

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

**Date:** 7 November 2022

**Public Authority:** Lewisham Council  
Town Hall  
Rushey Green  
Catford  
London  
SE6 4RU

**Decision**

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1. The Commissioner's decision is that that Lewisham Council is entitled to rely on regulation 12(4)(e) of the EIR to withhold information about a Low Traffic Neighbourhood consultation but the public interest favours disclosure. He also finds that, on the balance of probabilities, Lewisham Council holds no information relevant to the remaining two parts of the request and regulation 12(4)(a) is engaged in that regard.
2. The Commissioner requires Lewisham Council to take the following step to ensure compliance with the legislation:
  - Disclose the information requested in part 2 of the request.
3. Lewisham Council must take this step 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.

## Request and response

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4. The complainant made the following information request to Lewisham Council on 18 October 2021:

"I would like to request documentation on the content , creation and process for the LTN [Low Traffic Neighbourhood] consultation that closed on the 8th August.

In particular:

- 1) Documents on the decision that there would be no direct explicit question on whether the LTN was supported by responders.
  - 2) The process of creating and authorising the consultation questions including any involvement of councillors or 3rd parties.
  - 3) What is the timing and process of evaluating and authorising the consultation response again including the current or planed [sic] involvement of any 3rd parties or Councillors ."
5. The Council advised it did not hold the information requested in parts 1 and 3 of the request and it withheld the information requested in part 2 under regulation 12(4)(e) of the EIR.

## Reasons for decision

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6. On the basis of their complaint to the Commissioner, this reasoning covers whether the requested information is environmental information and, if so, the Council's application of regulation 12(4)(e) of the EIR to part 2 of the request. The Commissioner has also considered whether the Council holds information relevant to parts 1 and 3 of the request.
7. The requested information concerns a consultation on a Low Traffic Neighbourhood. As such the Commissioner is satisfied that the information is environmental information under regulation 2(1)(a) and 2(1)(c) of the EIR<sup>1</sup>.
8. Under regulation 12(4)(e) of the EIR, a public authority may refuse to disclose information to the extent that the request involves the

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<sup>1</sup> <https://www.legislation.gov.uk/ukxi/2004/3391/regulation/2/made>

disclosure of internal communications. This exception covers all internal communications and the sensitivity of the information is not a consideration for the exception to be engaged.

9. Part 2 of the request is for information that records the Council's process of creating and authorising consultation questions about the LTN; a scheme that was first introduced in July 2020.
10. In its internal review the Council advised that meetings were held on a day to day basis over a prolonged period of time. This generated the "consultation versions" and these evolved after each meeting. The Council explained that the purpose of regulation 12(4)(e) is to allow the merits of proposals and the implications of decisions to be discussed internally without outside intervention. It allows for private thinking space for officers to deliberate when reaching decisions and so protects the internal decision-making processes.
11. It is not clear whether the meetings the Council has referred to were in-person meetings or online meetings eg via Teams. And the Commissioner has not viewed the information the Council is withholding. However he has considered the request's focus – a consultation on a LTN - and the Council's internal review response. The Commissioner will accept that the information – different draft versions of the consultation material, presumably including questions – that was generated from a series of meetings can be categorised as internal communications and that the information therefore engages regulation 12(4)(e) of the EIR. He has gone on to consider the public interest test.
12. The Council's initial refusal of this part of the request did not discuss the public interest test, as it should have. In its internal review, the Council acknowledged the public interest in authorities being transparent and accountable and in more effective public participation in environmental decision-making. This, it said, ultimately contributes to a better environment.
13. However, the Council confirmed that it considered there was greater public interest in withholding the information. It argued that internal deliberation and decision making should be protected by preserving a 'safe space' for officers to debate issues away from external scrutiny, interference and distraction.
14. The Commissioner understands that the LTN consultation was launched on 29 June 2021 and closed on 8 August 2021. It had therefore concluded at the point that the complainant submitted their request in October 2021. The Commissioner therefore disagrees with the Council's argument that it needed private, thinking space to deliberate and reach decisions on the consultation – that is; decisions on the process of formulating consultation questions, not on the results of the consultation

- because the consultation was closed when it received the request. There could not have been any further internal discussion about the process leading to the launch of the consultation itself, including the questions to be asked in the consultation – because the consultation had concluded. And as the consultation had concluded there was also no risk that the public could be confused over earlier versions of the questions.
15. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure. In this case, the Commissioner does not consider that the Council's argument for withholding the information carries weight, for the reason he has discussed. He considers that there is greater public interest in people with a concern or interest in the LTN or who were impacted by it, having an understanding of how the consultation questions were developed and decided upon. It may or may not, for example, evidence that, over time, the questions became framed in such a way as to make eliciting a particular response more or less likely. On balance, and given regulation 12(2), the Commissioner therefore finds that the public interest favours disclosing the information the complainant has requested in part 2 of their request.
  16. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information to the extent that it does not hold the information when it receives the request. The Council has advised the complainant that it does not hold the specific information requested in parts 1 and 3 of their request.
  17. Part 1 of the request is a record of a decision that there would be no specific consultation question on whether responders supported the LTN. The complainant is sceptical that the Council would run a public sector consultation with no record as to how "obvious key questions" were excluded. In its internal review the Council explained that it held discussions via Teams to develop the consultation approach overall, but that it holds no recorded information in relation to those meetings.
  18. The Commissioner considers that the Council's explanation as to how the consultation approach was developed – over Teams – is reasonable and credible. The complainant's request is for very particular information – a record of a decision being taken not to include a specific question. Given the specificity of that request and how the consultation approach was developed – through discussion via Teams – the Commissioner will accept that, on the balance of probabilities, the Council does not hold in recorded form the specific information requested in part 1 of the request and that regulation 12(4)(a) is engaged. The information to which the Council applied regulation 12(4)(e) may contain some broader discussion which may help the complainant to understand why the Council selected the questions that it did.

19. Part 3 of the request is for the timing and process of evaluating and authorising the consultation response "again". In its initial response the Council had directed the complainant to its website where information of some relevance was published – a forward plan of Council decisions. In its review, the Council confirmed that it held no recorded information within scope of this part. It explained that the LTN scheme, like all other schemes for highways/transport that include consultations, had followed a similar route. This involved analysing the consultation, understanding the responses, applying other factors such as evidence (eg traffic surveys etc) and drawing conclusions.
20. The Commissioner has also noted the 'Mayor and Cabinet Report' on the LTN that was published on the Council's website in January 2022 and which discusses the consultation<sup>2</sup>.
21. In their complaint to the Commissioner, the complainant appears sceptical that the Council would not hold a plan [such as a project plan] for how it would process "the response" particularly, in their view, since third parties would be involved and would need to be budgeted for. The Commissioner understands the complainant to mean a plan for how and when the Council would process the responses it had received to the consultation.
22. It is not the Commissioner's role to consider whether a public authority **should** hold particular information but solely whether or not it does, on the balance of probabilities. The Council has categorically stated that it does not hold the specific information requested in part 3 of the request. It is conceivable, in the Commissioner's view, that it did not hold such information and it simply moved to the next stage of the process when the preceding stage had concluded. Clearly the consultation responses were evaluated between the conclusion of the consultation on 8 August 2021 and the Mayor and Cabinet Report being published in January 2022. Finally, the Commissioner can see no obvious reason why, once it had considered whether or not it held this information, the Council would say it did not hold (innocuous) information detailing how and when it would process the results of the LTN consultation, when it in fact did hold it.

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<https://councilmeetings.lewisham.gov.uk/documents/s92713/Lewisham%20and%20Lee%20Green%20Low%20Traffic%20Neighbourhood%20Consultation%20and%20next%20steps.pdf>

23. On the balance of probabilities therefore, the Commissioner accepts that the Council does not hold in recorded form the specific information requested in part 3 of the request and that regulation 12(4)(a) is again engaged.
24. Although regulation 12(4)(a) is a qualified exception, the Commissioner's position is that it is not necessary to consider the public interest test as to do so would be illogical; the public interest cannot favour disclosing information which is not held.

### **Other Matters**

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25. The Commissioner did not consider he needed to view the withheld information in order to reach a decision but he recognises that he is ordering the disclosure of information that he has not viewed. The Council should, however, have already identified and collated all the information within scope of part 2 of the request in anticipation of the Commissioner's investigation. The Council should keep records of its searches so that, if necessary, the Commissioner can verify that all the requested information it holds has been identified and disclosed.

## Right of appeal

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

27. 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.
28. 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

**Cressida Woodall**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**