

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

Decision notice

Date: 7 September 2016

Public Authority: London Borough of Merton
Address: Civic Centre
London Road
Morden
SM4 5DX

Decision (including any steps ordered)

1. The complainant has requested from the London Borough of Merton (the "Council") a copy of the high level 'output based specification' for the procurement of the parks and open space maintenance services. The Council refused to disclose the requested information under the 'material in the course of completion, unfinished documents and incomplete data' (regulation 12(4)(d)) exception in the EIR. It has also applied the 'third party personal data' (regulation 13) exception to a limited part of the requested information. The Commissioner has decided that regulation 12(4)(d) is engaged and that in all the circumstances the public interest in maintaining the exception outweighs the public interest in disclosure. She does not therefore require the Council to take any steps as a result of this notice.

Request and response

2. On 6 December 2015, the complainant wrote to the Council and requested information in the following terms:

This is to ask for a copy of the high level 'output based specification' for procurement of the parks and open space maintenance for the Borough as a freedom of information request. This information was promised by the Cabinet Member for Environmental Sustainability and Regeneration and the

Director of Environment & Regeneration at a meeting with Friends of parks and green spaces groups on 2 March 2015. Despite numerous requests and a question to Full Council it has not been forthcoming. We are not requesting any information which is commercially sensitive.

3. The Council responded on 10 December 2015 and stated that the relevant access legislation was the EIR. It explained that it was not obliged to comply with the request under the legislation as the information identified engaged regulation 12(4)(d), which is an exception to disclosure that applies to material that is still in the course of completion, unfinished documents or incomplete data. The exception is subject to the public interest test and the Council found that on balance the public interest favoured withholding the information.
4. On 11 February 2016 the complainant asked the Council to reconsider its refusal of the request. He challenged the Council's view that the requested information would fall within regulation 12(4)(d) of the EIR and in any event argued that the public interest test should have been exercised differently.
5. Accordingly, the Council carried out an internal review, the outcome of which was provided to the complainant on 7 March 2016. This upheld the original application of regulation 12(4)(d).

Scope of the case

6. The complainant contacted the Commissioner on 19 March 2016 to complain about the Council's decision to refuse the disclosure of the requested 'output based specification' for procurement of the parks and open space maintenance services.
7. The Council has maintained that regulation 12(4)(d) of the EIR was applied correctly. It also considers that elements of the specification are third party personal data that are protected by regulation 13(1) by way of regulation 12(3) of the EIR. The Commissioner's analysis of the Council's position under the legislation follows in the body of this notice.

Reasons for decision

Background

8. In his submissions, the complainant has informed the Commissioner that the Council requested input on the plans to outsource the parks and

green spaces maintenance contract, via the South London Waste Partnership and in conjunction with Sutton Council, at a meeting on 2 March 2015 and in subsequent correspondence. The complainant has stated that at least 10 groups responded detailing the standards to be met for their area – addressing issues such as plating, mowing regimes, litter clearance, tree maintenance and watering and other issues. The complainant says it was their understanding that the information provided would inform the specification which would be put out to tender. According to the complainant, the interested groups were told that they would be involved in the process.

9. The complainant advised that since the original engagement, the Council has not provided any further information as to the use of the information that had been supplied. On 18 November 2015 a question was put to Cabinet of the Council which asked when the output specification would be published. The Council's minuted response said:

The procurement of the Parks and open space maintenance services is progressing well and to timetable. This procurement is utilising the competitive dialogue process which uses extensive discussions and dialogue with bidders to develop the detailed approach and solutions that will ultimately be adopted in delivering the services.

The process begins with a high level "output based specification" which is then developed and amended through lengthy dialogue sessions with bidders. It was hoped that this high level output based specification could have been shared with Friends of Parks and Trade Unions already, however, legal advice has suggested that there is a risk to the procurement process in doing so and since Merton Council is only one party to the procurement process it has not been possible so far to release the document in the way first envisaged. This is disappointing, however we continue to discuss this with the legal advisers and the other Councils involved in order to identify a way in which we can provide the appropriate level of transparency.

10. In response to the Commissioner's query about the purpose of the 'output based specification' and how it is used, the Council has explained that it is the core document that clarifies the full extent of the basket of services that the Council is commissioning from the contractor. It is an 'output based specification' in that, insofar as possible, the specification focuses on the outcomes (eg the length of the grass) and not the inputs (eg the number of grass cuts).

Regulation 12(4)(d)

11. Regulation 12(4)(d) provides that a public authority may refuse to disclose information to the extent that –

The request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.

12. The inclusion of the exception in the legislation reflects an awareness that public authorities will on some occasions require 'safe space' in which to carry out its decision making. It is not necessary to show that disclosure would have any particular adverse effect in order to engage the exception but any adverse effects of disclosure may be relevant to the public interest test attached to regulation 12(4)(d) of the EIR.
13. The Commissioner's guidance on regulation 12(4)(d) of the EIR¹ says at paragraph 8 that the fact the exception refers both to material in the course of completion and to unfinished documents implies that these terms are not necessarily synonymous. While a particular document may itself be finished, it may be part of material which is still in the course of completion. As an example, the Commissioner cites the creation of an 'aide memoire' as forming part of an on-going process of developing a particular policy. The Commissioner also cautions, however, that just because a public authority has not completed a particular project or other piece of work does not necessarily mean that all of the information the authority holds relating to it is automatically covered by the exception.
14. This point was illustrated by the Commissioner in a decision notice served on Chichester District Council (FER0349127, 12 September 2011)². She said:

40. The Commissioner has considered the application of this exception to these documents. It is the Commissioner's view that the relevant consideration here is the information contained within each document and the purpose for which it was created not the overall project or development proposal it relates to. The Commissioner considers the fact that the proposal to develop affordable housing was still at idea stage at the time of the

¹ https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf

² https://ico.org.uk/media/action-weve-taken/decision-notice/2011/644548/fs_50349127.pdf

request and therefore an unfinished project is not a relevant consideration for the application of this exception.

15. In its responses to the complainant, the Council explained its use of the exception by stating that the procurement process to which the requested information relates is being developed and revised through lengthy dialogue sessions with the bidders. The complainant was informed that at the date of the request the dialogue was continuing with bidders and that the nature of the competitive dialogue means the bidders have a genuine input into the shape of the specification. In the view of the Council, the bidders' overview helps to refine the process, iron out any anomalies, and improve the clarity of the specification. The Council expected there to be a wash up session on 17/18 March and then a final opportunity for the parties to discuss any specification or other issues face to face.
16. The Council has amplified its explanation of the dialogue process for the Commissioner by clarifying that the sessions were the mechanism for the parties to understand the nature, scope and details of the service and to consider and discuss the operations going forwards. For example: the contractors' proposals for staff deployment and supervision of the plant and machinery to be deployed; service innovations employed on other contracts that might achieve efficiencies; and, to understand those elements of the service to be retained by the client.
17. The Commissioner has been informed by the Council that the finalisation of the output based specification document was an iterative process, with revisions being made to reflect the developments in the dialogue between the parties. This, in the Commissioner's view, is a critical consideration for the purposes of the exception – insofar as the specification remained a 'fluid' document and still subject to change at the date of the request, the Commissioner considers that it would engage the exception on the basis it represented an unfinished document.
18. In arriving at this conclusion, the Commissioner has taken account of the complainant's view that the Council would be unable to use the exception. The complainant said:

There is no clear evidence that the information we have requested was a draft at the time we requested it. Nowhere does Merton Council refer to the "output based specification" as being a draft document, and it is difficult to see how or why a local authority would publish an unfinished document as an invitation to tender. Nor was the specification an internal document as it has been disclosed to a third party.

Prior to preparing the specification (according to Cabinet minutes from 10 Nov 2014), the Council had already reviewed an 'outline business case in December 2013' and undertaken an "options analysis" and the "procurement strategy development included further officer and advisor workshops, research gathering and a second Soft Market Testing Exercise". This was therefore the "safe space" in the decision making process to which Regulation 12(4)(d) applies. The specification was the outcome of that process. It was one step in the process, and even though changes to the specification are expected as a result of further discussions with outside bodies this does not mean that the original published specification could be considered a 'draft' or 'unfinished'.

In deciding whether any document is a draft or incomplete the purpose of the document has to be taken into account. In this case the 'Output Based Specification' was produced specifically to stimulate discussion with potential bidders. Its purpose was to lay out the key issues and the Council's expectations to those who might wish to tender. These were fixed – completed – at the time the specification was published. Any resultant discussions would be based on it but would effectively result in a new document.

19. While appreciative of the complainant's concerns, the Commissioner does not accept that the arguments undermine the Council's ability to rely on the exception.
20. Firstly, the fact that the Council did not explicitly refer to the specification as being a draft document does not mean this is necessarily not the case. In any event, the Commissioner notes that, as quoted above, the Council's minuted response of 18 November 2015 did state that the specification would be developed and amended through lengthy dialogue sessions. Extending this clarification, the Commissioner does not agree that the original specification and the resulting specification produced following the dialogue process should be represented as essentially 'different' documents. Secondly, the Commissioner understands that the preparation of the document for the purposes of the procurement would have been done with the expectation that it may be subject to revisions further down the line. Thirdly, whether or not the specification was an internal document is immaterial for the purposes of the exception.
21. On a separate point, the complainant has highlighted to the Commissioner a previous decision of the Council to publish proactively draft documents relating to the South London Waste Partnership Procurement Strategy. The complainant argues that this example weakens the Council's reliance on regulation 12(4)(d) in this situation.

In the Commissioner's view, the sensitivity of draft documents or unfinished material will vary depending on the circumstances and the stage of the process to which the information relates. The Commissioner considers that because a public authority has disclosed draft documents in one instance does not set a precedent for all future situations.

22. Where regulation 12(4)(d) is found to be engaged, the next step for the Commissioner is to exercise the public interest test.

Public interest arguments in favour of disclosure

23. The complainant has powerfully argued for the disclosure of the requested specification. The thrust of these are reproduced below:

The ICO states that "The information must be disclosed unless the public interest in maintaining the exception outweighs the public interest in disclosure".

It is difficult to see how it is in the public interest for the Council to withhold a report when it had previously specifically requested input into the report from the very organisations to which it is now refusing to release the document. As there was considerable public input to inform the decision making process, it is clearly in the public interest for this information to be supplied.

It is also difficult to see how, if there have been major changes to the original specification due to dialogue between the Authority and its chosen bidders, it is in the public interest to withhold the document on which the discussions were based. According to the ICO "The public interest arguments in favour of the exception have to relate specifically to what the exception is protecting." We would question what the exception is protecting here. Merton's [name redacted] asks in his response "does the public interest for disclosure outweighs the exception?" Because he misinterprets the key factor because the "safe space" to which he refers relates to the early stages of decision making (whether or not "a venture should be entered into"). It does not apply when the decision to proceed has already been taken and a document prepared which has been put out to competitive tender.

Finally the awarding of the contract and especially the specification for the services which the contractor is being asked to supply, has a massive impact on the public. This is a £50m contract for the maintenance of all the parks, public gardens and cemeteries throughout the borough. The Friends Groups which make a substantial contribution to maintenance of these open

spaces have a right to know whether their views have been communicated to the potential contractors in the specification.

Public interest arguments in favour of maintaining the exception

24. The Council considers that the combined weight of the following factors is such that the public interest favours withholding the requested information:

- There is a need for a safe space and drafting space when negotiating on what terms a venture should be entered into.
- As the final version will be disclosed to stakeholders (and the broad scope of the specification has already been disclosed) so there is little public interest in disclosing a draft, unfinished document.
- Disclosure of the draft unfinished document may result in fruitless public debate and interrogation of officials as to unadopted positions and abandoned arguments.
- Disclosure may interfere with the procurement process and cause further delay if officers are diverted to deal with public and press enquiries on rejected or amended ideas.
- Public and press involvement in the specification negotiations, in the extreme, could create all sorts of issues for the procurement (such as a dissatisfied bidder complaint that the Council was influenced during the procurement/evaluation by press coverage, particular opinions, etc. or the Councils being under pressure to abandon the process due to public opinion being set against their published requirements).
- It can be quite difficult to manage expectations of interested parties during a procurement and parks and green spaces can be an emotive issue.
- Disclosure may lead to an expectation from the interested parties (such as the Friends Groups) that they are being consulted, which is not the case.
- Disclosure may set a precedent for the disclosure of draft documentation mid-way through a procurement process and therefore encourage an expectation that the Council would do so again (either in relation to additional documentation on this procurement or on other procurements).

- The draft specification document may give a misleading view as it an early draft subject to further change and revision.

Balance of the public interest

25. The Commissioner has considered all of the public interest arguments advanced by the complainant and the public authority, although she has not felt it necessary here to address individually each of the points submitted.
26. In terms of the relative importance of the public arguments, the Commissioner has not put much weight on the Council's concerns relating to the precedent set by disclosure. Any request made under FOIA or the EIR must be considered on a case-by-case basis and, as stated previously, the fact that a public authority had released draft information in one situation would not prevent it from applying regulation 12(4)(d) in other circumstances – the essential issue is the nature of the harm that could arise through disclosure.
27. The Commissioner also considers that the arguments pertaining to the potential misleading effects of disclosure – whether in relation to the consultation process or with regard to the potential inaccuracy of the data - are not particularly strong. The Commissioner explains in her guidance (paragraph 19) that the 'misleading information' argument does not in itself carry any significant weight because it should generally be possible for the authority to put the disclosure into context. There may be exceptions to this general rule but the Commissioner is not aware of any that would apply in this particular case.
28. The Commissioner has however found from his analysis of the remaining arguments that the public interest is finely balanced, with the critical factor distilled from the arguments being the weight that should be attributed to the concept of 'safe space'. The Commissioner's guidance introduces the consideration of safe space in the context of the exception by saying the following:

15. A public authority may well produce the types of material described in regulation 12(4)(d) as part of the process by which it formulates policy and reaches decisions. This is discussed above in relation to the definition of material in the course of completion. In such cases the public authority may argue that it needs a 'safe space' in which to do this away from public scrutiny, and that disclosing this material would harm that safe space. This is an argument about protecting the integrity of the decision making process. Whether it carries any significant weight in the public interest test will depend very much on the timing of the request. If the process of formulating policy on the particular

issue is still going on when the request is received, it may be that disclosure of drafts and unfinished documents at that stage would make it difficult to bring the process to a proper conclusion. However, if the process is effectively complete (for example if the public authority has made a policy announcement or published a final version of draft documents), then it is more difficult to argue that the safe space is still needed.

29. What emerges from the guidance is that it may legitimately be in the public interest for a public authority to have space in which to deliberate when making important policy decisions. It also highlights however that the weight of the public interest for maintaining the exception will depend on the severity of the harm to the safe space.
30. The first point to notice is that there is no suggestion the specification itself contains information which is sensitive from a commercial point of view. Rather, the harm envisaged relates to the procurement process and particularly the ability of the Council to manage the process effectively.
31. The second point is the general strength of the public interest arguments for disclosure. The Council has acknowledged in public statements the importance of volunteers, including friends of the parks groups, in assisting the Council to help maintain Merton's green spaces³. As part of the decision-making process, the Council did request and has received feedback from groups that had an interest in the way the strategy developed. The complainant is particularly concerned however that the information might not have been properly communicated in the specification, or given a low priority, or not included at all. The ability of the public to participate fully in environmental matters that affect them is a key principle behind the EIR, which recognises the importance of transparency in encouraging greater public debate and involvement. Reflecting this purpose, regulation 12(2) of the EIR expressly states that there should be a presumption in favour of disclosure.
32. In the Commissioner's view, these factors do provide a weighty case for disclosure. Against this is the importance that the Council has placed on ensuring it is able to carry out the procurement process unhampered. To support its position with regard to the exercising of the public interest test, the Council has referred the Commissioner to the findings of the First-tier Tribunal (Information Rights) in *Wirral Metropolitan Borough*

³ <https://news.merton.gov.uk/2015/02/24/working-with-community-groups-on-proposed-changes-to-environmental-services/>

Council v The Information Commissioner (EA/2012/0117, 8 May 2012)⁴. This concerned a request for all background papers relating to the preparation of a report produced under Wirral's 'Parks and Countryside Services Procurement Exercise' (PACSPE), which was launched following Wirral's decision to review its parks and countryside services. The Tribunal explained that the report was the culmination of ten earlier drafts accompanied by intensive consultation among officers at Wirral, and the request itself was made the day after the report was submitted to Cabinet. The final report requested decisions on two critical questions – Should Wirral contract with a single external provider? If so, which, having regard to the key factors listed in the report?

33. The Tribunal endorsed an earlier comment made by the First-tier Tribunal in *Mersey Tunnel Users Association v Information Commissioner & Halton Borough Council* (EA/2009/0001, 11 January 2010)⁵. In relation to the application of regulation 12(4)(d) the Tribunal said:

27. 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 discussion 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.

34. The Tribunal in *Wirral* continued at paragraph 22 by saying that 'there may also be, as in this case, in our view, a strong public interest in protecting such draft reports from exposure because of the risk of fruitless debate and interrogation of officials as to unadopted positions and abandoned arguments' – an argument directly cited by the Council.
35. What can be seen from the comments of the Tribunals in *Wirral* and the *Mersey Tunnel Users Association* is that a balance must be struck between protecting a public authority's decision-making space where this is required and ensuring there is sufficient transparency to ensure that the arising decisions are accountable. To determine whether the correct balance had been found by the Council in this case, the Commissioner has queried whether the Council had managed to identify

⁴http://www.informationtribunal.gov.uk/DBFiles/Decision/i905/EA20120117_Decision_20121206.pdf

⁵[http://www.informationtribunal.gov.uk/DBFiles/Decision/i364/MTUA%20v%20IC%20&%20HBC%20\(0001\)%20Decision%20\(Stage%202\)%2011-01-10.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i364/MTUA%20v%20IC%20&%20HBC%20(0001)%20Decision%20(Stage%202)%2011-01-10.pdf)

a way in which to 'provide the appropriate level of transparency'; which was one of the objectives stated in the Cabinet's reply to a question in its meeting of 18 November 2015, the relevant extract of which is quoted above.

36. The Council has confirmed its intention to disclose the specification when it has settled on a preferred bidder. For the Council, this was due to take place in early July 2016 but the selection of a preferred bidder relies on all 4 councils in the South London Waste Partnership reaching an agreement and the completion of the process may be delayed if the decision is called-in. More generally, the Council has explained that a meeting was organised in January 2016 with/for key stakeholders, which was an open forum with the opportunity for questions to the Lead Member and service Director. Furthermore, the Council stated that one of the key appendices was made available in its version at this meeting. Stakeholders will also be kept updated on progress through letters sent by the Council. The Commissioner notes that these activities came after the date of the request, which is the point at which the relevant circumstances must be considered. Nevertheless, they would appear to support the Council's view that it was trying to find ways of keeping the stakeholders involved and engaged.
37. In reaching a view on the public interest test, the Commissioner has been careful not to underestimate the importance of groups, such as the friends groups, in assisting the Council with its civic responsibilities or the potential value of the views of these groups. In the current climate, the use of, and reliance on, volunteers and other groups by public authorities can be expected to increase and it is only right that the groups should, in turn, expect their voices on strategy proposals to be taken into account.
38. The Commissioner recognises that an assurance the finalised specification will be made available once the preferred bidder has been chosen may not necessarily placate individuals who have an interest in the direction of policy. This is because at that stage it may be much more difficult to influence the process. The Commissioner accepts this but is also reminded that the Council has already asked for, and received, input from stakeholders as part of the development of the procurement. This, in the Commissioner's view, is important. While the stakeholders will inevitably be interested in how their views will be used, the Commissioner considers that it may not be beneficial to open up the decision-making process entirely with, to echo the Tribunal in *Wirral*, the resultant risk of fruitless debate and interrogation of officials as to unadopted positions. The Commissioner has not had any reason to doubt that the Council had, or would, incorporate the stakeholders' contributions when devising its strategy. She also allows that the period of private dialogue between the Council and the bidders may be a

valuable way to develop a procurement strategy that was realistic and manageable.

39. The Commissioner has concluded that the disclosure of the requested information at the time the request was made may not have greatly assisted the procurement process and may in fact have disadvantaged the Council in carrying out this exercise. For this reason, the Commissioner has decided that the public interest in disclosure is outweighed by the public interest in favour of maintaining the exception.
40. In light of her finding on regulation 12(4)(d) of the EIR, the Commissioner has not been required to consider further the Council's application of regulation 13 to personal data contained within the scope of the requested information.

Right of appeal

41. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

42. 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.
43. 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
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