disclose information under these exceptions only if "in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information". In assessing this, under regulation 12(2), the authority must also apply a presumption in favour of disclosure.

### **The public interest arguments in favour of disclosure**

21. The Commissioner considers that there is always a general public interest in disclosure of environmental information deriving from the purpose of the EIR because it supports the right of everyone to live in an adequate environment and ultimately contributes to a better environment.
22. The council has stated that there is a significant public interest in understanding how a decision is reached by a public authority and that release of the requested information would improve the transparency for the general public of the decision making processes by officers working on the NLWP. The Commissioner agrees with this position.
23. The complainant has submitted that notwithstanding the need for council officers to share information, make and correct mistakes, enjoy the space necessary for them to operate effectively, council officers should be placed in a position where their decisions can be properly scrutinised and their thinking, insofar that it differs from that of their external consultants, should be subject to scrutiny of the wider public.
24. The complainant also stated that the release of the information requested at point 5 would allow the public to review the extent to which

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<sup>1</sup> Appeal number EA/2008/0052

'moderation' has been applied to the first Mouchel report and to consider the reasonableness of any 'moderation'.

25. In addition, the complainant has stated that there is considerable uncertainty around the accuracy and appropriateness of the assessment scoring for one of the major sites (Pinkham Way) identified by the NLWP as suitable for waste purposes. Although the Commissioner cannot assess whether there has been any wrongdoing, there is public interest in releasing information that may shed light on, or conversely, remove the suspicion of the wrongdoing. He also considers that there is always an argument for presenting the full picture and allowing people to reach their own view.
26. The Commissioner appreciates that the Preferred Options Technical Report October 2009, part of which was derived from the information requested at points 3 and 5, will have been a key reference tool for the seven boroughs in selecting the sites for waste management use and for the Planning Inspector in submitting his final report on the soundness of the plan. The council has provided the Commissioner with examples of information that was dropped from and added to the requested documents to create the final published versions. The disclosure of the first drafts will, the Commissioner accepts, allow the public to trace the picture of what information the officers drafting the reports felt should be included in, and equally omitted from, the final versions.
27. This will help satisfy the public that the decision made by the seven boroughs regarding site selection was fully-informed and based on reasonable grounds.
28. Equally, the Commissioner has previously adopted the position that once a final version of a document has been completed (as it was in this case), it is likely that the public interest in withholding incomplete or draft records is likely to diminish.
29. The need to secure public confidence in the decision-making of the council was also acute at the time of the request. The council informed the Commissioner that it has faced a public inquiry in relation to the NLWP. Upon enquiring when the public enquiry took place, the council explained that this is the 'Hearing' stage of the NLWP. The Commissioner notes that the concerns with the NLWP are on-going as the 'Hearing' scheduled for summer 2012 has been suspended until further notice due to the South East Waste Planning Advisory Group (SWEPEG) and the East of England Waste Technical Advisory Body (EoEWTAB) submitting a joint statement to be considered at the session in which they raised the "duty to co-operate" and claimed that the requirement had not been met by the North London Waste Plan (NLWP). Although the Commissioner acknowledges that events post-dating the

request cannot be taken into consideration when reaching a decision under the EIR, he does view this as evidence of a plausible basis for the above concerns that appropriate procedures had been followed.

### **The public interest arguments in favour of maintaining the exception**

30. When assessing the public interest associated with the exception, the Commissioner will consider the nature of the withheld information itself alongside the timing of the request.
31. In its initial and internal review responses to the complainant, the council stated that officers have to be free to offer each other free and frank advice as to the options open to them and if officers were to qualify or modify that advice on grounds such as exposure, then that would discourage the decision making process and communication that they are expected to offer in cases such as this.
32. This is what is known as the 'chilling effect' argument. The Commissioner considers that in a situation where the relevant issue is still under consideration it may be plausible that the frankness of ongoing discussions on that issue would be adversely affected. However, the Commissioner understands that in this case, although the overall plan was not adopted at the time of the request, and indeed at the time of this decision has not yet been adopted, the sites for inclusion in the plan have been selected. Therefore, it is harder to accept that disclosure of this information would affect the frankness of unspecified and unrelated discussions in the future. The Commissioner also considers that officials have a responsibility to provide information and advice as part of their job, whether or not it may subsequently be disclosed under the EIR, which weakens the 'chilling effect' argument.
33. In correspondence with the complainant, the council also stated that officers need to have a space in which they can think and communicate in private and that given the nature of a cross borough project across a large physical area with many different characteristics, there would need to be a sharing of information, correction of mistakes and moderation of scores and officers would need the space to be able to do this without fear of exposure at each point in the process.
34. The Commissioner, however, respectfully disagrees with the council about the weight or relevance of this argument. This is because he considers that the need for safe space in which to think and draft ceases with the completion and publication of the final version of a document. The council has stated that the requested information was incorporated in two final reports (Preferred Options Technical Report October 2009 and Proposed Consultation Technical Report May 2011) that pre-date

the request in this case therefore the need for a safe space did not exist at the time of the request.

35. An additional argument offered by the council to the complainant is that the release of unfinished and incomplete information could give rise to public confusion and uncertainty. The Commissioner does not consider that this argument generally carries any weight because any confusion or uncertainty could be explained by the council at the time of disclosure by putting the information into context.
36. In correspondence with the Commissioner, the council advanced the argument that release of the requested information would facilitate the council's un-adopted position being exposed to public scrutiny even after drafting is complete. It stated that this scrutiny would involve the council having to expend resources on justifying draft documents or interim positions. It explained that the project has been subject to much public scrutiny and relates to a contentious subject, where the council has had to already disburse a lot of officer time and public resources into dealing with this scrutiny including facing a public inquiry in which the complainant in this case was part of the objecting party. To support this, the council referenced the decision of the Commissioner in the case FER0422498 where the argument that resources would need to be spent justifying interim positions swung the public interest in favour of maintaining the exception.
37. The Commissioner does place some weight on the above argument as inherent in regulation 12(4)(d) is a public interest argument in favour of avoiding un-adopted positions being exposed to public scrutiny even after drafting is complete. This is so a public authority can avoid expending resources on justifying draft documents or interim positions. However, the council have not suggested that disclosure would shift public debate onto a secondary issue which would necessitate a real diversion of resources.
38. During the Commissioner's investigation, the council also stated that the public interest in this case favours maintaining the exception as disclosure of unfinished documents would result in partial or inaccurate information being released into the public domain. It stated that a similar public interest argument was found to be in favour of non-disclosure in the decision of the Information Tribunal in *Mersey Tunnels Users Association v Information Commissioner*<sup>2</sup>. Regarding the application of regulation 12(4)(d), the Tribunal remarked that –

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<sup>2</sup> Appeal EA/2009/0001, stage 2



" We consider that there may be little, if any, public interest in disclosing a draft which is an unfinished document, particularly if a finished or final version has been or is likely to be made public...Presenting work in a draft form before a final decision is made allows a public authority to consider matters at an early stage and to comment upon the final form such a report would take.

We do not consider that disclosure of these draft documents would provide the public with any greater understanding of the way in which the Council has dealt with the relevant issues." (paragraphs 27 and 28)

39. The Commissioner accepts that in some instances the release of draft documents will add little to the public debate about a prevailing issue.
40. In addition, the Commissioner considers that saying drafts are partial or inaccurate usually leads to the argument that disclosure would mislead the public but the council did not provide any details of how disclosure in this instance could have this effect.

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

41. As stated above, the Commissioner accepts that there is always a general public interest in disclosure of environmental information, that there is public interest in understanding how a decision is reached by a public authority, and where there is a suspicion of wrongdoing or a lack of public confidence in a particular process there is a public interest in presenting the full picture.
42. The Commissioner has not accepted the council's arguments in relation to the need for a safe space and that release of unfinished and incomplete information could give rise to public confusion and uncertainty. He considers that the 'chilling effect' argument is weak in the circumstances of this particular case.
43. The Commissioner considers that the council has not provided specific reasons, other than expending resources, why the un-adopted position should not be exposed to public scrutiny after the final publication of the documents. Although it provided examples of what was dropped from the initial drafts and what was added to the published documents, it was not clear to the Commissioner why the first drafts should not be disclosed. Indeed, the argument that the council would have to expend resources on justifying draft documents is weakened by the council's submission to the Commissioner that the reasons why some of the scoring criteria were dropped from the final version were in fact explained within the final version.
44. In addition, the Commissioner does not consider that the council's assertion that the case of FER0422498, where the argument that

resources would need to be spent justifying interim positions swung the public interest in favour of maintaining the exception, is sufficiently similar to this case to be valid. In the case of FER0422498 such an argument was applied to requested information that was contained within an exempt appendix to the published information and each case is decided on its own unique circumstances.

45. In relation to the council's argument that disclosure of unfinished documents would result in partial or inaccurate information being released into the public domain and its reference to the Mersey Tunnels Users Association tribunal decision, as stated above, the Commissioner does accept that in some instances the release of draft documents will add little to the public debate about a prevailing issue. However, he does not consider this to be the case here. In particular, the Commissioner believes there is a real and substantial public interest in understanding how officers decided what criteria should be used for the waste site selections and what information should be put before the Planning Inspector. Not least, this should have the effect of presenting the full picture in relation to the balance and reasonableness of decisions made.
46. The Commissioner also appreciates that the overall issue remains live, as the final plan has not yet been adopted, and relates to a contentious subject. Therefore, release of information which would add to the public debate on the issue is in line with the purpose of the EIR.
47. For the reasons stated above and taking into account the timing of the request, the nature of the information and the EIR's emphasis on disclosure, the Commissioner has found that the public interest weighs in favour of the release of the requested information.

#### **Exception – Regulation 12(4)(e)**

48. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.
49. The council has submitted that the information requested at point 5, 'the first Mouchel report' is subject to this regulation as although it was shared by seven boroughs it constitutes an internal communication.
50. The council stated that it reached this conclusion after consideration of ICO guidance which states that 'internal communications' includes communications between government departments.
51. The Commissioner considers that an internal communication is one which stays within one public authority. Once a communication has been sent to someone outside the authority, it will generally no longer be internal. In other words, the Commissioner's view is that this exception

only covers communications passing between members of staff in a single public authority.

52. Having seen the information, the Commissioner was of the opinion that the document was produced by Mouchel. Upon the Commissioner's request the council confirmed that this was the case. The Commissioner accepts there may be possible exceptions to the general rule set out above, for example where a third party is contracted to perform a statutory function on behalf of a public authority and so may almost be regarded as the employee of a public authority for the duration of that function being carried out. However, the Council did not advance arguments of this nature and ultimately, the Commissioner's analysis has to be based on the arguments made by the Council.
53. Nevertheless, even if Mouchel was contracted to perform a statutory function on behalf of the council and so may almost be regarded as the employee of a public authority for the duration of that function being carried out, the document was passed to the seven boroughs for comment. The Commissioner considers that communications between different local authorities will not constitute internal communications.
54. The Commissioner therefore considers that the exception is not engaged and has therefore not gone on to consider the public interest test.

## Right of appeal

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55. 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: 0116 249 4253

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

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

56. 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.
57. 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** .....

**Andrew White**  
**Group Manager**  
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