

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 24 May 2023

**Public Authority:** London Borough of Ealing  
**Address:** Perceval House  
14/16 Uxbridge Road  
Ealing  
W5 2HL

#### **Decision (including any steps ordered)**

---

1. The complainant has requested detailed information related to the Discount Market Sale affordable housing from the London Borough of Ealing Council (LBEC).
2. The Commissioner's decision is that LBEC was correct to rely on regulation 13(1) to withhold third party personal data.
3. The Commissioner has found that LBEC was in breach of regulation 5(2) as LBEC failed to respond to the information request within the required time of 20 working days.
4. The Commissioner does not require LBEC to take any steps in relation to this breach.
5. The Commissioner has also found LBEC in breach of regulation 11(4) as it failed in its duty to provide reconsideration or internal review within 40 working days after receipt of the representations.
6. The Commissioner is aware that LBEC, at the Commissioner's request, has now provided their internal review to the complainant. Therefore the Commissioner does not require LBEC to take any further steps in relation to this breach.
7. Finally, the Commissioner's decision is that LBEC was also entitled to refuse to comply with the request in accordance with regulation 12(4)(b) of the EIR.

8. However, the Commissioner has found LBEC in breach of regulation 9(1) as it failed in its duty to provide advice and assistance to the complainant, at the time of the request, to help him to refine his request in relation to specific information he sought.
9. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Provide the complainant with appropriate advice and assistance on how to narrow down/refine the request, if possible.
10. 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 FOIA and may be dealt with as a contempt of court.

## **Request and response**

---

11. On 26 August 2021, the complainant wrote to the London Borough of Ealing Council (LBEC) and requested information in the following terms:

“Can you please provide the following data in line with the provisions of the Freedom of Information Act.

### Housing Register

- 1.** The total number of households on the Council's Housing Register at 1st April 2021.
- 2.** The total number of households on the Council's Housing Register at 1st April 2021 specifying a) Southfield Ward, b) Askew Ward and c) East Acton Ward as their preferred choice of location.
- 3.** The average number of bids per property in a) Southfield Ward, b) Askew Ward and c) East Acton Ward for the 2020/21 monitoring period for the following types of affordable property: a. A shared accommodation affordable dwelling; b. 1-bed affordable dwelling; c. 2-bed affordable dwelling; d. 3-bed affordable dwelling; e. 4-bed affordable dwelling; and f. A 4+ bed affordable dwelling.
- 4.** The average waiting times at 1 April 2021 for the following types of affordable property: g. A shared accommodation affordable dwelling; h. 1-bed affordable dwelling; i. 2-bed affordable dwelling; j. 3-bed affordable dwelling; k. 4-bed affordable dwelling; and l. A 4+ bed affordable dwelling.

**5.** The average waiting times at 1 April 2020 for the following types of affordable property: a. A shared accommodation affordable dwelling; b. 1-bed affordable dwelling; c. 2-bed affordable dwelling; d. 3-bed affordable dwelling; e. 4-bed affordable dwelling; and f. A 4+ bed affordable dwelling.

**6.** Any changes the Council has made to its Housing Register Allocations Policy since 2011 including: a. The date they occurred; b. What they entailed; and c. Copies of the respective documents

#### Social Housing Stock

**7.** The total number of social housing dwelling stock at 1st April 2021 in a) Southfield Ward, b) Askew Ward and c) East Acton Ward.

**8.** Whether all, or a part of, the Local Authority's social housing dwelling stock has been transferred to another organisation(s). If so, when did this occur and to whom (i.e. which housing association(s) or Arms-Length Management Organisation (ALMO)) was the stock transferred.

#### Social Housing Lettings

**9.** The number of social housing lettings in the period between 1 April 2019 and 31 March 2020; and between 1 April 2020 and 31 March 2021 in a) Southfield Ward, b) Askew Ward and c) East Acton Ward.

#### Housing Completions

**10.** The number of NET housing completions in the London Borough of Ealing Council region broken down on a per annum basis for the period between 2000/01 and 2020/21.

**11.** The number of NET affordable housing completions in the London Borough of Ealing Council region broken down on a per annum basis for the period between 2000/01 and 2020/21.

**12.** The number of NET housing completions in a) Southfield Ward, b) Askew Ward and c) East Acton Ward broken down on a per annum basis for the period between 2000/01 and 2020/21.

**13.** The number of NET affordable housing completions in a) Southfield Ward, b) Askew Ward and c) East Acton Ward broken down on a per annum basis for the period between 2000/01 and 2020/21.

#### Right to Buy

**14.** The number of social rented dwellings lost in the London Borough of Ealing Council region broken down on a per annum basis for the period between 2000/01 and 2020/21 through: a. Right to Buy; b. Preserved Right to Buy; and c. Voluntary Right to Buy

**15.** The number of Right to Buy replacements funded by receipts from Right to Buy sales in the London Borough of Ealing Council region broken down on a per annum basis for the period between 2000/01 and 2020/21.

**16.** The number of social rented dwellings lost in the a) Southfield Ward, b) Askew Ward and c) East Acton Ward broken down on a per annum basis for the period between 2000/01 and 2020/21 through: a. Right to Buy; b. Preserved Right to Buy; and c. Voluntary Right to Buy

**17.** The number of Right to Buy replacements funded by receipts from Right to Buy sales in the a) Southfield Ward, b) Askew Ward and c) East Acton Ward broken down on a per annum basis for the period between 2000/01 and 2020/21.

#### Discount Market Sale

**18.** The number of Discount Market Sale affordable homes, as defined in Annex 2 of the National Planning Policy Framework, consented (together with planning application references) and broken down on a per annum basis for the period between 2000/01 and 2020/21.

**19.** Whether London Brough of Ealing Council hold a Register of those seeking Discount Market Sale affordable housing and/or other affordable home ownership housing.

**20.** If yes to Q19 above, how many households are on that Register in need of these affordable housing products.

#### Temporary Accommodation

**21.** The number of households on the Housing Register housed in temporary accommodation within London Borough of Ealing Council region at 1st April 2021.

**22.** The number of households on the Housing Register housed in temporary accommodation outside the London Borough of Ealing Council region at 1st April 2021.

- 23.** The number of households on the Housing Register housed in temporary accommodation within the London Borough of Ealing Council region at 1st April 2020.
- 24.** The number of households on the Housing Register housed in temporary accommodation outside the London Borough of Ealing Council region at 1st April 2020.”
12. LBEC responded on 4 November 2021. It provided some information within the scope of the request but refused to provide the remainder, related to questions 3-5, 10-13 and 21-24. It cited section 12 (cost limit) of the FOIA as a basis for doing so.
13. The complainant requested an internal review on 1 March 2022. Specifically in relation to the Discounted Market Sale section, question 18 of the request, asking for information about “The number of Discount Market Sale affordable homes, as defined in Annex 2 of the National Planning Policy Framework, consented (together with planning application references) and broken down on a per annum basis for the period between 2000/01 and 2020/21”.
14. The complainant disagreed with LBEC and contended that the response was inaccurate and misleading, and it did not provide all relevant held information. LBEC later accepted that there had been an error and provided further information on 16 February 2022, confirming the following:
- “From further checks, the Council advises there are DMS units at the Filmworks (13 units in phase 1, but only 3 so far in the remaining 30 units in phase 2) and Dickens Yard (was 70 DMS but resulted in 11 DMS units plus a commuted sum being provided in lieu of the other 59) and 144-156 Uxbridge Road, W7, which has 4 DMS units approved, but it is not yet complete.”
15. The complainant contended that, as a result of his own findings, there appeared to be further information relevant to this request – beyond that which had been disclosed on 16 February 2022 - which LBEC had not disclosed. (He listed this further information in the table at the end of his email of 1 March 2022.)
16. It was the Commissioner’s understanding, based on the complainant’s confirmation on 6 December 2022, that LBEC had not completed an internal review in relation to this request.
17. It also further appears that the complainant made two additional, albeit related to the original one, requests for information, prior to his request for internal review on 1 March 2022.

18. The first of the two requests, made on 6 December 2021 asked the following information:

'1) Provide full copies of all internal or external reports, communications and correspondence (written, oral and/or electronic) relating to the FOI response dated 4<sup>th</sup> November 2021.

2) Provide full copies of all internal or external reports, communications and correspondence (written, oral and/or electronic) relating to the appellants claim that contrary to the FOI response the London Borough of Ealing has not approved Discount Market Sales Housing (at the site known as Filmworks – as set out in Document B).'

19. It appeared, from the information provided to the Commissioner, that LBEC provided a partial response to this request on 16 February 2022.

20. The complainant then sought an internal review of this response on 1 March 2022 (in the same letter as his request for an internal review of his original request).

21. The second of the two requests, made on 1 March 2022, asked for the following information:

'1) A formal request for a FULL AND UNREDACTED set of correspondence notes minutes, exchanges and other documentation relating to our enquiries regarding discount market sale housing between the date of our original request of 26<sup>th</sup> August 2021 and the date of your latest response, namely 16<sup>th</sup> February 2022.

2) Please provide a full copy of anything sent to the Inspectorate with dates, times and proof of service, together with any response and acknowledgement of receipt.'

22. The Commissioner understands that LBEC provided the complainant with information it held falling within the scope of this request, redacted on the basis of regulation 13(1) of the EIR.

23. Following no response to the internal review request for the first and second requests, and a subsequent complaint made to the Commissioner by the complainant, the Commissioner requested on 7 July 2022 that LBEC provides its response to the internal review within 10 working days.

24. However, it did not respond to that request.

25. As part of his investigation, the Commissioner wrote to LBEC on 10 February 2023 requesting copies of the redacted information together with any further explanation in support of non-disclosure of information, including details of the enquiries and searches it carried out to identify, locate and extract any information falling within the scope of the complainant's request.
26. The Commissioner also noted, and drew LBEC's attention to the fact that it originally responded to the request under the FOIA. However, as the information sought by the complainant was environmental in nature, the appropriate information access regime should be the EIR.
27. As a result LBEC provided its internal review response on 9 March 2023 under the EIR, relying on regulation 13(1) in relation to non-disclosure of third-party personal data and regulation 12(4)(b) in relation to question 18.

### **Scope of the case**

---

28. The complainant contacted the Commissioner on 29 April 2022 to complain about the way his request for information had been handled.
29. Specifically, the complainant was dissatisfied with the quality of the information he received to his requests of 26 August 2021, particularly in relation to question 18 about Discount Market Sale. He contended that the information received was inaccurate, partial and misleading.
30. The complainant questioned the reliance of LBEC on exceptions to redact information under regulation 13(1) in respect to his request of 6 December 2021 and to refuse information under regulation 12(4)(b) in respect to 'question 18' of his original request of 26 August 2021.
31. The complainant was also dissatisfied with the lack of response from LBEC to the internal review requested on 1 March 2022 in relation to the information request he had made on 16 February 2022 and lack of response to his further information request made on 1 March 2022, which the Commissioner understands was subsequently responded to.
32. The scope of the Commissioner's investigation in this decision has been to determine whether LBEC was correct to rely on regulation 12(4)(b) in relation to question 18 to refuse the request as manifestly unreasonable, and regulation 13(1) to withhold third party personal data.

### **Reasons for decision**

---



## **Regulation 13 – Personal Data**

33. Regulation 12(3) of the EIR states to the extent that the information requested includes personal data of which the applicant is not the data subject it shall not be disclosed otherwise than in accordance with regulation 13.
34. Regulation 13 prohibits a public authority from disclosing third party personal data if to do so would contravene the UK General Data Protection Regulations (GDPR) or the Data Protection Act 2018 (the DPA).
35. Firstly, the Commissioner must determine whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data then regulation 13(1) of the EIR cannot apply.
36. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the data protection principles (DP principles).

### Is the information personal data?

37. Section 3(2) of the DPA defines personal data as:

‘any information relating to an identified or identifiable living individual’.

38. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
39. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
40. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
41. In the present case LBEC withheld names and email addresses of staff who coordinated and contributed to the information request response.
42. The Commissioner has viewed the third-party personal data identified and redacted by LBEC and considered its application of regulation 13(1) of the EIR.
43. In this case, the Commissioner is satisfied that the withheld information is the personal data of the third parties identified by LBEC.



44. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
45. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

46. Article 5(1)(a) of the GDPR states that:

'personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject'

47. In the case of an EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
48. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

49. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" lawful bases for processing listed in the Article applies.
50. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:
- 'processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child'.
51. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the EIR, it is necessary to consider the following three-part test:-
- i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;
  - ii) Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

52. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

53. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
54. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
55. In this case, the complainant is pursuing legitimate interests of transparency and accountability in full disclosure of names of individuals involved. He contended that LBEC had unreasonably anonymised all correspondence in an attempt to protect officers from sanctions for providing false statements to an inquiry. However, he pointed out that despite redacting the names of the officers, LBEC left 'clues' as to the identities of the officers in the form of their job descriptions, particularly officers who gave evidence to the inquiry who were senior officers with a public facing role.
56. The complainant further argued that the request concerned the reasons for a particular decision or the development of a policy and therefore there was a legitimate interest in full transparency, including the names of those officials who contributed to the decision or the policy.
57. The Commissioner accepts there is a legitimate interest in the disclosure of the names for the purposes of transparency and accountability.

Is disclosure necessary?

58. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
59. The Commissioner notes that, whilst LBEC redacted names and email addresses of the officers, it has otherwise disclosed their roles held within the organisation together with the remainder of the requested information.

60. The Commissioner considers that the disclosure of the names of the individuals would not add any further appreciable transparency or value to the redacted emails already disclosed, particularly as the Council have provided the roles and positions of the key individuals involved in the email discussions.
61. It is therefore the view of the Commissioner that transparency has been provided to an appropriate and proportionate degree and the disclosure of names was not necessary.
62. As the Commissioner has decided that disclosure of the names of individuals involved is not necessary to meet the legitimate interests in transparency and accountability of the planning matter to which the emails relate, he has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
63. The Commissioner has therefore decided that LBEC was entitled to withhold the information under regulation 13(1).

**Regulation 12(4)(b) of the EIR – manifestly unreasonable**

64. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose environmental information to the extent that the request for information is manifestly unreasonable.
65. There is no definition of 'manifestly unreasonable' under the EIR, but the Commissioner's opinion is that 'manifestly' implies that a request should be obviously or clearly unreasonable for a public authority to respond to. The Commissioner has published guidance on regulation 12(4)(b).
66. In this instance the requested information related to the Discount Market Sale, particularly a response to question 18 of the original request, which the complainant disputed as inaccurate and misleading.
67. To address this, as part of his investigation, the Commissioner requested from LBEC, detailed explanation of what searches were conducted to ensure that no other relevant information was held, whether any other requested information remained undisclosed and if yes, the reasons, including the exceptions under the EIR, where appropriate.
68. In relation to what searches were conducted LBEC explained that further enquiry revealed that the officer coordinating the response to the original request, left the organisation making it impossible for LBEC to establish how the searches were carried out. However, it accepted that the original response of 'none' in relation to question 18 was incorrect and it provided further information to the complainant.

69. LBEC further confirmed that although other information containing details related to Discount Market Sale affordable homes in question 18 is included in planning applications, this is not kept separately and to identify and extract the relevant information the service area would need to review each application separately, as it is not obvious from the description of the application. This would involve checking thousands of applications which would exceed 18 hours of work.
70. LBEC therefore now relied on regulation 12(4)(b), despite initially providing a response to the request, arguing that to deal with this part of the request in order to provide the relevant information would be:
- too burdensome and
  - it would disrupt a public authority's ability to perform its core functions;
71. The Commissioner has had sight of information received from LBEC demonstrating that the specific information relevant to question 18 requested by the complainant is not a standalone piece of information but is contained within planning application information. To retrieve it would require LBEC to review each one of thousands of applications to check whether it contains the requested information which would exceed a reasonable and proportionate use of resources.
72. Having considered LBEC's position, the Commissioner acknowledges that LBEC disclosed some information to address the complainant concerns about inaccuracy of the original response. However, the Commissioner accepts that to locate all of the requested information would require allocation of a considerable amount of time and resources and therefore impose a significant burden on LBEC.
73. The Commissioner is therefore satisfied that the time it would take to carry out the necessary searches would exceed the appropriate limit of 18 hours set by the FOIA fees regulations for local authorities.
74. Although there is no equivalent limit within the EIR, the Commissioner considers that public authorities may use FOIA cost limits as an indicative guide when considering whether a request for environmental information would impose an unreasonable or disproportionate burden.
75. The Commissioner is satisfied that the exception in regulation 12(4)(b) has been validly engaged by LBEC. The Commissioner has therefore gone on to consider the public interest test required by regulation 12(1)(b).

**Regulation 12(4)(b) – Public interest test**

76. The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
77. The Commissioner notes that it does not appear that LBEC has carried out the public interest test in support of its relying on the exception.
78. There will always be some public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding of environmental matters, a free exchange of views, and more effective public participation, all of which ultimately contribute to a better environment.
79. The Commissioner also recognises that complying with the request would result in the information requested by the complainant being disclosed, and this would aid openness and transparency.
80. However, having considered the arguments for and against the disclosure, the Commissioner is satisfied that for LBEC to respond to the request, the time it would take is significant and disproportionate compared to the public interest in the disclosure of the information.
81. The Commissioner is therefore satisfied that, in this case, the balance of the public interest lies in the exception being maintained.

### **Regulation 9(1) – Duty to provide advice and assistance**

82. Regulation 9(1) of the EIR provides that, where an authority is refusing the request because an applicant has formulated a request in too general a manner, the authority must provide advice and assistance to the requestor, insofar as it would be reasonable to expect the authority to do so, to allow them to reframe the request so that relevant information can be provided.
83. In this case LBEC relied on regulation 12(4)(b), to refuse the request for the specified information for the reason that it would be too burdensome for the organisation.
84. The Commissioner notes that although there is some discussion among the LBEC's staff suggesting consulting the requester about refining his request, the Commissioner could not see any evidence in the information provided by LBEC that they actually contacted the complainant to provide assistance and advice on how he could narrow down his request in relation to the particular information he was seeking.
85. It is therefore the decision of the Commissioner that LBEC failed to comply with the requirement under regulation 9(1) of EIR.

## **Procedural matters**

---

### **Regulation 5(2) of the EIR – Duty to make environmental information available on request**

86. Regulation 5(2) requires that a public authority disclose information in response to a request within 20 working days after the date of receipt of the request.
87. The complainant submitted his request for information on 26 August 2021. LBEC provided partial response on 4 November 2021, which falls outside of the 20 working days required by regulation 5(2).
88. The complainant made two subsequent requests for information. The first one on 6 December 2021, to which he received some information from LBEC on 16 February 2022, and the second on 1 March 2022 to which LBEC responded outside the statutory requirement of 20 working days.
89. In view of the above information, it is therefore the decision of the Commissioner that LBEC breached its legal obligation under regulation 5(2) of the EIR.

### **Regulation 11(4) of the EIR - Representations and reconsideration**

90. Regulation 11(1) of the EIR allows a requester to request an internal review of the original decision should they disagree with the public authority's response to their request.
91. Regulation 11(4) of the EIR requires the public authority to provide the outcome of its reconsideration or internal review within 40 working days after receipt of the representations.
92. In this case, the complainant requested an internal review on 1 March 2022 to which LBEC did not respond until 9 March 2023, following two interventions of the Commissioner, first on 7 July 2022 to which LBEC did not respond, and the second on 10 February 2023 as part of the Commissioner's investigation.
93. In view of the above information, it is therefore the decision of the Commissioner that LBEC breached its legal obligation under regulation 11(4) of the EIR.

## **Other matters**

---

### Section 46 Code of Practice – Record keeping

94. The information seen by the Commissioner, particularly that related to question 18 when LBEC had initially told the complainant that it does not hold the requested information to later confirm that it did in fact hold the information, suggests that the searches and checks carried out were not sufficiently thorough and the original error could have been a result of inefficient or poor record management.
95. The Commissioner therefore draws LBEC's attention to the importance of ensuring that its record management conforms with the section 46 Code of Practice.<sup>1</sup>

---

<sup>1</sup> [section-46-code-of-practice-records-management-foia-and-eir.pdf \(ico.org.uk\)](https://ico.org.uk/section-46-code-of-practice-records-management-foia-and-eir.pdf)



## Right of appeal

---

96. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0203 936 8963  
Fax: 0870 739 5836  
Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

97. 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.

98. 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 .....**

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