

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

**Date:** 21 September 2021

**Public Authority:** London Borough of Bromley  
**Address:** Civic Centre  
Stockwell Close  
Bromley  
BR1 3UH

**Decision (including any steps ordered)**

---

1. The complainant has requested information regarding a particular road in respect of its status as either a private or public right of way.
2. The Commissioner's decision is that the London Borough of Bromley ("the Council") is not able to rely on regulation 12(5)(b) – The course of justice, to withhold the requested information because the exception is not engaged. The Commissioner finds the exception at regulation 12(4)(e) – Internal communications is engaged, however, the balance of the public interest favours disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the withheld information with the personal data of junior officers and named individuals redacted in accordance with regulation 13 – Personal data.
4. 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.

**Request and response**

---

5. On 27 May 2020 the complainant wrote to the Council and requested information in the following terms:

"[A named officer] in the Highway Development Office produced a report about The Drive, Scadbury Park. This report was sent to the Council's Legal Section on or around 27th May 2020. I would like a copy of this report; preferably sent as an email attachment."

6. The Council responded on 17 June 2020. It stated:

"I can confirm that we do not hold this information and are advising you as per Section 1(1) of the Freedom of Information Act 2000 (FOIA). The reason is that the report that you are referring to does not exist, it is a mis-interpretation of a comment in an email from [named officer] to yourself dated 27 May."

7. The complainant clarified his request on 18 June 2020 by quoting from the email he had received from [named officer]:

"In the email of 27th May from [named officer] to me, he writes 'I have passed my findings to the Council's Legal Section'. So can you please send me a copy of [named officer's] "findings" in whichever form they are in."

8. Following an internal review the Council wrote to the complainant on 15 July 2020. It stated:

"The 'findings' you have requested are an internal email from [named officer] to the Legal Department and are by no means a 'report'. As this email was sent to the Legal Department, the panel concluded that this information is exempt from disclosure under Section 42 of the Freedom of Information as the email is protected by legal professional privilege."

## **Scope of the case**

---

9. The complainant contacted the Commissioner on 16 July 2020 to complain about the way his request for information had been handled. The complainant explained:

"Having been accused of trespassing on a road that, as far as I know, is owned by the London Borough of Bromley(LBB), I was put in touch with a Highway Officer at LBB. After my request for information about the road, Peter replied saying he would endeavour to provide me with a detailed response. However, when he had concluded his investigation he sent his "findings" to the Council's legal section."

"Also, the information collated by Peter to produce his findings (or report as I prefer to call it) is accessible by the public so I don't think it is

confidential. It is entirely possible that a member of the public could produce a report similar to [the officer's]. Of course, this is not possible at the moment as the council offices and reference libraries are currently closed to the public due to Covid 19."

10. The Commissioner asked the Council to consider whether its application of the FOIA rather than the EIR was appropriate. In its subsequent submissions the Council relied on regulation 12(5)(b), the course of justice exception which broadly aligns with the FOIA section 42 exemption. The Council decided to add a second exception to its reasons for withholding the requested information. It wished to rely on regulation 12(4)(e) internal communications.
11. The Commissioner therefore considers the scope of her investigation to be the Council's handling of the request and its application of the FOIA section 42 exemption and subsequently EIR regulations 12(5)(b) and 12(4)(e).

## **Reasons for decision**

---

### **Is the information environmental information for the purposes of the EIR?**

12. Regulation 2(1) of the EIR defines environmental information as any information in any material form on:

"(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)'

13. The Commissioner considers that the phrase 'any information...on' should be interpreted broadly. In this case the requested information concerns the designation of a road which affects the use of the road and therefore the landscape. The way in which the road is used and maintained affects the landscape. She is satisfied that the information falls within regulation 2(1)(c).
14. The Commissioner asked the Council to consider whether its application of the FOIA rather than the EIR was appropriate. In its subsequent submissions the Council relied on regulation 12(5)(b), the course of justice exception which broadly aligns with the FOIA section 42 exemption and regulation 12(4)(e), internal communications.

**Regulation 12(5)(b) The course of justice etc.**

15. Regulation 12(5)(b) EIR states:

"12(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;"

16. The Commissioner's guidance on this exception<sup>1</sup> explains that the exceptions under regulation 12(5) allow a public authority to refuse to disclose environmental information where "its disclosure would adversely affect" the interests listed in each exception. A public authority must apply a presumption in favour of disclosure, both in engaging the exception and in carrying out the public interest test.

---

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

17. "Adversely affect" means there must be an identifiable harm to or negative impact on the interests identified in the exception. Furthermore, the threshold for establishing adverse effect is a high one, since it is necessary to establish that disclosure would have an adverse effect. 'Would' means that it is more probable than not, i.e. a more than 50% chance that the adverse effect would occur if the information were disclosed. If there is a less than 50% chance of the adverse effect occurring, then the exception is not engaged.
18. The course of justice element of this exception is very wide in coverage. The Commissioner considers that material covered by legal professional privilege ("LPP") usually falls within the type of information covered by this exception.
19. The Council initially solely relied on section 42 FOIA which is an exemption for information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. The Council maintained its reliance on LPP in its application of regulation 12(5)(b) in regard to advice privilege.
20. LPP exists to ensure complete fairness in legal proceedings. LPP protects advice given by a lawyer to a client and confidential communications between them about that advice. The Council considers that the requested information comprises advice given by its own lawyers to the Council officer named in the request.<sup>2</sup>
21. For regulation 12(5)(b) to apply to legally privileged information, the public authority must demonstrate that disclosure of the requested information would have an adverse effect on the course of justice.
22. The Commissioner has considered the material withheld by the Council which comprises of the named officer's email to a colleague in the Highways Department and his response, followed by an email to a colleague in the Land Charges Department, followed by an email to a Council lawyer. The emails cover a 7 day period 12 – 19 May 2020. The Commissioner agrees with the Council that this information does not comprise a report but is information collated by the officer and could be described as "findings".
23. The Commissioner notes that any enclosures or attachments to a communication are usually only covered by LPP if they were created with the intention of seeking advice. She considers that the emails not addressed to the Council's lawyer could be considered to have been

---

<sup>2</sup> The Commissioner clarifies the Council's consideration below at paragraphs 22 and 26.

created in order to pass on to the lawyer as attachments to the officer's email to a lawyer in the Council's legal department. However, the Commissioner notes that at the time of his investigation the officer was seeking to provide the complainant with a response. He was unable to do so following the information he received from the third parties with whom he consulted and therefore was required to seek legal advice before replying to the complainant. The officer advises the lawyer:

"I shall be happy conclude [sic] my dialogue with [the complainant], subject to your findings and advice."

24. The Commissioner notes that amongst material provided to her by the Council, regarding on-going correspondence between the Council and the complainant, there is an email from the Leader of the Council, Councillor Colin Smith to the complainant. This email has attached to it a detailed report dated 3 September 2020 written by one of the Council's lawyers regarding the status of The Drive within Scadbury Park. Further correspondence between the lawyer, the Assistant Director of Highways and the complainant regarding the report and its conclusions has continued for several months. The Commissioner notes that correspondence between the Council and the complainant both predates and postdates the request for information of 17 June 2020.
25. To support its application of regulation 12(5)(b) the Council explained the following adverse effects on the course of justice:
  - "The Council, as a highways authority, needs to be able to confidently and freely, investigate and set out its legal position in relation to the challenges raised and determine the official status of a route. In all cases there is the potential for the matter to reach the stage of litigation as often there are opposing views from members of the public and those with a public or commercial interest in the route.
  - The Council is the official authority and such communications; to seek legal advice and the advice itself needs [sic] to be preserved. Determining the status of routes is often controversial depending on the conflicting interested parties. The Council needs to be able to maintain public confidence in its decision making and public access to privileged information when the case is still ongoing is likely to affect and effect [sic] such parties.
  - Disclosure of information at this predetermination stage is likely to prejudice the Council's position in response to any potential litigation that may result from the publication of the official statuses [sic]. Although the Council acknowledges that at the current time there is no pending litigation, it is not beyond the realms of possibility on such matters.

- Should the background information be released into the public domain before official status has been determined, any misinterpretation or premature acceptance of the information as being the official status is likely to mean members of the public or those with a commercial or private interest in the route or associated land could act in an unlawful way and face their own challenge or litigation.”
26. The Commissioner has considered whether LPP is attached intact to the withheld information. The email exchanges between the named officer and his colleague in the Highways department and the email exchanges between the officer and the Land Charges department are investigatory. The officer is not seeking legal advice in these emails but simply investigating the matter raised by the complainant. The officer attaches the emails to his email addressed to one of the Council’s lawyers which also references an earlier conversation. The Commissioner accepts that this email (dated 19 May 2020) seeks legal advice. The additional emails attached, although not initially created with the intention of seeking legal advice, ultimately informs the officer’s request for legal advice. On this basis the Commissioner is prepared to accept that advice privilege attaches to the withheld information.
27. Turning to the Council’s arguments, set out above in paragraph 25, the first bullet point refers to the Council’s ability to investigate freely and to set out its position regarding the status of the route. The Commissioner appreciates the Council’s concerns about disclosing information which reveals its legal advice or position. However, there is no consideration of a legal position contained in the withheld information. The officer is requesting a legal view, not receiving one. Notwithstanding this, the Commissioner notes that the complainant was, in fact, provided with the legal view written on 3 September 2020 by one of the Council’s lawyers.
28. The second bullet point states that the determination of the status of roads is often controversial. The Commissioner accepts this point. She also accepts that the Council should endeavour to maintain public confidence in its decision making. However, the Council has already provided legal opinion in some detail and engaged in protracted correspondence with the complainant and at least one other member of the public. The Commissioner cannot determine any difference in the potential to create an adverse effect at the time of the request and at the time of disclosure of the report of 3 September 2020. The Council has not identified any adverse effect which existed at the time of the request which no longer existed at the time of the disclosure of the report.
29. The third bullet point relates to an adverse effect created by the publication of information relating to advice about the official status of

the road prejudicing the Council's position in relation to possible litigation.

30. The Commissioner understands that the status of The Drive remains to be confirmed. The detailed report of 3 September 2020 reached a conclusion, on the balance of probabilities. However, following the complainant and others challenging the report, further investigation remains ongoing. Notwithstanding this, the withheld information predates any current ongoing points and predates the report of 3 September 2020.
31. From the submissions provided by the Council the Commissioner does not understand how disclosure of the withheld information could have created an adverse effect to the Council's position at the time of the request which no longer existed in September, irrespective of when an official status is eventually determined.
32. The Commissioner understands the fourth bullet point to relate to the public's misunderstanding of the withheld information resulting in unlawful acts, with the potential for disturbance and conflict between members of the public resulting in an adverse effect on public safety.
33. The Commissioner has been advised that disturbance and conflict had already taken place before the request for information. The Commissioner is aware that the complainant has been in confrontation with members of the public during his cycling on The Drive which demonstrates that conflict and extreme behaviour is already taking place irrespective of the disclosure of the requested information. The Commissioner notes that the ongoing indecision regarding the status of The Drive has resulted in the public confusion which has, in turn, resulted in an adverse effect on public safety.
34. In a further submission to the Commissioner the Council explained its view that:

"If it is agreed by the Council that the confidentiality of the LPP has been removed, this would effectively mean that all of the correspondences regarding this matter are no longer legally privileged. In the Council's view, just because the Council may have chosen to provide information or a document which may have been legally privileged, does not mean that all correspondences regarding that matter have lost LPP, prior to or subsequent to that disclosure, or that the correspondences which fed into the information disclosed have lost privilege."

35. The Commissioner is cognizant of her guidance<sup>3</sup> regarding the loss of LLP which states:

“Where legal advice is disclosed outside litigation without any restrictions, it is no longer confidential and therefore is no longer protected by LPP.”

36. In this case there is no legal advice contained in the withheld information. The lawyer’s report of 3 September 2020 provides legal advice. The withheld information is clearly pertinent to the report which was provided to the complainant without any restriction imposed on its future use.

37. The Commissioner considers that the Council has not demonstrated that the circumstances at the time of the internal review of 15 July 2020 differed in any respect to the circumstances of the disclosure of the report of 3 September 2020. Therefore the Commissioner does not accept that disclosure of the withheld information would have caused an adverse effect on the course of justice on 15 July 2020 that would not have equally resulted from the disclosure on 3 September 2020. In reaching this view the Commissioner has taken into account that the withheld information comprises different information to that disclosed in September and that disclosure of the withheld information would not have undermined the production of the detailed report which was subsequently disclosed.

38. The Commissioner notes the comments of the Upper Tribunal in *DCLG v Information Commissioner & WR* [2012] UKUT 103 (AAC) (28 March 2012), case number GIA/2545/2011, in considering the significance of LPP under the EIR. She is aware of the importance of not undermining public confidence in the efficacy of LPP generally.

39. In the circumstances of this case the Commissioner has decided that regulation 12(5)(b) is not engaged because the Council has failed to convince her that disclosure of the requested information would have an adverse effect on the course of justice. As the exception is not engaged the Commissioner has not set out a consideration of the public interest.

### **Regulation 12(4)(e) Internal communications**

40. Regulation 12(4) states:

---

<sup>3</sup> [https://ico.org.uk/media/for-organisations/documents/1208/legal\\_professional\\_privilege\\_exemption\\_s42.pdf](https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf)

“For the purposes of paragraph(1)(a), a public authority may refuse to disclose information to the extent that-

(e) the request involves the disclosure of internal communications.”

41. The concept of a communication is broad and will encompass any information someone intends to communicate to others. It will therefore include not only letters, memos, and emails, but also notes of meetings or any other documents if these are circulated or filed so that they are available to others. Essentially, an internal communication is a communication that stays within one public authority.
42. The exception for internal communications is class-based, meaning that there is no need to consider the sensitivity of the information in order to engage the exception.
43. The Commissioner accepts that the information was exchanged internally between council officers and that the information comprises the requested information. The Commissioner is satisfied that the exception is engaged.
44. The exceptions from the duty to disclose information under the EIR are subject to the public interest test set out in regulation 12(1)(b) EIR. The Commissioner therefore went on to consider whether in all the circumstances of the case, the public interest in maintaining the exception in regulation 12(4)(e) outweighs the public interest in disclosing the disputed information.
45. Regulation 12(2)<sup>4</sup> of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. The Upper Tribunal<sup>5</sup> has stated:

“If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure...” and “the presumption serves two purposes:

(1) to provide the default position in the event that the interests are equally balanced and

---

<sup>4</sup> <https://www.legislation.gov.uk/ukxi/2004/3391/regulation/12/made>

<sup>5</sup> Vesco v Information Commissioner (SGIA/44/2019) at paragraph 19

(2) to inform any decision that may be taken under the regulations<sup>7</sup>.

46. The Council provided the Commissioner with one set of public interest considerations in respect of both the exceptions relied on in its submissions. The Commissioner therefore finds that the majority of the points listed by the Council are not applicable to regulation 12(4)(e). She has considered those which are applicable.

### **Public interest in maintaining the exception**

47. The Council explained that the requested information relates to an ongoing matter:

“that not only involves more than one conflicting interested party, but consideration has to be made to the impact of the wider general public who are likely to be affected by not only the publication of this predetermination information, but also the official declaration.”

48. The Council added:

“The Council has to act responsibly and ensure that only correct information is put out into the public domain and deems it irresponsible to issue this information that someone may take as being official status and interact in an unlawful manner with the route.”

49. The Commissioner notes that her guidance<sup>6</sup> advises:

“Although a wide range of internal information will be caught by the exception, public interest arguments should be focussed on the protection of internal deliberation and decision making processes.”

50. It is not the Commissioner’s role to create arguments on behalf of public authorities, however, she would suggest that the withheld information comprises internal deliberation. Arguments presented in favour of maintaining the exception should always relate to the content and sensitivity of the particular information in question and the circumstances of the request. Arguments about protecting internal deliberation and decision making processes will often relate to preserving a ‘safe space’ to debate issues away from external scrutiny, and preventing a ‘chilling effect’ on free and frank views in future.

---

<sup>6</sup> <https://ico.org.uk/media/for-organisations/documents/2021/2619005/12-4-e-internal-communication-31122020-version-31.pdf>

## **Public interest in disclosure**

51. The Council stated that it is in the public interest for it to be open and transparent in “all of its business”. It added:

“Allowing greater public scrutiny of the decision making rationale employed by the Council with regard to the determination and subsequent declaration as to the status of a route.”

52. Furthermore the Council explained that there is a public interest in demonstrating that it, as a Highway Authority for the purposes of the Highways Acts 1959 and 1980:

“... is diligent in applying the necessary procedures and considering all available information from sources such as but not limited to the Ordnance Survey, and the Council’s own statutory and non-statutory records.”

## **Balance of the public interest**

53. The Commissioner considers that the underlying rationale for this exception is to protect a public authority’s need for a private thinking space. The Commissioner considers that the extent to which disclosure would have an impact on such processes is contingent upon the particular information in question and the specific circumstances of the request. Broader arguments about the principle of LPP will not carry any inherent weight under this exception.
54. The Commissioner accepts that a public authority often needs a safe space to reach decisions away from external interference and distraction. The need for a safe space will be strongest when the issue is still live.
55. The Commissioner must therefore focus on identifying what harm would be caused to the Council’s internal deliberations and decision making processes by disclosure of the specific withheld information in the particular circumstances of request.
56. The Commissioner acknowledges that conflicting views are held amongst the general public regarding the status of The Drive. She notes that it has been a topic previously raised with the Council under FOIA in 2018<sup>7</sup>.

---

<sup>7</sup> [https://www.whatdotheyknow.com/request/public\\_access\\_along\\_the\\_drive\\_th](https://www.whatdotheyknow.com/request/public_access_along_the_drive_th)

57. The Commissioner is therefore somewhat surprised that the matter of the status is still an on-going matter, yet to be resolved by the Council. A definitive answer appeared to have been given in the link above at paragraph 56 and again in the report provided by the Council's lawyer on 3 September 2020. The report appears to be conclusive and has been robustly defended by the Council in its correspondence with the complainant. Nevertheless the Council has now decided further consideration is required. It explained that the finalising of this position is subject to further checks of "financial records" held at the National Archive in Kew.
58. The withheld information adds little to information already in the public domain and although the Commissioner accepts that further deliberation in the Council is required she does not accept that disclosure of the specific information requested in this case would result in harm to any internal deliberations, including at the time of the request. In balancing the public interest she therefore cannot attribute significant weight to the potential for harm. The Commissioner notes that the Council's final position on withholding the requested information pre-dates the disclosed conclusions reached by the legal department in the report of 3 September 2020. The Commissioner considers that the seven weeks between the refusal to disclose very limited internal deliberations and the disclosure of a full, detailed internal report is a very short period of time.
59. The Council has stated at paragraph 48 that it must act responsibly to ensure only correct information is placed in the public domain. The Commissioner acknowledges this position, however she would remind the Council that there is no provision to withhold information simply on the basis that it is deemed to be inaccurate. She notes that a contextual explanation can easily be provided in such circumstances. Information regarding the status of The Drive has been placed in the public domain; if the Council considers that the information still requires further consideration the Commissioner questions why the Council already disclosed relevant information into the public domain.
60. The Commissioner supports the points made by the Council, set out above in paragraphs 51 and 52. She considers that greater public scrutiny of the decision making rationale employed by the Council with regard to the determination of the status of The Drive carries significant weight. She notes that the complainant, and others, have raised many issues and queries directly to the Council which has resulted in the Council's further deliberations. She considers that this demonstrates the benefit of openness and transparency in this matter.
61. The Commissioner has decided that in all the circumstances of this case the public interest in maintaining the exception falls short of equalling

the public interest in disclosure therefore the public interest favours disclosure of the withheld information.

## **Other matters**

---

62. The Commissioner has encountered significant difficulties in investigating this case. The Council failed to respond to her letter of 16 March 2021 requesting its submissions by 15 April 2021. The Council neither acknowledged nor responded to the Commissioner. After several attempts to contact the Council she spoke with an officer and received an acknowledgement on 11 May 2021. The Council continued not to engage with the Commissioner until she wrote on 11 June 2021 advising that an Information Notice would be served if a response was not received within 7 days. The Council provided its submissions on 17 June 2021 and provided further information on 7 July 2021.
63. The Commissioner spoke with the Council on 8 July 2021 regarding a query with the further response and was promised a reply on 12 July 2021. No response was forthcoming and despite numerous voice messages and emails the Council did not respond until 3 August 2021. This resulted in a further query which she emailed on 4 August 2021. At the date of issuing this Decision Notice she has still not received a response.
64. The delays and lack of engagement with the Commissioner has hindered her investigation which has resulted in the delay in serving this Decision Notice. The Commissioner is disappointed with the Council's engagement in this case and expects it to take steps to address this, and the delays encountered, in order to avoid a recurrence of the difficulties encountered.
65. Furthermore, the Commissioner is aware that the Council made a late reliance on this exception many months after the disclosure of the 3 September 2020 report. When retrospectively considering and revisiting the request, in the light of its subsequent actions, the Commissioner is surprised that the Council did not consider the public interest in disclosure of the requested information to be more significant.

## Right of appeal

---

66. 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)

67. 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.

68. 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 .....**

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