BARNET
LONDON BOROUGH

Freedom of Information Toolkit

London Borough of Barnet

(c) Copyright London Borough Barnet 2015

POLICY NAME	Freedom of Information Toolkit		
Document Description	Document which provides general, more detailed and some specific expert guidance on the Freedom of Information Act and Environmental Information Regulations.		
Document Author 1) Team and 2) Officer and contact details	1) Information Management Team 2) Sarah Laws sarah.laws@barnet.gov.uk 02083592587		
Status (Live/ Draft/ Withdrawn)	Live	**Version**	03.01
Last Review Date	January 2015	**Next Review Due Date**	January 20-16
Approval Chain:	Head of Information Management	**Date Approved**	02/02/2015

Version number	Date	Author	Reason for New Version
V 1.1	April 2012	Temi Akindele	Creation of Guidance
V 1.2	May 2012	IGC	Comments and approval
V 2.0	May 2013	Sarah Laws	Wholesale review, amalgamations.
V03.01	Jan 2015	Sarah Laws	Annual review

(c) Copyright London Borough of Barnet 2015

© Copyright London Borough of Barnet 2015

Contents

1. INTRODUCTION 1

2. PURPOSE AND SCOPE. 2

3. IS THIS A REQUEST FOR INFORMATION? IDENTIFYING AND CLASSIFYING REQUESTS. 3

4. IS IT A BUSINESS AS USUAL REQUEST? 3

5. HANDLING A BUSINESS AS USUAL REQUEST 5

6. IS IT AN EIR (ENVIRONMENTAL INFORMATION REGULATIONS 2004) REQUEST? 6

7. IS IT A FOI (FREEDOM OF INFORMATION ACT 2000) REQUEST? 7

8. HANDLING A FOI OR EIR REQUEST 8

8.1 LOGGING A REQUEST. 8

8.2 WHAT IS A VALID REQUEST? 9

8.3 ACKNOWLEDGEMENT 9

8.4 CLARIFICATIONS 10

8.5 TIME LIMITS. 10

8.6 GATHERING INFORMATION 11

8.7 WHO HOLDS THE INFORMATION? 11

8.8 DATA SETS 13

9. TOP TIPS IF YOU ARE ASKED BY A LINK OFFICER TO PROVIDE INFORMATION FOR A FOI OR EIR REQUEST 13

9.2 CAN WE CHANGE OR DELETE INFORMATION THAT HAS BEEN REQUESTED BEFORE PROVIDING IT? 15

9.3 CAN WE CHARGE FOR THE INFORMATION*?* 15

10.1 NEITHER CONFIRMING NOR DENYING THAT WE HOLD THE INFORMATION. 17

11. RESPONDING 17

12. REQUESTS FROM THE PRESS, JOURNALISTS, BLOGGERS OR CAMPAIGNERS. 18

13. VEXATIOUS/ MANIFESTLY UNREASONABLE 20

14. EXEMPTIONS AND EXCEPTIONS 21

15. FOI EXEMPTIONS 22

15.2 SECTION 32 - COURT RECORDS. 22

15.3 SECTION 40: PERSONAL INFORMATION 23

FOI - QUALIFIED EXEMPTIONS 24

15.6 SECTION 22: INFORMATION INTENDED FOR FUTURE PUBLICATION. 25

(c) Copyright London Borough Barnet 2015

© Copyright London Borough of Barnet 2015

15.7 SECTION 30: INVESTIGATIONS AND PROCEEDINGS CONDUCTED BY PUBLIC AUTHORITIES AND SECTION 31: LAW ENFORCEMENT 25

15.8 SECTION 36: PREJUDICE TO EFFECTIVE CONDUCT OF PUBLIC AFFAIRS 25

15.9 SECTION 38: HEALTH AND SAFETY 26

15.10 SECTION 39: ENVIRONMENTAL INFORMATION 26

15.11 SECTION 42: LEGAL PROFESSIONAL PRIVILEGE 26

15.12 SECTION 43: COMMERCIAL INTERESTS 26

16. EIR EXCEPTIONS 27

16.1 THE INFORMATION IS THE PERSONAL DATA OF THE APPLICANT – REGULATION 5(3) 27

16.2 REGULATION 12(3) AND REGULATION 13 - THE INFORMATION IS THE PERSONAL DATA OF A PERSON OTHER THAN THE APPLICANT 28

16.5 REG 12 (4)(B): THE REQUEST IS MANIFESTLY UNREASONABLE. 29

16.6 REG 12 (4)(C): THE REQUEST IS TOO GENERAL (AFTER FULFILLING DUTY TO ADVISE AND ASSIST) 29

16.7 REG 12 (4)(D): THE REQUEST IS FOR UNFINISHED DOCUMENTS OR DATA (IN WHICH CASE ESTIMATED TIME FOR COMPLETION MUST BE GIVEN) 30

16.8 REG 12(4)(E) THE REQUEST INVOLVES THE DISCLOSURE OF INTERNAL COMMUNICATIONS. 30

THE COUNCIL MAY ALSO REFUSE TO DISCLOSE INFORMATION OR WITHHOLD PART OF IT IN ORDER TO PROTECT THE FOLLOWING ISSUES. 31

16.9 REG 12 (5)(A): INTERNATIONAL RELATIONS / PUBLIC SECURITY / DEFENCE 31

16.10 REG 12 (5)(B): THE COURSE OF JUSTICE AND RIGHT TO FAIR TRIAL 32

16.11 REG 12 (5)(C): INTELLECTUAL PROPERTY RIGHTS 33

16.12 REG 12 (5)(D): CONFIDENTIALITY OF PROCEEDINGS 33

16.13 REG 12 (5)(E): COMMERCIAL CONFIDENTIALITY 33

16.14 REG 12 (5)(F): INTERESTS OF THE PERSON WHO PROVIDED THE INFORMATION TO THE AUTHORITY. 34

16.15 REG 12 (5)(G): ENVIRONMENTAL PROTECTION 35

17. THE PUBLIC INTEREST TEST 35

18. HOW DO I REMOVE THE EXEMPT OR EXCEPTED PARTS OF THE INFORMATION- HOW DO I REDACT? 36

PIVOT TABLES 37

WHAT RESTRICTIONS CAN WE PUT ON THE USE OF THE DISCLOSED INFORMATION? 38

19. ROLE OF THE INFORMATION COMMISSIONER AND THE FIRST TIER TRIBUNAL 39

20. REVIEW OF POLICY 39

21. CONTACT INFORMATION/ FURTHER GUIDANCE 39

22. APPENDICES 40

(c) Copyright London Borough Barnet 2015

© Copyright London Borough of Barnet 2015

23. APPENDIX 1 - 40

GUIDANCE ON REFUSING COSTLY REQUESTS SECTION 12 FREEDOM OF INFORMATION ACT 2000 (FOIA) AND AGGREGATION OF SIMILAR REQUESTS 40

24. APPENDIX 2 45

SECTION 43(2) COMMERCIAL INTERESTS 45

25. APPENDIX 3 SECTION 14 – VEXATIOUS 53

APPENDIX 4 REG 12 (5) (B) THE COURSE OF JUSTICE AND RIGHT TO FAIR TRIAL 55

3. APPENDIX 5 57

DATA SETS, LICENSING AND PIVOT TABLES 57

APPENDIX 6 62

COPYRIGHT AND REQUESTS FOR INFORMATION UNDER FOI AND EIR AND ORDNANCE SURVEY DATA 62

APPENDIX 7 PLANNING FINANCIAL VIABILITY DOCUMENTS 67

(c) Copyright London Borough Barnet 2015

© Copyright London Borough of Barnet 2015

1. Introduction

The Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR) establish a right of access to council information.

Allowing access to council information increases openness and transparency, enabling residents and other stakeholders to better understand and participate in decisions affecting them. It increases public scrutiny of how services are delivered and contributes to strong, accountable local government.

However, unlimited access to council information would make it very difficult to operate. Officers may fear expressing frank views during decision making processes and private companies might shy away from doing business with the council.

The FOIA and EIR balance these interests through exemptions and exceptions which allow council information to be withheld in particular circumstances.

The Freedom of Information and Environmental Information Regulations Policy provides a framework for access to council information that ensures the council meets its obligations under FOIA and EIR.

This Toolkit provides a practical how-to guide for Link Officers in the council and outsourced services such as in Re and CSG, and for any other council officer who is involved with FOI/EIR more generally, or who has a specific query.

This Toolkit provides some general information and advice on the FOI and EIR, and then goes on to provide more detailed advice over certain areas. The Appendices have topic specific detailed guidance.

If you have a query that is not answered by this Toolkit then please seek expert advice from the Information Management Team (IMT): foi@barnet.gov.uk or ext 7080.

(c) Copyright London Borough Barnet 2015

2. Purpose and scope.

- This Toolkit and related policies apply to all requests for information **except** requests by an individual for their own personal data (subject access requests) and disclosure requests under Data Protection Act 1998. The council's Data Protection Policy and Data Protection Act Compliance Toolkit set out how to handle those requests.

- This Toolkit covers all information held by or on behalf of the council, in whatever form, irrespective of its origin or ownership. Information belonging to the council held by an outsourcing partner (contractor) e.g. Capita or RE Ltd, is covered by the FOI/EIR and therefore by this Toolkit. Information that belongs to the council but is held or processed by a partner on the council's behalf is the council's information. This is covered in more detail here: Who holds the information?

- This Toolkit will be of assistance to council employees, contractors, agency workers, consultants, interims and temporary staff who are involved in responding to a request for access to council information. It also applies to Link Officers employed by the council's contractors, and to employees of contractors who have been asked to assist with an FOI or EIR request. This Toolkit also applies to Barnet councillors to the extent that they hold information that is subject to the FOIA and EIR.

- This Toolkit provides a practical how-to guide for FOI and EIR requests. It starts with some general information and advice on the FOI and EIR, and how to recognise these requests; and then goes on to provide more detailed advice over certain areas. The Appendices have topic specific detailed guidance.

(c) Copyright London Borough Barnet 2015

3. Is this a Request for Information? Identifying and Classifying Requests.

- **It is important to make sure you deal with a request for information under the correct regime.**
- Not all requests for information, even those for recorded information will be FOI /EIR requests, they could be a business as usual request.

4. Is it a Business as Usual request?

- Requests which would usually be handled as part of a service area's day to day business (for example information about waste or recycle pick up times and procedure) need not be processed as a request under FOIA or EIR. These are 'business as usual' requests.
- Business as usual requests can include requests for recorded information if they are routine and easy to deal with for example: 'please send me the forms to apply for a blue badge'.
- There is a 'gentleman's agreement' between all the Chief Executives of London local authorities that they will not make EIR/FOI requests to each other. So any request for information from a London local authority – whether it is a general query, a survey, bench marking or expressed as a FOI or EIR request is to be treated as a business as usual request. Contact IMT at foi@barnet.gov.uk if you are not sure if you have a request that falls into this category.
- If it's a written/email general request for non-personal information that cannot be answered quickly and simply as a business as usual request it is a FOI/EIR request. Forward it to FOI@barnet.gov.uk immediately so the team can log it. If the customer is asking on the phone and it's a request for environmental information put them through to extension 7080, if its non-environmental information advise them to email FOI@barnet.gov.uk to make a FOI request; or offer to email the FOI team for them.

(c) Copyright London Borough Barnet 2015

- **People can make a FOI request by emailing the request along with their name and contact details to foi@barnet.gov.uk or by writing to Information Management Team, Commissioning Group, London Borough of Barnet, NLBP, Oakleigh Road South London N11 1NP.**

(c) Copyright London Borough Barnet 2015

5. Handling a Business as Usual Request

- A business as usual request needs to be responded to within the council's customer service standards timescale. Provide the customer with the information they have requested, and in the format requested if possible.

- **A business as usual request may involve handing personal information.** Personal information is information that allows an individual to be identified. It includes name, address, photographs, car registration numbers and reference numbers eg Council Tax reference number. For example someone may call wishing to discuss a parking penalty charge notice, or their complaint about a neighbour's extension.

- Personal information and its processing (eg copying, sending out, discussing with someone on the phone etc) is governed by the Data Protection Act 1998. There is separate council guidance on this, but the guidelines below will help in dealing with a business as usual request.

    - **Make sure you are talking to the right person** – check and verify their details **before** giving out any personal information.

    - If their **details can be verified** then the requester **can generally have**:

        - **their own details/ information** about them or what is on their file, subject to the points below,

        - names and contact details of staff they have dealt with or staff who are publically known eg planners, or staff that are senior – see the council's structure chart on the council website for senior staff.

    - **Do NOT disclose**

        - names and contact details of junior staff who have not dealt with requester, or who have only been involved in an admin type role; or

(c) Copyright London Borough Barnet 2015

- names, addresses or any other details of complainants or other people. If they can be identified from information in a document (eg “my next door neighbour”) then do not disclose, and if sending then redact (blank out). If the complainant is already known eg they have appeared in public at a planning inquiry into an enforcement notice or were a witness in court some details can be disclosed. See IMT for advice.

- **If in any doubt as to who they are/ their ID** disclose no personal details at all but disclose only anonymous data/information and advise them to make a Subject Access Request under the Data Protection Act 1998. See the council’s Subject Access Request Guidance for more help.

6. IS IT AN EIR (Environmental Information Regulations 2004) REQUEST?

- **If it is a request for recorded information about the environment then it is an EIR request.**

- Environmental information includes information about land development, pollution levels, energy production, and waste management. Information can appear to be a degree removed from environmental but still come under the definition eg financial information would be classed as environmental information if it related to the costs of redeveloping land and building a new leisure complex.

- If the information is held by one of the council’s contractors, eg Capita or Re Ltd, then it is still subject to the EIR if it is the council’s information. For example, Re Ltd will hold information about planning applications. They will hold information about specific sites and more general information such as performance statistics for processing planning applications. This is all the council’s information held by the partner on the council’s behalf and so would come under the scope of the EIR. Information that is not held on the council’s behalf such as details of the partner’s spend on their own site landscaping would be out of scope of the EIR.

- An EIR request does not have to be in writing. It can be made orally, or by text or social media etc. A record of the request should be made. The requester needs to give their name and an address for correspondence, eg an email address or a street based address.

(c) Copyright London Borough Barnet 2015

7. IS IT A FOI (Freedom of Information Act 2000) REQUEST?

- **A request for recorded non environmental information that cannot be handled as a business as usual request is a FOI request**. (There are other service specific pieces of legislation covering access to information such as for adoption records so if a request forms part of legislation other than the FOIA/EIR, it should to be considered under that legislation).

- **Examples** of FOI requests:

  - How many PCNs has the council issued this month?
  - How many people have you prosecuted for trading standards offences in each of the last 5 years, and how many were found guilty?
  - How much have you spent on paperclips and staplers in the last 3 financial years?

- If the information is held by one of the council's contractors then it is still subject to the FOI if it is the council's information. For example, CSG run by Capita will hold information about budgets and expenditure across the council. They will hold information about specific invoices and more general information such as overall budgets and classes of spend. This is all the council's information held by the contractor on the council's behalf and so would come under the scope of the FOI. Information that is not held on the council's behalf; such as details of Capita's total spend on office furniture would be out of scope of the FOI.

- To be a valid request under FOI it must be in writing and have the requester's name and contact details. The requester may or may not expressly mention the FOIA in the request.

- Anyone can make a request for information, including members of the public, journalists, lawyers, businesses, charities and other organisations. All requests must be treated as "applicant and purpose blind" that is without regard to the identity or the requester or reason(s) for making the request. However, we do have an internal protocol for the clearance

(c) Copyright London Borough Barnet 2015

of responses to requests from journalists, campaigners and bloggers – see the Journalists and Bloggers section here: Requests from the press, journalists, bloggers or campaigners.

- **It is important to make sure you deal with a request for information under the correct regime.**
- Not all requests for information, even those for recorded information will be FOI /EIR requests, they could be a business as usual request.

8. HANDLING A FOI OR EIR REQUEST

Although they are different statutory regimes there are many similarities in handling these two types of request.

This general guidance for both FOI AND EIR requests is a short guide.

8.1 Logging a Request.

If you receive a valid EIR or FOI request it needs to be logged. This is done either by Link Officers within services including CSG and Re Ltd, or by IMT. The request needs to be passed to a Link Officer or IMT immediately on receipt. If you are unsure who your Link Officer is send it to foi@barnet.gov.uk . It is important not to delay because the time limit to respond starts running when the council receives the request, not when it gets to the right team. A valid FOI/EIR request for council information received by a contractor is classed as being received by the council **when it is received by the contractor**, so immediate referral is required. Any request made by email is classified as a request for electronic format under the Act – unless the requester specifies that they would like to receive it in hard copy. (If it is not practical to send by email e.g. it is too big, or odd sized documents that won't scan we can still send information by post).

(c) Copyright London Borough Barnet 2015

8.2 What is a valid request?

- **Under FOI :**

- The request must be for recorded information, and state the information requested
- The request must be in writing which includes email, web forms, fax, letter, via social media or by text message.
- The requester must give their name (pseudonyms are not permitted) and an address for correspondence – whether email or street based; and
- The requester does not have to explicitly state they are requesting the information under FOI.

- **Under EIR:**

- the requester must state the information sought and
- Give and an address for correspondence – whether email or street based;
- The request can be made in writing as for FOI or orally eg: on the phone or at reception. If orally then a written record should be made by the person receiving the request.

The requester can use a pseudonym if they want, and they do not have to explicitly state they are requesting under EIR.

8.3 Acknowledgement

Requests received under the FOIA or EIR need to be acknowledged within 3 working days. This will be done by the Link Officer allocated the case by IMT.

(c) Copyright London Borough Barnet 2015

8.4 Clarifications

The Link Officer allocated the case needs to consider the information request as soon as it is allocated to them to see if the request is clear and unambiguous. If the request is unclear, it could have several different meanings or if further detail is required to identify the information requested the council can ask the requester for clarification.

This is done by the Link Officer contacting the requester and explaining the council's difficulties and suggesting how the requester could remove ambiguity or clarify their request. It is important to be helpful to the requester, not just for customer care but as we have a duty to provide advice and assistance which includes helping a requester frame their request. A reasonable time limit needs to be given by the council to the requester for them to provide the clarification.

In these circumstances the 'clock stops' on the request until sufficient detail has been provided for the council to identify the requested information. **If you receive a request for information from your Link Officer and the request is not clear or is ambiguous tell your Link Officer straight away.**

8.5 Time Limits.

- FOI and EIR requests must be responded to **promptly** but no later than **20 working days** from the day following receipt of the request. A response provided after 20 working days (without correct application of an extension of time if one is allowable) is a breach of the FOIA/EIR and could lead to a complaint against the council.
- The council may, in limited circumstances, extend the 20 working day response period. These circumstances differ under FOIA and EIR.
    - **FOIA**: the time limit may be extended for a '*reasonable period'* (usually up to 20 working days) if additional time is required to consider the public interest factors for and against disclosure of information where it is considering applying a qualified exemption.

(c) Copyright London Borough Barnet 2015

- **EIR:** the time limit may be extended for an additional 20 working days if the request is of such complexity and volume that the council would not be able to comply within that period. You cannot extend to consider the public interest.

- In both cases the council must notify the applicant of the extension of time ***within*** the initial 20 working day period. Any extension of time must be discussed with and have prior approval from IMT. It is poor practice to apply an extension very close to the 20 working day limit; extensions should be applied as soon as it becomes clear they are required.

8.6 Gathering Information

Once a request for information has been received and acknowledged, searches must be undertaken to identify and locate the information. A record of the searches undertaken should be made.

In circumstances where the process of gathering the information requires significant resources; the council may be able to refuse the request if it exceeds the appropriate limit as set out by FOIA. This limit does not apply to requests under EIR.

There is a duty to conduct reasonable searches, but not to create information if it is not held.

Information held in computer recycling bins is considered information held.

8.7 Who holds the information?

- Often is will be obvious who holds the information. For example if a request is for details of the number of planning enforcement notices served over a particular time frame, the team to ask would be planning enforcement. Where it is not obvious, or the request cuts across several different teams or departments, Link Officers will need to ask several team leaders to help them find and collate information. Complex, cross cutting requests are usually dealt with by IMT so you may get a request for information from IMT rather than your usual Link Officer.

- **CSG & Re Ltd services**. Services outsourced under the major outsourcing contracts – to Capita for CSG, Re Ltd for DRS, NSL for parking, HBPL for legal matters etc all handle, hold and process information for the council. If the information

(C) Copyright London Borough Barnet 2015

is held by one of the council's contractors then it is still subject to the FOI /EIR **if it is the council's information**. For example, Capita in CSG will hold information about budgets and expenditure across the council. They will hold information about specific invoices and more general information such as overall budgets and classes of spend. This is all the council's information held by the contractor on the council's behalf and so would come under the scope of the FOI. Information that is not held on the council's behalf; such as details of Capita's spend on office furniture would be out of scope of the FOI.

- **Barnet Homes.** Barnet Homes are a public authority for the purposes of FOI/EIR and so answer their own FOI/EIR requests. They hold information in their own right. If we are asked for information that is held by Barnet Homes eg the number of council houses rented during the last 2 years or the average service charges for a 2 bed flat we would tell the requester to ask Barnet Homes and give them Barnet Homes' details. We do not ask Barnet Homes for the information ourselves, neither do we pass the request directly on to Barnet Homes.

- **Councillors** are subject to FOIA/EIR if they receive, create or hold any information while acting on behalf of the council. Examples of information caught by the legislation are those received in a councillor's capacity as Cabinet Member or as a representative of the council.

    - Information received by a councillor when acting in their capacity as a ward member is not subject to FOIA/EIR.

    - Councillors are not public authorities in their own right; and therefore have no obligation to respond to a request for information addressed to them. If a request is made to a councillor under FOI, it is considered good practice for the councillor to explain this to the requester and, with their permission pass the request to the council. Subject access requests (SARs) can however be made to councillors individually because they are registered as data controllers with the ICO.

    - Councillors are expected to provide assistance to officers in complying with the council's FOI and EIR obligations and should promptly provide officers with information they hold.

(c) Copyright London Borough Barnet 2015

8.8 Data Sets

The focus of Freedom of Information has moved from *accessing* information to *re-using* it. The FOI Act was amended so that whenever the council receives a request for information in an electronic format, and the response is contained within a data set, the council should publish that data set in an open and re-usable form. There is some advice on this in Appendix 5 here: **Data Sets, Licensing and Pivot TablesData Sets, Licensing and Pivot Tables**

9. Top Tips if you are asked by a Link Officer to provide information for a FOI or EIR request

You may receive a request from your Link Officer or someone in IMT for information to help respond to a request.

- You should respond promptly and within the deadline they have given you.
- If the deadline is a problem let them know, **quickly** and why with a date of when you could comply or the details of a colleague who could assist.
- If the response has come to you in error, please do not ignore it, reply and try and point your colleague in the right direction.
- Please read the request carefully to make sure you know what is being asked for and if it's not clear or is ambiguous contact your Link Officer **immediately** and ask them to go back to the requester for clarification.
- You must not wait until the last date given to come back to your Link Officer and ask for clarification, please do it as soon as you have received the request.
- We have 20 working days to go back to the requester for further information and if we do this, we don't have to respond until the requester clarifies their request. Then we have 20 working days to respond to the rephrased request. We should offer the requester advice and assistance to help to explain, clarify or rephrase their request which might involve explaining the options available to them, and asking which they meant.

(c) Copyright London Borough Barnet 2015

- You should locate the information requested and provide it to your Link Officer, in the format requested. If there is a large amount of information requested then talk to your Link officer quickly about this, as there may be costs limits or similar to apply.

- If you have concerns about disclosing the information then see the sections about exceptions and exemptions below and contact your Link Officer to discuss. Never refuse to provide information to your Link Officer because you do not want to disclose it.

- Some of the exemptions are very technical, and how they work is covered not just by their title but ICO guidance and decisions. Sometimes the 'headline' for an exemption fails the 'Ronseal test' i.e. they doesn't always do what they say on the tin.

- Remember that embarrassment to the council is never a reason not to disclose information!

- Your Link Officer and IMT are the in-house experts on FOI and EIR, and can give you specialist detailed advice on issues – however they cannot advise in a vacuum so providing them with all the information and details at the earliest stage will help them give you the best advice more quickly.

9.1 Appropriate Limit /Costs

The appropriate limit under **FOI** refers to the time spent determining whether information is held, locating, retrieving and extracting the information in order to respond to a request. The cost of these activities is estimated by identifying how much time is required per person (both staff and external contractors irrespective of rate of pay) to complete them. **The limit will be exceeded if these activities take longer than 18 hours**. The Fees Regulations say that the maximum cost that locating, retrieving, extracting the information should cost the council is £450. The nominal amount per hour is £25 – it doesn't matter whether the people doing the work are paid £7, £77 or £700 per hour, the calculation is made at £25 per hour. The £450 maximum cost divided by £25 per hour is 18 hours. The cost of deciding whether exemptions apply and of any subsequent redactions cannot be included.

For more information on the appropriate limit, see the section on Costs in the Appendix here: Appendix 1APPENDIX 1 -

(c) Copyright London Borough Barnet 2017

It does not apply to EIR where there is no costs limit to be applied (but you might be able to apply the 'manifestly unreasonable' exception to very costly EIR requests).

Third Party Information

If a request includes information that relates to a third party, for example a contract between the council and a private company or a report commissioned by the council from an external body, it is considered best practice to notify the third party.

The third party should be provided with the opportunity to inform the council of any concerns it has about disclosure of the information. However the decision whether or not to disclose the information ultimately rests with the council.

This is often relevant to cases where the section 43(2) Commercial interest exemption is being considered. See the specialist guidance on this in the Appendix.

9.2 Can we change or delete information that has been requested before providing it?

No! If the deletion is intended to prevent disclosure then it could be a criminal offence. Neither is it permitted to destroy information the council holds when the request is received, where that information is due for routine destruction shortly afterwards (for example routine electronic destruction). You must delay destruction and consider the request in the usual way. The only changes to a document that are allowed are redactions made under an exemption or exception.

This is the case even if we know the info is out of date or inaccurate etc …

9.3 Can we charge for the information?

FOI

We can only charge where we issue a fees notice, and cannot generally charge for providing information. There is more advice on the costs appendix here: APPENDIX 1 -

EIR

(c) Copyright London Borough Barnet 2015

We can charge for environmental information **only** where we have published a schedule of charges and details of when we do or do not charge. The schedule of charges is on our website and is usually updated annually. If the information is in a public register then we cannot charge for allowing a requester access to the public register. We should not charge for information that would not cost us anything to send e.g. an email attachment. There is more information in the Costs appendix here: APPENDIX 1 -

10. *Personal Data*

- Personal data is governed by the Data Protection Act 1998 (DPA) and is defined as *data which relates to a living individual who can be identified (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller*

- It includes name, address, photographs, car number plates and reference numbers eg Council Tax reference numbers.

- If the requested information includes personal data it must usually be withheld under section 40 of the FOIA or Regulation 13 EIR.

- If the information is the **requester's own personal data** then the FOI/EIR covering this should be refused, and they should be advised to make a subject access request (SAR) under the DPA. This is because under FOI/EIR disclosure to one person is considered the same as disclosure to the whole world. Any parts of the request that are not personal data must be dealt with as FOI/EIR requests. This may mean splitting a request and treating parts as a SAR and parts as an FOI.

- All personal data must be redacted from information to be provided in response to an FOI request. See the council's Redaction Policy on how to do this. Personal data is handled slightly differently under the EIRs given the presumption in favour of disclosure so there needs to be a careful balance between the case for transparency and openness under the EIRs against the data subject's right to privacy under the Data Protection Act in deciding whether personal third party data can be released.

(c) Copyright London Borough Barnet 2014

- Where the personal data relates to the names of council officers or councillors, it may be appropriate to provide it in certain instances. The Redaction Policy provides guidance on when this applies.

- There are certain other cases where special rules apply to accessing personal information, for example adoption records. If you have a case where the request is for social services records or adoption records then contact the Information Management Team for specialist advice.

10.1 Neither confirming nor denying that we hold the information.

There are circumstances where even confirming or denying that information is held will disclose exempt information, for example: confirming or denying that the council holds information about a council employee who is under criminal investigation. In such circumstance, the response to the requester should advise that there is no obligation to confirm and stating the applicable section but not giving any details. Link officers should liaise with IMT when drafting 'neither confirm nor deny' responses.

11. Responding

- **The council must respond to an applicant and tell them whether or not they hold the information requested** (there are some limited cases where the council needs to neither confirm nor deny).

- **If the council holds the information it must be provided (disclosed) to the applicant, (in the format requested by the applicant if practicable) UNLESS :**

  - **the information is exempt (FOIA) or excepted (EIR) from disclosure – see details of these below here:** Exemptions and Exceptions**;**

  - **or the time limit (18 hours) will be exceeded (FOI only) – see Costs above here:** Time Limits. **and the detailed costs guidance in the Appendix here:** APPENDIX 1 -

(c) Copyright London Borough Barnet 2015

- **Or the request is vexatious (FOI) or manifestly unreasonable (EIR) – see Vexatious/ Manifestly Unreasonable below here:** Appendix 3 Section 14 – vexatious

- The default position is disclosure. This means that we should start considering from the stand point of 'we are going to disclose unless there is a very good reason not to'. This is often called the presumption in favour of disclosure. There are circumstances where it is inappropriate to disclose information and the Act/Regs clearly state when this is the case. These are outlined below, and some of the exemptions/exceptions have more detailed guidance in the Appendices.

- Where all or part of the information is to be withheld, the relevant exemptions/exceptions *must* be stated in the response and reasons given. If applicable the public interest test must also be conducted. The response **must** set out the public interest factors considered for and against disclosing the information and explain why the weight of the public interest falls where it does.

- All responses to requests for information handled under FOIA and/or EIR must set out the review procedure provided by the council. Standard templates on the FOI case management system include paragraphs that explain the review procedure for FOIA and EIR.

- Responses to requests from journalists, TV companies, bloggers and campaigners are cleared by Communications before they are sent out – see the next section below.

12. Requests from the press, journalists, bloggers or campaigners.

These categories of people can make a FOI or EIR request the same as anyone else, and we respond to them in the same way. However, we do have the responses cleared with communications before they go out.

A journalist, blogger, member of the press (written, TV, radio or internet based) or campaigner might identify themselves as such by their signature block or email address, or through a course of previous dealing or experience. A campaigner may be national such as the Taxpayers Alliance and Big Brother Watch (other campaign organisations are available) or local (eg Pinkham Way No Way).

(c) Copyright London Borough Barnet 2015

The request should be sent to Communications for information by the Link Officer to see if they have any initial views. The request should be dealt with as a standard request, with information gathered, a response drafted and any exemptions/exceptions applied **exactly the same** as for any other request.

The Link Officer responsible for the request needs to send the draft response to Johnathan Schroder in the Communications Team **at least** 4 working days before the response falls due to allow him sufficient time for review. If you think the response would benefit from additional information being provided, perhaps to clarify a situation or provide an explanation please send the additional information marked separately, along with an explanation of why you think it needs to be included in the response. The Communications team can then decide whether or not to include it.

When a request is received from a requestor who is not a journalist, blogger etc, but has asked for information that may attract media attention IMT will ask the Link officer to discuss the proposed response with Communications.

"Hot Topics"

From time to time various issues may become 'hot topics' in the press or to the Barnet community, and often these situations are dealt with by several different parts of the council. At times there may be a requirement that any response on a particular subject be cleared by Communications (and/or senior managers) before it goes out. This will be to ensure that the correct wider corporate information is given and allows the opportunity for issues to be raised that one service is aware of but another, providing the relevant information, is not, and which may eg affect the application of exemptions or the advice and assistance that should be provided. IMT will keep Link officers informed as and when these occur or services may know themselves etc.

(c) Copyright London Borough Barnet 2015

13. Vexatious/ Manifestly Unreasonable

FOI

For FOI Section 14(1) of the Act says that a council does not have to comply with a request that is 'vexatious'. There is no public interest test. This section can be used when a request, or its impact on the council cannot be justified. **It is important to note that it is the request itself and not the individual who submitted it that is classed as vexatious**. Sometimes a request may be so patently unreasonable or objectionable that it will obviously be vexatious – for example 'how many members of staff are wastes of money?'

In cases where the issue is not obvious you need to consider whether the request is likely to cause a **disproportionate** or **unjustified** level of disruption, irritation or distress. This means objectively judging the evidence of the impact on the council and weighing this against any evidence about the purpose and value of the request. It is important not to fixate on the amount of time dealing with a request will take as this is covered by Section 12 – costs – see here: APPENDIX 1 - . For example, a request may take 6 hours to deal with but will cause such disruption to council business or distress that it is vexatious. However, a request that could be classed as vexatious may not be so if there is enough serious value or purpose in it. The context and history of the request, where this is relevant can be taken into account.

The ICO suggests that although not appropriate in every case, it may be worth considering whether a more conciliatory approach could help before refusing a request as vexatious.

We still have to issue a refusal notice, unless we have already given the same individual a refusal notice for a previous vexatious request, and it would be unreasonable to issue another one, and we have warned the individual that we will not issue further refusal notices.

There is more detailed advice in the Appendix here: Appendix 3 Section 14 – vexatious, and if you have a request you think may be vexatious you should speak to IMT for specialist advice.

(c) Copyright London Borough Barnet 2015

EIR

Regulation 12 (4) (b) is an exception that says that a request may be refused if it is 'manifestly unreasonable'. This is very nearly exactly the same as the FOI section 14 refusal for 'vexatious' so the guidance above and in the Appendix here: Appendix 3 Section 14 – vexatious may be used. However, because EIR do not have a cost limit (unlike FOI) an EIR request could be refused under Reg 12(4) (b) if it would take an inordinate amount of time to respond. As there is no upper costs limit an hours limit cannot be put on this, so you could not say 'this response will take 18, 25, 36 or x hours so it is manifestly unreasonable', particularly as the Regs have the provision to extend the time limit for voluminous or complex responses. However, where a response would take such a large amount of time it would disrupt from council business then it may be manifestly unreasonable. There is still the presumption in favour of disclosure, and the public interest test to consider. If you think you have a case that should be refused as manifestly unreasonable please contact IMT to discuss and to gain assistance with drafting the response.

14. Exemptions and Exceptions

The FOIA and EIR both recognise that certain types of information should be exempt from disclosure. This means there is some information that will not be disclosed under a FOI or EIR response even if the council holds the information. The exemptions and exceptions are discussed below. Physically removing the exempt information is called redaction and this is covered later on in the toolkit after the specific exemptions and exceptions.

- **FOIA:** There are two categories of exempt information under FOIA- **absolute** and **qualified.**
- **Absolute exemptions** mean that if the information meets the exemption criteria then it is exempt from disclosure.
- **Qualified exemptions** mean that once the exemption criteria are met a second test needs to be carried out– the **Public Interest Test**. This means weighing the arguments in favour of disclosing information against the arguments in favour of withholding the information. The public interest is what is in the interests of the public – not what interests the public. Where the balance of the public interest test lies in favour of disclosure, the information must be released. If the for and against arguments are equally balanced then presumption in favour of disclosure means that there should be

(c) Copyright London Borough Barnet 2015

disclosure. The public interest test is not a case of counting the factors on each side of the argument – weight needs to be given to different factors. It is possible for 3 arguments against disclosure to be outweighed by one in favour of disclosure.

- **EIR: All exceptions** under the EIR are subject to the public interest test. Where all or part of the requested information is being withheld, the response **must** set out the public interest factors considered for and against disclosure of the information and explain why the weight of the public interest falls where it does.

This is a list and brief outline of the exemptions and exemptions that Barnet could use. There is more detailed guidance for some of the exemptions/ exceptions in the Appendices.

The Act includes etc a number of other exemptions that Barnet as a local authority could not apply, so only the relevant ones are outlined below.

15. FOI Exemptions

FOI - absolute exemptions - if the information meets the exemption criteria then it is exempt from disclosure

15.1 **Section 21 - Information accessible by other means.** If the information requested can be obtained easily by the requester whether hard copy or online, even if a fee is payable then the request can be refused under section 21. For example the information may be part of the council's Publication Scheme or may be available on our website. However, if the requester does not have access to a computer or has a disability that makes such access problematical the council may need to provide a physical copy. This does not mean information needs to be provided to someone without a computer where it available elsewhere for payment for a fee. As we have a duty to provide advice and assistance to requesters we should explain how they could obtain the information, giving a specific web link if possible, or a contact address. It is in our interest to be as helpful as possible, both as good customer service and also to reduce the numbers of Internal Reviews (requests for a review of the response, essentially a complaint) that result.

15.2 **Section 32 - Court Records.**

(c) Copyright London Borough Barnet 2015

If information was created especially for a court case eg a witness statement, or is a court document eg a court order it is exempt under this section. The courts have a very hard line towards applying this exemption and encourage local authorities to use it.

15.3 **Section 40: Personal Information**

Personal information is defined by the DPA as information which allows the identification of a living individual. Personal information is information that allows an individual to be identified. It includes name, address, photographs, car registration numbers and reference numbers eg Council Tax reference number. For example someone may call wishing to discuss a parking penalty charge notice, or their complaint about a neighbour's extension.

Section 40 includes three types of exemption.

1**. Section 40(1)** where the applicant is requesting their own information. Because disclosure to one person under FOI is considered the same as disclosure to the whole world we cannot disclose a requester's personal information to them under FOI. They need to make a subject access request under DPA instead. People often find this perplexing, so an early refusal, some helpful advice and assistance explaining the position and sending them the subject access forms attached to the refusal notice is good practice.

2. **Section 40 (2)** where the information concerns a third party (someone that's not the requester) and disclosure would breach one of the data protection principles. For example the information includes a complaint about named individuals or gives contact details for a company's junior admin staff. It might also include descriptions such as 'my next door neighbour' or 'the old lady over the road' if that would allow someone to be identified. LBB staff details are sometimes included under this section. There is a separate guidance note – staff details and the FOI which is in the Appendix and gives detailed guidance on this issue.

3. **Section 40 (5)** allows the council to neither confirm nor deny that it holds the information. This is used where to say whether information is held would in itself breach the DPA. For example a requester asks "please can I have all the disciplinary records for Timothy Jacobs". To refuse under section 40(2) would be to confirm there ARE disciplinary records, which discloses the personal information that Timothy Jacobs has been subject to disciplinary action. If we say information is not held where there are no such records, but refuses to confirm or deny where there are such records a pattern emerges so people could see through the types of wordings used. Therefore for consistency the council refuses to confirm or deny in all such similar types of cases.

(c) Copyright London Borough Barnet 2015

15.4 **Section 41 - Information provided 'In Confidence'** If a third party has provided information to the council in a situation where to disclose it would be a breach of confidence actionable by law the information is exempt.

15.5 **Section 44 - Prohibitions on disclosure** - where a disclosure is prohibited by an enactment or would constitute contempt of court. An example of a statutory bar would be Reg 44 of the Public Contract Regulations which have restrictions on what information can be disclosed when it has been submitted to a council as part of a tender and reasonably marked as confidential by the company. A court order may contain a clause stating that certain facts in a case are not to be disclosed without permission of the court. To contravene a court order is potentially contempt of court, therefore this information would be exempt from disclosure. If you think disclosure of information may be prohibited by a court order you should consult IMT urgently, as contempt of court is viewed exceptionally seriously by the court, and is frequently punished by imprisonment

FOI - Qualified Exemptions

- Exemptions where once the exemption criteria are met a second test needs to be carried out– the Public Interest Test.

Once one of the exemptions below is met, a second stage must be carried out for the exemption to be applied – the Public Interest Test (PIT). This means weighing the public interest arguments in favour of disclosing information against the arguments in favour of withholding the information. The public interest is what is in the interests of the public – not what interests the public. The public interest test is not a case of counting the factors on each side of the argument – weight needs to be given to different factors. It is possible for 3 arguments against disclosure to be outweighed by one in favour of disclosure. Where the balance of the public interest test lies in favour of disclosure, the information must be released. If the balance is in favour of not disclosing then the information may be withheld under the exemption. If the for and against arguments are equally balanced then presumption in favour of disclosure means that there should be disclosure. This means that sometimes information that is potentially damaging to the council or its interests will be released, if the public interest requires it. Sometimes this can cause tensions between services and where this may happen IMT should be consulted. The PIT can be difficult to undertake and IMT will always be happy to provide specialist advice on this tricky subject.

(c) Copyright London Borough Barnet 2015

15.6 **Section 22: Information Intended for Future Publication.**

If at the time the request is made the council already intends to publish the information, then if the public interest test is met the information is exempt. It is not sufficient when a request is received to think 'this should be on the website, we will publish it next year'. The intention must be there already. If information is routinely updated on the website at specified intervals and needs thorough checking and verifying on a defined schedule, it will be easier to meet the public interest test for exemption. If the information is updated annually, and is simply an administrative convenience to do so, then the public interest may lie in disclosing earlier. Each case will be looked at on its merits.

15.7 **Section 30: Investigations And Proceedings Conducted By Public Authorities And Section 31: Law Enforcement**

The section 30 exemption applies to information that we currently hold or have ever held for the purposes of criminal investigations. For example papers in a Corporate Anti-Fraud Team (CAFT) file. It also applies to information obtained in certain other types of investigations, if it relates to obtaining information from confidential sources eg a whistle blowing allegation.

When information does not fall under either of these headings, but disclosure could still prejudice law enforcement, section 31 is the relevant exemption. Section 31 only applies to information that does not fall into the categories in section 30.

Section 31 applies where complying with the request would prejudice or would be likely to prejudice various law enforcement purposes (listed in the Act) including preventing crime, administering justice, and collecting tax. It also protects certain other regulatory functions, for example those relating to health and safety and charity administration. For example if a property file contains an email from the police saying that they have concerns about a property because its state of disrepair leaves it vulnerable to criminal damage or squatters section 31 could apply. There is more detailed guidance in Appendix XX

15.8 **Section 36: Prejudice to effective conduct of public affairs**

The section 36 exemption applies where complying with the request would prejudice or would be likely to prejudice "the effective conduct of public affairs". This includes, but is not limited to, situations where disclosure would inhibit free and frank advice and discussion and can be applied to a large number of possible situations. Section 36 is unique in that the judgement about prejudice must be made by the "qualified person" – in our case the Monitoring Officer. The qualified person's opinion must be a "reasonable"

(c) Copyright London Borough Barnet 2015

opinion, allowing the ICO on appeal to hold that the exemption is improperly applied if he considers the opinion not to have been 'reasonable'. It is effectively an objective test of whether the opinion of the qualified person was reasonable. Once the 'qualified person' has decided disclosure would /would be likely to cause harm the public interest test has to be applied. If you think you have a case where section 36 is applicable you need to discuss with IMT as this is a highly technical exemption to apply.

15.9 **Section 38: Health And Safety**

You can apply the section 38 exemption if complying with the request would or would be likely to endanger anyone's physical or mental health or safety. Merely being unhappy or upset would not be sufficient to come within this exemption; for mental health some medical *evidence* would generally be required. For physical health there may be more general information available for example some emergency planning documents would be likely to be exempt under this section as disclosure would allow circumvention (by criminals) of the council's planned responses to civil disasters which would put peoples' safety at risk.

15.10 **Section 39: Environmental Information**

- as this can be accessed through the Environmental Information Regulations

15.11 **Section 42: Legal Professional Privilege**

This applies whenever complying with a request would reveal information that is subject to 'legal professional privilege' (LPP). LPP ensures people can be confident about being totally honest and open with their legal adviser when obtaining legal advice, without fear of disclosure. LPP protects information shared between a client and their professional legal advisor for the purposes of obtaining legal advice or for on-going or proposed legal action. It can include instructions to a lawyer, their advice and attachments to the advice. Merely copying a lawyer into correspondence doesn't allow LPP to be claimed; there must also be a request for or receipt of legal advice. This exemption can be difficult to apply as prejudice caused by disclosure can be weakened through the passage of time (especially once a case is concluded) but there is a plethora of case law supporting the principles of LPP so if you have a case where you think this exemption applies speak to IMT to get advice.

15.12 **Section 43: Commercial Interests**

This exemption covers two situations:

(c) Copyright London Borough Barnet 2015

i) when information constitutes a trade secret (such as the recipe for a branded product); or

ii) when complying with the request would prejudice or would be likely to prejudice someone's commercial interests.

This exemption requires:

- the commercial interests to be identified (merely financial interests are not enough – commercial implies trading or transactions),
- the harm caused by disclosure to be identified and
- the way in which the harm will be caused by the disclosure to be identified.

Where the commercial interests are another party/person's eg a company we have contracted with, we need to obtain their view on disclosure and whether or not it will prejudice their commercial interests, and if so how and why. The public interest test is then applied.

It is important to note **it is the council's decision whether or not to disclose the information**. We take the third party's views and opinion into account but the public interest test is for the council to apply. It is quite possible (and correct under the Act) for information that would prejudice a third party's or the council's commercial interests to be released under FOI if the public interest falls on the side of disclosure.

There is more detailed specialist guidance in the Appendix here: Section 43(2) Commercial interests.

16. EIR Exceptions

The exceptions under which environmental information may be withheld are listed under Regulation 12 sections (4) and (5). **All the exceptions (except the personal information one) are subject to the Public Interest Test.**

16.1 The information is the personal data of the applicant – regulation 5(3)

A request for the requester's personal data is a 'subject access request' under the Data Protection Act. It is often the case that a mixed request will be made eg please tell me when I last received a black wheelie bin, and how many people in EN5 have asked

(c) Copyright London Borough Barnet 2015

for a wheelie bin in the last 6 months. The first half would be a subject access request and the second an EIR. You should make sure any personal information disclosed is clearly under the DPA regime and is separate to any EIR response. We are also entitled to ask for proof of identity and charge an administration fee for dealing with a subject access request. Specialist guidance on subject access requests is available here :
http://barnetwork/images/library/documents/corporateservices/subject%20access%20guidance.doc

16.2 **Regulation 12(3) and regulation 13 - The information is the personal data of a person other than the applicant**

When information is the personal data of someone other than the applicant, regulation 12(3) requires us not to disclose that personal data, except in accordance with regulation 13. Regulation 13 stops us from disclosing third party personal data if this would breach the Data Protection Act. Usually it would be unfair to the individual concerned and so the exception is engaged. Regulation 12(3) is not subject to the public interest test. However, some public interest considerations are relevant when deciding whether you can disclose third party personal data in accordance with regulation 13.

We can refuse to confirm or deny if we hold third party personal data about living people under Regulation 13(5) if:

- doing so would breach the Data Protection Act; or
- the data subject would not be entitled to know if their own personal data was being processed.

(c) Copyright London Borough Barnet 2014

16.3 **A request for information can be refused (or part of the information withheld) if:**

16.4 **Reg 12 (4)(a): Information is not held.** If you don't have the information the requester has asked for, regulation 12(4) (a) says you must issue a formal refusal notice telling them that you do not have the information. If we don't already have the relevant information in recorded form we don't have to create an answer or find out information from elsewhere. So there is no need to ask TfL or look it up on external websites or telephone people outside the council.

If the requester has asked a question and although we don't hold recorded information but can answer it, it may be good customer service to answer that question but the EIRs do not require this.

If we know that the information is held by another public authority e.g. Barnet Homes we should advise the requester to redirect their request. We usually do this by providing the other public authority's contact details in the refusal notice.

Although this exception is subject to the public interest test the ICO have said that they accept where a local authority doesn't hold the information there is no merit in undertaking a Public Interest Test.

16.5 **Reg 12 (4)(b): The request is manifestly unreasonable.**

This is very nearly exactly the same as the FOI section 14 refusal for 'vexatious' so see that section for details here: Vexatious/ Manifestly Unreasonable and more details in the Appendix here Appendix 3 Section 14 – vexatious: . However, because EIR do not have a cost limit (unlike FOI) an EIR request could be refused under Reg 12(4) (b) if it would take an inordinate amount of time to respond. As there is no upper costs limit an hours limit cannot be put on this, so you could not say this response will take 18, 25, 36 or x hours so it is manifestly unreasonable, particularly as the Regs have the provision to extend the time limit for voluminous or complex responses. However, where a response would take such a large amount of time it would disrupt from council business then it may be manifestly unreasonable. There is still the presumption in favour of disclosure, and the public interest test to consider. Your link officer or IMT would be able to advise on specific cases.

16.6 **Reg 12 (4)(c): The request is too general (after fulfilling duty to advise and assist)**

The exception under regulation 12(4) (c) allows us to refuse requests that are 'formulated in too general a manner'. The ICO say that this means "requests that:

- have more than one possible interpretation; or

(c) Copyright London Borough Barnet 2015

 are not specific enough to allow you to identify what has been asked for."

If you refuse a request under this Reg you must go back to the requester and ask for more information within 20 working days of receiving the request and give them advice and assistance to help them clarify or reword their request. If clarification is received then the 20 working days start and the request proceeds as normal. The ICO recognise that it can be difficult to do a proper public interest test for this Reg, but say that as long as we have given proper advice and assistance to a requester then we can usually give significant weight to the public interest in favour of maintaining the exception.

If the requester does not respond within three months of our request for clarification the request will lapse.

16.7 **Reg 12 (4)(d): The request is for unfinished documents or data** (in which case estimated time for completion must be given)

We can refuse to provide information under regulation 12(4) (d) if at the time the request is made the relevant material was still being completed, unfinished documents including drafts, or incomplete data. This exception has two aims.

1. Firstly to protect work in progress so on-going work can be completed without interruption and interference from outside; and
2. Secondly to provide some protection from having to spend time and resources explaining or justifying ideas that are not or may never be final.

The public interest test applies to this exception. The ICO take the line that they consider drafts to be incomplete documents even after a final version has been completed, but the public interest in maintaining the exception will decline once the final version of a document is finished or published on the reasoning that a 'safe space' to complete the work is not needed. So we may need to release both the draft and final versions. Sometimes the public interest will lie in just releasing the final version. It will be a case by case decision.

16.8 **Reg 12(4)(e) The request involves the disclosure of internal communications.**

When a request is for information that is an **internal** communication we can refuse it under regulation 12(4) (e). "Communication" isn't just emails or calls, it includes information intended to be communicated to others or to be placed on file where others may

(c) Copyright London Borough Barnet 2015

consult it. Communications within one public authority will constitute 'internal communications'. Communications between a public authority and a third party will not be internal communications except in very limited circumstances. For example, the council may want to argue that emails between Harrow Legal Services and the council were internal communications.

It is important to note that we shouldn't refuse every request for information that is an internal communication. This exception is designed to allow discussion of the merits and drawbacks of proposals or decisions etc and the implications of decisions without outside interference. It allows space to think in private when reaching decisions. As the focus is on safeguarding internal decision-making processes it can apply to completed as well as uncompleted material. If disclosure would harm the way we make decisions or give advice this would be a factor in favour of maintaining the exception. As the public interest test applies, disclosure of many internal communications will be in the public interest.

The council may also refuse to disclose information or withhold part of it in order to protect the following issues.

All the Reg 12(5) exceptions apply **only if** disclosing the information would 'adversely affect' (harm) one of the interests listed in regulations 12(5)(a) to 12(5)(g). The 'adverse effect' test is very similar to the FOI prejudice test. For the exception to apply we need to do **all** of the following:

- Show a negative consequence (this is the adverse effect) of the disclosure
- Show that the negative consequence is significant i.e. it is more than merely trivial, and that it is relevant
- Demonstrate the causal link – i.e. how the disclosure will cause the negative consequence
- Show the likelihood – that the harm is more likely than not to occur.

The public interest test is applied once (and if) the exception test is met.

16.9 **Reg 12 (5)(a): International relations / public security / defence**

The part relevant to Barnet is the public safety part. This includes information that, if disclosed, would adversely affect the ability to protect the public, public buildings and industrial sites from accident or acts of sabotage; and where disclosing information would harm the public's health and safety. For example if a request were received for a copy of the council's emergency planning

(c) Copyright London Borough Barnet 2015

documentations in respect of a wide spread flood, this might be considered under the exception if disclosure would show the areas of vulnerability which could lead to sabotage of flood defences which would be detrimental to public safety.

16.10 **Reg 12 (5)(b): The course of justice and right to fair trial**

Under regulation 12(5) (b), the council can refuse to disclose information that would adversely affect formal legal proceedings, whether criminal or civil, including enforcement proceedings. This would include for example ongoing planning enforcement investigations or food safety prosecutions.

"The course of justice" includes information such as court documents and documents covered by legal professional privilege. It would also cover information about investigations the council conducts about a potential breach of legislation, for example, planning law or environmental law. The meaning of 'an inquiry of a criminal or disciplinary nature' is likely to include information about investigations the council conducts into potential breaches of legislation, for example, planning law or environmental law.

To apply this exception, the disclosure must adversely affect the inquiry by causing some real harm. For example where a tree prosecution is under active consideration it may adversely affect the enquiry if the council's expert tree officer's report is disclosed before a decision is made about a prosecution.

This exception is subject to the public interest test. A 2012 Upper Tier Tribunal Decision (DCLG v Information Commissioner and WR 2012) has held that legal advice provided in an environmental matter was exempt from disclosure under this regulation, even after the court case has ended, and that public policy required a very firm line to be taken on the confidentiality of legal advice.

Once a case has concluded or it is clear there will be no proceedings the public interest in maintaining the exception will be weaker, but still likely to be strong for legal advice. There is a strong public interest in ensuring that the Regulations do not undermine other legal rules and processes that govern access to court records and information There is specialist advice to be found in the Appendix here: Appendix 4 Reg 12 (5) (b) The course of justice and right to fair trial.

(c) Copyright London Borough Barnet 2015

16.11 **Reg 12 (5)(c): Intellectual property rights**

Intellectual property rights are granted to those who create and own works that are the result of human intellectual creativity, in areas like industry, science, literature and the arts. Intellectual property rights (IPR) include copyrights, database rights, patents, trademarks and protected designs. These rights do not prevent disclosure under the EIRs. To except under Reg 12 (5) (c) we have to show that disclosing environmental information will harm the ability of the rights holder to exploit or control their intellectual property rights. The intellectual property rights could be the council's or a third party's. A technical infringement would not be enough to engage the exception. Although we cannot put any conditions or restrictions on information disclosed we can include a copyright notice. This would allow a claim for breach of copyright to be made if the requester or any third party uses the information in breach of copyright. The ICO say that the easier it would be to enforce a copyright breach the less likely it is that the exception would apply. The public interest test applies to this exception. The cross over between EIR and copyright is complex, and advice should be sought from IMT if you think it applies to a case. There is some guidance in the Appendix: APPENDIX 6.

16.12 **Reg 12 (5)(d): Confidentiality of proceedings**

We can refuse to disclose information if this would adversely affect the confidentiality of proceedings. 'Proceedings' are the council's formal meetings and procedures, and confidentiality of those proceedings must be provided by law (a specific Act or case law). If the law does not provide confidentiality of the proceedings then the exception doesn't apply.
Cases would include:

- formal meetings where attendees deliberate over matters within a public authority's jurisdiction; such as papers relating to exempt parts of meeting concerning environmental matters
- Circumstances where a public authority exercises its legal decision-making powers, such as committee meetings where license appeals are heard, and parts of the papers and meetings are exempt from public attendance.

16.13 **Reg 12 (5)(e): Commercial confidentiality**

This exception is unique to EIR and is similar to part FOI section 41 (information provided in confidence) and part FOI section 43 (commercial interests) but with differences. The ICO say that "The purpose of the exception is to protect any legitimate economic interests underlying commercial confidentiality " The information must be commercial or industrial in nature which means it needs to be concerning commercial activity, whether the council's or a third party's. Commercial activities usually involve the sale or

(c) Copyright London Borough Barnet 2015

purchase of goods or services, usually for profit. The ICO say that "Not all financial information is necessarily commercial information. In particular, information about a public authority's revenues or resources will not generally be commercial information, unless the particular income stream comes from a charge for goods or services." If the information falls within this then this test must be met:

- The confidentiality is provided by law.
- The confidentiality is protecting a legitimate economic interest.
- The confidentiality would be adversely affected by disclosure.

Contact IMT for advice if you think this exception applies to information for a request you have.

Appendix 7 contains a guidance note produced for the planning team on how this regulation applies to planning Financial Viability Assessments. These are documents submitted by developers setting out why there should be a particular level of affordable housing in a proposed development.

16.14 **Reg 12 (5)(f): Interests of the person who provided the information to the authority.**

Where the interests of the person providing the information to the public authority will be adversely affected by disclosure; then if these conditions are met the information is excepted:

- the person providing information was not under any legal duty to provide it;
- the public authority is not entitled to disclose the information provided;
- the person providing the information has not consented to disclosure.

This exception protects the free flow of information to public authorities and will often apply to information sent to an ombudsman or other regulators for their investigations. It may apply to details of people who have reported things like planning breaches to the council. However, they should be contacted to ask if they consent to having their data released, so in many cases regulation 12 (3) may be more appropriate. The exception can also cover circumstances where an individual provides information in response to a survey (where they have not given consent to release it into the public domain).

(c) Copyright London Borough Barnet 2019

16.15 **Reg 12 (5)(g): Environmental protection**

Regulation 12(5)(g) provides an exception from the duty to make environmental information available if it would harm the protection of the environment to do so. We would need to establish:

- that the information in question relates to the aspect of the environment that is being protected;
- how and to what extent the protection of the environment would be affected; and
- that the information is not on emissions

Even when the exception is engaged, public authorities must carry out the public interest test.

Special situation regarding emissions:

If information relates to emissions, a public authority cannot refuse to disclose it on grounds of confidentiality of proceedings, commercial confidentiality, personal/ voluntary data or environmental protection.

17. The public interest test

The public interest test applies to most of the exceptions in the Regulations apart from Regulation 12(3) (personal data of a person other than the applicant). However, when considering whether disclosing such data is in accordance with regulation 13, we have to take account of the public interest.

Sometimes we cannot carry out a meaningful public interest test, such as refusing a request under regulation 12(4) (a) because the council doesn't hold the information.

When an exception is engaged, we must consider where the public interest lies before deciding whether to disclose the information. There is a presumption in favour of disclosure under the Regulations; that there should be disclosure unless there is a good reason not to. We can refuse to provide information only when the public interest in maintaining the exception outweighs the public interest in disclosure.

(c) Copyright London Borough Barnet 2015

We must consider the circumstances at the time the request was made. When considering the public interest arguments in favour of maintaining the exception, we can only take into consideration arguments that are directly relevant to the interests that the exception protects. Usually we cannot rely on general arguments for the public interest in withholding the information, although the Upper Tribunal has applied much wider public policy considerations in respect of legal communications.

In addition to the public interest in transparency and accountability, there is a further public interest in disclosing environmental information because it supports the right of everyone to live in an adequate environment, and ultimately contributes to a better environment. Normally public interest arguments in favour of the exception have to be specifically related to what that exception is protecting, but this is a general public interest argument for disclosure, and it does not have to be related to the specific exception.

If the requested information is already in the public domain, it can affect:

- whether the disclosure would still cause an adverse effect;
- whether the test for an exception is still met; and
- where the balance of the public interest lies.

Where more than one exception applies to the information we can combine the public interest arguments in maintaining the exceptions against the public interest in disclosure. This means we can amalgamate the public interests for different exceptions. This is different to the FOIA where the public interest arguments for different exemptions cannot be added together, but need to be considered separately for each exemption.

18. How do I remove the exempt or excepted parts of the information- how do I redact?

If the whole document is excepted then there is nothing to be released and this will be detailed in the response. However, often only parts of a document need to be exempted or excepted, perhaps simply names or initials, or whole pages or even sections eg of a contract. This is done by redaction – making unreadable parts of the text. See the council's Redaction Policy for how to do this

(c) Copyright London Borough Barnet 2017

It is **essential** this is done correctly and also that the original copy is never redacted – we must always keep a clean unredacted copy of the information.

You should also make it clear to the requester what has been redacted and which exception has been used for each redaction.

If the redactions are so extensive as to render the document unreadable consider if you can provide any advice and assistance about what it contains without disclosing excepted material.

You must ensure that exempt (and excepted) information is not hidden and still contained within the data set before publishing, being careful that trace data or all sensitive data from pivot tables has been removed. For example check that the document is not larger than expected – that would indicate hidden data is still in the document.

Pivot tables

Pivot tables sort and summarise data, providing a top level summary of information but still contain underlying data. While the top level summary may be disclosable the underlying data beneath it may be exempt or need partial redaction. Pivot tables, both in Microsoft Excel and other spreadsheet programs, retain a copy of the source data used. This information is hidden from view, but is easily accessible.

You should talk to the providers of the data sets to ensure that you have understood all and any exempt information which may be contained. Ask their advice for removing it.

- Avoid using pivot tables for any disclosures or data sharing involving personal data. Consider using CSV files.
- Check the file sizes before disclosure – larger than expected file sizes should be a trigger for further checks.
- You may also consider anonymising or aggregating information in order to release data sets in a non-sensitive format.

(c) Copyright London Borough Barnet 2015

What restrictions can we put on the use of the disclosed information?

We cannot place any conditions or restrictions on information that we have disclosed under the EIRs or FOI and cannot for example require the requester to sign any agreement before they are given access to the information. However, we could include a copyright notice with the information you disclose.

Also see the Appendix for information on reuse and licensing here: **APPENDIX 5**.

Generally, copyright, database rights and intellectual property rights should not prevent a public authority disclosing information under the Regulations. However, the EIRs differ from the FOIA in that they include an exception to disclosure where releasing information would adversely affect intellectual property rights (regulation 12(5) (c)). This is a very technical area please see the Appendix here: APPENDIX 6

Internal Review Procedure

Any expression of dissatisfaction by a requester regarding an information request is treated as an internal review. This could include a complaint:

- that the response was not responded to
- that the response was late
- that the response did not answer the questions asked
- that the response did not provide the requested information
- disagreeing with an exemption applied
- disagreeing with how the public interest test was applied

A requester that is unhappy with the council's policy on a matter or with the law itself is not a request for an internal review, but may need to be responded to as general correspondence.

(c) Copyright London Borough Barnet 2015

Internal reviews are acknowledged and responded to by IMT so Link officers must pass any correspondences expressing dissatisfaction with an information request to the FOI inbox. The council's internal review procedure complies with the relevant Codes of Practice under FOIA and EIR.

19. Role of the Information Commissioner and the First Tier Tribunal

The Information Commissioner's Office (www.ico.org.uk) is the UK's independent authority set up to uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals.

If following a review the requester remains dissatisfied with the handling of a request they have a right to appeal to the Information Commissioner. They can then appeal to the First Tier Tribunal if dissatisfied with the outcome of the ICO's decision notice. A requester also has a right to complain to the ICO at any stage of an information request. A complaint can be made if a request is not responded to within the statutory time frame. The best way to avoid a complaint to the ICO is to respond promptly and properly to a request.

The ICO also has a wealth of guidance and advice on FOI and DPA, both on general issues and specific topics and sections.

20. Review of Policy

This Guidance and related policies will be reviewed annually and as appropriate by IMT to take into account changes in legislation and to ensure that the policy remains timely and relevant.

21. Contact Information/ Further Guidance

Further advice and guidance is available from the Information Management Team at foi@barnet.gov.uk or on extension 7080.

(c) Copyright London Borough Barnet 2015

22. Appendices

23. APPENDIX 1 -

Guidance on refusing costly requests section 12 Freedom of Information Act 2000 (FOIA) and aggregation of similar requests

This appendix provides detailed advice on how to apply the *Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.* These Regulations are usually known by the more user friendly name of the Fees Regulations and apply to FOI requests only. They do not apply to requests for environmental information, which are subject to the Environmental Information Regulations 2004 and where there is no equivalent costs limit.

Under section 12 of the FOIA the council does not have to comply with a request for information if the cost of compliance exceeds the 'appropriate limit' of £450.

Assessing whether or not the appropriate limit is exceeded. In estimating whether complying with a request would exceed the appropriate limit, we can only take into account the costs we reasonably expect to incur in:

1. **determining** whether we hold the information;

2. **locating** the information, or a document containing it;

3. **retrieving** the information, or a document containing it; and

4. **extracting** the information from a document containing it.

These activities cover the process of identifying what information the council holds and actually collating it together.

(c) Copyright London Borough Barnet 2015

The cost of these activities is estimated by identifying how much time is required per person (both staff and external contractors) to complete them. Costs are calculated at £25 per hour per person regardless of the actual cost or rate of pay. The limit will be exceeded if these activities take longer than 18 hours (as £25 x 18 = £450).

Whilst the council does not have to make a precise calculation of these costs the estimate must be **reasonable,** be made on a case-by-case basis and according to the ICO be "*sensible, realistic and supported by cogent evidence*".

The council does not have to make an estimate before it has started searching for the requested information. In fact it is often necessary to undertake a preliminary search in order to make an estimate. We do not have to spend 18 hours on the four activities listed above in order to apply this exemption, it is enough to have estimated that this time WOULD be spent. However, if it was not expected that this much time would be needed to deal with a request, once 18 hours have been spent then exception can then be used.

In all cases however the response to the applicant must still confirm or deny whether the council holds the information requested (unless this alone would take over 18 hours to determine).

We cannot include the cost of deciding whether exemptions apply and of any subsequent redactions.

It is often the case that collating and extracting the information is very simple – perhaps printing off a large number of emails and documents. However, the redaction and subsequent copying will take many hours. These do not count towards the fees limit and so a request could not be refused in this way. However, a fees notice may be an option. See Appendix below for this.

Refusing a request on time grounds.

When refusing a request under section 12 you must issue a refusal notice that**:**

- confirms or denies whether the council holds the information requested (unless this alone would take over 18 hours to determine)
- explains how the estimate was calculated

(c) Copyright London Borough Barnet 2015

- where possible advised the applicant how to refined or reduce their request to come within the cost limit. For example if the request was for all prosecutions brought by the council in the last 10 years, the advice could be to reduce the time to 6 months, or to one class of prosecutions over 1 year.

It is important to note that there is no requirement to spend 18 hours working on a request, reach the hours limit and then refuse the request, whilst providing the information collated during the time spent. Whilst this may seem to be more helpful to the requester than refusing the request, the ICO guide against this. It may be for example a requester submits a 2 piece request, but question 2 is the information most useful to them. Collating the information for question 1 takes the council 9 hours and it estimates question 2 will take 10 more hours, so it provides the question 1 information and then refuses question 2 on time grounds as the total time would be over 18 hours. This would be effectively wasting the council's time and not providing the requester with the help to refine their request. Refusing the request on the costs grounds under section 12 and advising the requester they can have question 1 or 2 would allow the requester to say they would just have question 2. This would save the council around 19 hours of work and provide the requester with the information most useful to them.

It is always worth contacting a requester by phone or email prior to a costs refusal to discuss with them whether they are prepared to reduce, refine or reword their request.

Aggregation of costs

The council can combine the estimates of complying with two or more requests if the requests are:

- by one person, or by different persons who appear to us to be acting together or in pursuance of a campaign;
- for the same or similar information; and
- the subsequent request is received **within 60 working days** of the previous request.

"Same or similar information" The test for determining whether the information requested is 'the same or similar' is very broad as the requests need only partially relate to the same or similar information. Requests will be similar ***where there is an overarching theme or common thread running between them in terms of the nature of the information that has been requested***.

(c) Copyright London Borough Barnet 2015

For example, questions from the same requester about CPZs, PCNs, and parking enforcement costs are all concerning parking and so would be the same or similar information.

Requests are likely to be similar if they relate to a relationship between two parties, for example between the council and a particular contractor.

Where an applicant expressly relates their request to another in terms of the nature of the information being requested, this can also support the case for aggregation.

Where the aggregated cost only exceeds the appropriate limit by a small amount we may decide not to aggregate the requests. We must consider the merits of each case when considering aggregation and we should provide the applicant with the reasons for doing so. If they request an internal review or complain to the ICO we will need to explain and justify our reasons for aggregation.

Take care with multiple requests contained in the same letter or email as these may be for very different information. For example we may receive two requests in one email, one relating to social services, the other to a planning application. These requests are unlikely to be for 'similar' information and so should not be aggregated, even though they were submitted together.

If we regularly receive requests for the same or similar information, we should consider whether the information can be made available via our publication scheme.

EIRs

- The Fees Regulations apply to FOI requests only and do not apply to requests for environmental information. The Environmental Information Regulations 2004 have no equivalent costs limit.
- We can charge for environmental information **only** where we have published a schedule of charges and details of when we do or do not charge. The schedule of charges is on our website and is usually updated annually.
- If the information is in a public register then we cannot charge for allowing a requester access to the public register.

(c) Copyright London Borough Barnet 2015

- We should not charge for information that would not cost us anything to send eg an email attachment.

- Any charge should be ‘reasonable’ and should not exceed the costs the council will incur in making the information available. We can cover the cost of the paper for photocopying or printing the information and a covering letter and the cost of postage but we cannot charge the costs of staff time in identifying, locating or retrieving the information from storage.

If we do charge a fee we need to refer the requester to our schedule of charges within 20 working days and where we need upfront payment we should tell them together with the amount and methods of payments Until payment is received we do not have to provide the information.

(c) Copyright London Borough Barnet 2015

24. Appendix 2

Section 43(2) Commercial interests

This is a very technical exemption to apply, and although we can give guidance each case must be treated on its merits. Because the ICO will take their own independent view on any case there cannot be any guarantee that section 43(2) exemptions will be upheld on appeal. It is important to pass as much information and evidence as possible to IMT or your Link Officer, as a mere statement that the information is exempt under commercial interests will **never** be sufficient to apply the exemption.

Section 43 has three distinct parts

(1) Information is exempt information if it constitutes a trade secret. This is unlikely to be the case for Barnet or its contractors.

(2) Information is exempt information if its disclosure under this Act "would", or "would be likely to" prejudice the commercial interest of any person (including the public authority holding it). This is the subsection most usually used by Barnet.

(3) The duty to confirm or deny whether the information requested is actually held by the council does not arise if that in itself would prejudice the commercial interests.

Commercial Interests

- The first step is to identify what commercial interests will be adversely affected by disclosure. These must be set out clearly and concisely.

- A commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services. Whilst the underlying motive is likely to be profit this is not necessarily the case, for instance where a charge for goods or the provision of a service is made simply to cover costs. The information may only relate indirectly to the activity of trading, eg where information concerns the risks associated with a proposed course of business action.

(c) Copyright London Borough Barnet 2015

- Financial interests concerning the authority's financial position – areas like banking and investment. Often prejudice to the council's financial interests may affect its commercial interests, but this is not necessarily the case. An example could be prejudice to our banking arrangements would not affect trading as the council could change banks on similar terms.

The following *could* all be the council's commercial interests:

- **Procurement** – Information relating to procurement includes future procurement plans, information provided during a tendering process, including information contained in unsuccessful bids right through to the details of the contract with the successful company. There may also be details of how a contractor has performed under a contract.
- **Private Finance Initiative/Public Private Partnerships** – the council may hold a lot of information both about a particular project in which a private partner is involved and more generally regarding the partner's business.
- **Barnet's purchasing position** –information about the council's position as a purchaser in a commercial environment.
- **Barnet's own commercial activities** – any information held in relation to Barnet's engagement in commercial activities may be commercial interests.
- **Policy development** – during the formulation or evaluation of policy Barnet may have sought commercial information from companies.
- **Policy Implementation** – the council will hold information in relation to the assessment of business proposals when considering the award of grants to organisations.

The council therefore needs to clearly set out the commercial interests involved in as much detail as possible.

The ICO are reluctant to provide a list of the types of information likely to prejudice someone's commercial interest. They suggest some of the questions that should be considered:

Can we show that the information relates to, or could it impact on a commercial activity?

- Could we show that disclosing the budget set aside for a purchase would encourage suppliers to raise their prices?
- Could the information prejudice the council's bargaining position?

(c) Copyright London Borough Barnet 2016

- Is the information likely to have staffing relations issues which the council needs to manage properly in order to minimise disruption to service delivery?

- It is important to note that the price submitted by a contractor is likely to be commercially sensitive during the tendering process, but less likely to be so once the contract has been awarded.

Can we show that the commercial activity is conducted in a competitive environment?

The level of competition is important, as if there is a monopoly over the provision of the goods or services it is less likely that releasing the information will have a prejudicial impact on that company.

Can we demonstrate damage to reputation or business confidence?

- Would the release of the information damage the council's reputation or the confidence that customers, suppliers or investors may have in it?

- Could we show that release would have a significant impact on revenue or threatens its ability to obtain supplies?

There is no exemption for embarrassment!

Is the information commercially sensitive?

Information that identifies how a company has developed its unique elements is likely to be commercially sensitive, for example information explaining how a known price can be achieved or information revealing profit margins is more likely to be commercially sensitive. This could be extended to working practices etc. that allow a quality of service to be more efficiently delivered.

Identifying prejudice

It is not enough to just identify the information as commercial. It is **essential to demonstrate with evidence** that the release of the information would, or would be likely to, harm someone's commercial interests. This may be the council's or our contractor or supplier.

(c) Copyright London Borough Barnet 2015

Third party interests. If we identify that it is a third party's commercial interests (such as a contractor we should contact them and obtain written evidence of the interests involved and the prejudice they foresee. The council must not speculate, and must base the assessment on evidence provided by the third party. The third party might want to seek its own legal advice to assist drafting its arguments. This may have been provided in advance. (Derry City Council v Information Commissioner (EA/2006/0014; 11 December 2006).

The decision about disclosure is the council's to make. Although the third party's views will be considered it is the council's decision alone.

The council's commercial interests.

- Consider how likely the harm is. The council must show that the release *would*, or *would be likely to* cause prejudice. These are slightly different and are known as 'causation'.

- A high standard of proof is needed for 'would' as it indicates the risks is more likely than not to occur. The test for 'would be likely to' is lower than that, but not as low as just theoretical. It still has to be a significant risk.

    - The ICO guidance states that "While the "prejudice" that may be caused by disclosure may not be substantial, nor should it be completely trivial. As for likelihood, while prejudice need not be certain, there must be a significant risk rather than a remote possibility of prejudice. "

    - In its 2012 decision notice to Barnet (FS50448565) the ICO stated :"The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not." In that decision notice the ICO went much further and expected the council to have identified exactly what prejudice would be likely to be caused. It was not satisfied with a general explanation, although the council was concerned that explaining the exact prejudice would effectively be disclosure of the sensitive information.

However the ICO stated at paras 59- 65

(c) Copyright London Borough Barnet 2015

“The Commissioner's guidance and many previous decision notices have accepted the general principles that information relating to a commercial activity is more likely to be sensitive when the activity in question, in this instance, contractual negotiations, is live. However, the Commissioner considers that arguments which identify this generic scenario alone are not sufficient to engage the exemption. The Commissioner considers that the prejudice test is not a weak test, and a public authority must be able to point to prejudice which is "real, actual or of substance" and to show some causal link between the potential disclosure of specific withheld information and the prejudice. The Commissioner considers that an evidential burden rests with public authorities to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, real, actual or of substance…

However, the Commissioner considers that the council has failed to

identify precisely what form the prejudice would take and failed to clarify how this would be caused by the disclosure of the specific withheld information. …{and had failed} to explain precisely how the disclosure of those specific, withheld elements of the register would be likely to result in prejudice…”

What must you do?

Describe precisely how the disclosure of *each specific piece* of information will affect the council

- Show how the disclosure of each piece of information will result in the damage i.e. show the causal relationship
- Quantify the risk - show the prejudice is real, actual or of substance and not just theoretical.
- You will need documented evidence for all of the points above.
- A general argument will be unlikely to succeed: the ICO will need specific examples.
- Often you will (quite reasonably) not know exactly what form the prejudice will take. However to make a successful case for the ICO we will need to inpoint the damage that will be caused, and to be able to detail how disclosure will cause this damage.

(c) Copyright London Borough Barnet 2015

The Public Interest Test

Identifying commercial interests and showing that harm is likely to occur is not sufficient to withhold the information. Section 43 is a qualified exemption which means it is subject to the public interest test. We can refuse to provide the information **only** where we are satisfied that the public interest in withholding the information outweighs the public interest in disclosing it.

There is a bias in favour of disclosure so the arguments against release must outweigh arguments for release before the exemption can be applied.

The public interest test is not the same as what the public is interested in. It is a test of the public 'good' and benefit not of levels of interest.

There will be occasions where information has to be released even though it is likely to prejudice Barnet's commercial interests.

What arguments should we consider both for and against disclosure when applying the Public Interest Test?

Factors to weigh in favour of disclosure.

Releasing the information would be in the public interest where it would:

- improve the public's understanding of, and participation in the debate of issues of the day
- facilitate the accountability and transparency of Barnet's decisions
- allow people to understand the council's decisions. The ICO guidance even goes so far as to say the public interest would sometimes lie in assisting people to challenge the council's decisions
- facilitate the accountability and transparency of how the council spends its money. This is a strong public argument that holds for purchasing goods or services or awarding grants. The ICO view is that transparency of decisions on how public funds are spent will also generate confidence in the integrity of the procedures involved. Demonstrating value for money, especially in the wider context of the current financial climate and the increasing use of the private sector in council service delivery make these arguments for disclosure especially strong.

(c) Copyright London Borough Barnet 2015

Factors that would not be relevant to the public interest test:

- The fact that the information is incomplete, complex or out of context and therefore potentially misleading.
- The only or main identifiable harm is embarrassment or political difficulties. However, if disclosure might discourage openness in expressing opinions, then that might be a reason for withholding it.
- Stating the information was refused previously is not relevant. The passage of time is a factor to consider. What was not in the public interest a year ago may now be in the public interest or have a different 'weight'.
- Potential for the information to be misinterpreted. This argument was dismissed by the ICO in FS50448565 as they stated " where authorities have concerns about the accuracy of information or the potential for misinterpretation, rather than withholding the information, one option is to provide an explanation or other background information to set the disclosure in context".

Factors that would weigh against disclosure

- Ensuring that there is sufficient competition for public sector contracts, as disclosure could reduce the number of companies willing to do business with the public sector, leading to reduced competition and increased costs.

The ICO advises against using this argument on the following grounds

  - Companies must?? accept public access scrutiny as a cost of public sector business
  - The value of public sector contracts is a great incentive to tender.
  - Increasing access to information about the tendering process may actually encourage more potential suppliers to enter the market.
  - A better understanding of the process, criteria and successful bid details may lead to improved bids being submitted which would increase competition and decrease public sector costs.

- Disclosure may cause reputational damage that could affect future commercial dealings.

(c) Copyright London Borough Barnet 2015

There will be other arguments that can be made that will be specific to the information concerned, and these will be defined on a case by case basis. You will need to consider what these are for each case and provide clear written details of them.

Summary

To withhold information under the section 43(2) exemption you need to demonstrate with evidence ALL of the following:

- The information is of a commercial nature
- Whose commercial interests these are
- Describe precisely how the disclosure of *each specific piece* of information will affect the council i.e. what damage will be caused.
- State whether disclosure would or would be likely to cause harm to the council's commercial interests.
- State why and how disclosure of each piece of information will result in the damage i.e. show the causal relationship.
- Quantify the risk - show the prejudice is real, actual or of substance and not just theoretical.
- The public interest test is met - it is more in the public interest to withhold the information than it is to release. You will need to provide arguments about what factors you have considered for withholding and for release and why you have concluded the test is met. If some factors have more weight than others you need to state which ones and why.

Whether the ICO will uphold the exemption will be decided by them on a case by case basis. Making a successful section 43(2) argument has been made more complicated by the ICO decision against the council, and if you wish to make an argument under this section you are advised to seek early advice from IMT.

(c) Copyright London Borough Barnet 2014

25. Appendix 3 Section 14 – vexatious

Section 14 allows a local authority to refuse to respond to a request if it is “vexatious”. “Vexatious” is not defined in the Act. However, it means a request that is unnecessarily onerous, mischievous, or disproportionate to the aims of the Act, a case that would take people away from local authority core duties with little public benefit to be gained from the information. Requests which will cause distress or harassment to colleagues may also be vexatious. There have been a number of ICO decision notices on this subject, which as every case was decided on its own individual merits were often of limited more general use as guidance. However, in 2012 the Upper Tribunal ruled on a landmark section 14 case, known as Dransfield. The UT gave clear guidance on what could be vexatious and identified the guiding principles to be followed. Following this case the ICO issued new updated guidance (available on their website (link)). This, in accordance with Dransfield puts the emphasis on the disproportionate nature of a vexatious request, and the disruption dealing with it would cause, with no overwhelming public benefit to negate the disproportionality. There is no checklist for vexatious, and every case needs to be looked at strictly on its merits. Unusually for the FOIA the context and history of a request can be taken into account. This can turn an otherwise vexatious request into a request that should be responded to, and vice versa.

In 2013 the council successfully defended the labelling of 21 requests from one requester, mainly around one subject, over a 2 month period as vexatious. This was based on the number of requests received, the obsessive nature of the requester, the distress and harassment that could be evidenced as being caused to staff and the lack of a serious purpose to the requests. This was an exceptional case, and it is not necessary to meet every ‘criteria’ for a request to be vexatious. Another instance was where a requester had made a relatively small number of requests (9) concerning one specific premises, but the argumentative and tendentious nature of the requests, coupled with repeat Internal Reviews and associated correspondence that was rude, aggressive and intemperate led us to refuse a request as vexatious. The ICO informally upheld our action, although as the requester withdrew their complaint no formal Decision Notice was issued.

It is important to remember it is the request not the requester who is deemed vexatious; and having one request refused as vexatious will not bar a requester from asking future requests – which should be assessed on their own individual merits.

(c) Copyright London Borough Barnet 2015

This Section guidance can be used for determining whether a case is manifestly unreasonable under the EIR, however that regulation is slightly wider as costs and time may be used in manifestly unreasonable, but not in section 14 (where section 12 should be used instead).

If you have a case where you think section 14 might apply you should speak to a member of IMT for advice.

(c) Copyright London Borough Barnet 2015

Appendix 4 Reg 12 (5) (b) The course of justice and right to fair trial

Under regulation 12(5) (b), the council can refuse to disclose information that would adversely affect formal legal proceedings, whether criminal or civil, including enforcement proceedings. "The course of justice" includes information such as court documents and documents covered by legal professional privilege. This advice covers the LPP aspects. LPP covers legal advice given by lawyers (internal layers and external solicitors and barristers). It also covers the request to lawyers for advice (instructions) and may cover the supporting documents to the instructions and advice if disclosure of these would divulge the content of the advice.

A 2012 Upper Tier Tribunal Decision DCLG v The Information Commissioner + WR (2012) UKUT 103 (AAC) has held that legal advice provided in an environmental matter was exempt from disclosure under this regulation, even after the court case has ended, and that public policy required a very firm line to be taken on the confidentiality of legal advice. In the case of *Reg v Derby Magistrates Court, Ex p. B*, [1996] AC 487, the Judge stated "The principle which runs through …is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."

According to the Information Commissioner in DCLG and WR "there will always be a strong element of public interest inbuilt into the LPP exception……. the public interest in allowing public authorities to discuss their legal rights and obligations with their legal advisers in confidence is very strong."

Once a case has concluded or it is clear there will be no proceedings the public interest in maintaining the exception will be weaker, but still likely to be strong for legal advice. There is a strong public interest in ensuring that the Regulations do not undermine other legal rules and processes that govern access to court records and information.

This exception is subject to the public interest test.

Some factors that would be in favour of disclosure would be:

(c) Copyright London Borough Barnet 2015

- There is a presumption of disclosure of environmental information.

- Whether the issues relating to the advice have attracted considerable national and/or local interest.

- There is a public interest in ascertaining what advice the council has taken, whether it has been acted upon and whether it has been properly taken into account.

- There is also a general interest in ensuring that decisions taken by public authorities are as transparent as reasonably possible.

Some factors that would be in favour of maintaining the exception would be:

- The legal advice and surrounding and supporting documentation attract Legal Professional Privilege (LPP). This is a very strong interest.

- Whether the legal advice and surrounding documentation is recent, live and still being relied upon.

- Whether there are related court proceedings underway and if the council is required to disclose its advice that would adversely affect its ability to protect its position in any proceedings currently or subsequently.

- Whether it would be unfair for the council to disclose its legal advice without having the same benefits from any complainants. It could put the council at a disadvantage in preparing for any prospective proceedings to be forced to disclose in advance confidential advice that was legally professionally privileged. Even once the likelihood of legal proceedings had been diminished the information might still be relevant to future proceedings for any subsequent similar actions in respects of other similar schemes or policies.

- The effect on the course of justice, in terms of a weakening of confidence in the efficacy of LPP generally

(c) Copyright London Borough Barnet 2015

3. APPENDIX 5

Data Sets, Licensing and Pivot Tables

The council has to comply with amendments to the Freedom of Information Act which relate to *how* information is released to requestors. The focus on Freedom of Information has moved from *accessing* information to *re-using* it. These amendments mean that whenever the council receives a request for information in an electronic format, and the response is contained within a data set, the council should publish that data set in an open and re-usable form.

As with usual FOI responses personal, sensitive, and commercially sensitive information must be redacted. You must ensure that exempt information is not hidden, and still contained within the data set before publishing, being careful that trace data or all sensitive data from pivot tables has been removed.

Data sets

Any information which you collect and collate electronically is a data set in some format. It might be listed in a simple spreadsheet with few or multiple columns, or in a data base. The definition under the Act is:
a collection of factual information in electronic form to do with the services and functions of the authority which is neither the product of analysis or interpretation, nor an official statistic and has not been materially altered.

- You should release *factual information* – information that is quantitative rather than qualitative –i.e. numbers not opinions
- You should *not* release information subject to *analysis and interpretation*, *other than calculation* – eg not predictions, nor attach further information which are not inherent in the data itself. Further calculation is permitted since it produces factual information inherent in the data itself.
- You do not have to release information which has been *materially altered* - the format of the information should not have substantially changed since first being collected.

Quality checking does not count as altering or analysing or interpreting the data set!

(c) Copyright London Borough Barnet 2015

Determining which data sets to publish

Once you have verified that the request is for an electronic format, and that the response is contained within an electronic data set as defined by the Act, you must decide whether and how you can publish the data set.

You are not required to turn hard copy into electronic data sets.

If the requester has asked for part of a dataset, you are not obliged to provide the whole of the dataset, only the information that has been requested. However it may be more useful or easier to provide whole data sets, provided the other information is not exempt.

In some cases it will be straightforward and involve no expenditure to convert a dataset to an open format such as CSV. If the dataset is held as a relational database, rather than as a single table, then this may be a more complex operation. If the dataset is very large or held in a proprietary system, to convert it to an open format may involve significant expenditure. In this case it may be outside our duty to provide it.

Factors to consider in relation to whether it is reasonably practicable to provide a response in electronic form relate to existing provisions in the FOI Act and include time and cost.[1] However staff should consider that the council is working towards making increasing amounts of information available in open format and that it may be practical to respond and maintain update processes as requests come in as part of this wider work. Information Management Governance Groups will be taking a strategic lead on open data work and you should refer significant numbers of requests for data sets from complex systems to them.

There may also be a situation in which the dataset has been heavily redacted, for example to remove personal data that is exempt from disclosure under FOIA, and what is left may have limited informative value. The requester is still entitled to receive this under FOIA, but if to convert it to a re-usable form would involve substantial cost and effort there may be a case for saying that it is not

[1] Section 11 of FOIA, 11(2) *In determining for the purposes of this section whether it is reasonably practicable to communicate information by particular means, the public authority may have regard to all the circumstances, including the cost of doing so.*

(c) Copyright London Borough Barnet 2015

reasonably practicable to do so. Apart from the cost considerations, there may also be cases where technical issues make it impracticable to convert the data from a proprietary to an open format.

If the public authority decides that it is not reasonably practicable to provide the information in a re-usable form, the requester can ask the authority to review its decision and then, if they are not satisfied with the authority's review, complain to the Information Commissioner.

Redacting Exempt information

Information is redacted under FOI/ EIR exceptions and exceptions in the usual way. You must ensure that exempt information is not hidden, and still contained within the data set before publishing, being careful that trace data or all sensitive data from pivot tables has been removed.

Pivot tables

Pivot tables sort and summarise data, providing a top level summary of information but still contain underlying data. While the top level summary may be non-sensitive the underlying data beneath it may be sensitive. Pivot tables, both in Microsoft Excel and other spreadsheet programs, retain a copy of the source data used. This information is hidden from view, but is easily accessible.

You should talk to the providers of the data sets to ensure that you have understood all and any exempt information which may be contained. Ask their advice for removing it.

1. Disclosure of hidden personal data in pivot table spreadsheets may be a breach if the Data Protection Act. The data is not secure and is easily accessible, even if not immediately viewable.

2. Avoid using pivot tables for any disclosures or data sharing involving personal data. Consider using CSV files.

3. Check the file sizes before disclosure – larger than expected file sizes should be a trigger for further checks.

You may also consider anonymising or aggregating information in order to release data sets in a non-sensitive format.

(c) Copyright London Borough Barnet 2015

Re-usable format

Data sets should be released *in a form technically capable of re-use.*

A re-usable format means it is in a machine readable format (such as Comma-separated Value (CSV) format) based on open standards.

The new EU Directive on the re-use of public sector information contains the following definitions:

Machine-readable format: means a file format structured so that software applications can easily identify, recognize and extract specific data, including individual statements of fact, and their internal structure; in a format which can be easily read by a computer. Rather than block text data should be structured, and rather than pdf files or image scans ('human-readable'), data should be in files that a computer can also read such as Excel.

Open / non-proprietary format: means a file format that is platform independent and made available to the public without any restriction that impedes the re-use of documents. Using a non-proprietary format ensures that developers can easily make use of the data without further formatting. This could be a comma separated values file, (CSV) or XML for example.

Formal open standard: means a standard which has been laid down in written form, detailing specifications for the requirements on how to ensure software interoperability.[2]

You can easily save an Excel file as an XML spreadsheet or CSV file. After selecting 'Save as' click on the dropdown box 'Save as type' and then select 'CSV'.

(c) Copyright London Borough Barnet 2015

[2] Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information.

Licensing

As well as releasing datasets which are technically capable of release, we must provide datasets under a specified licence where possible.
First we must ascertain whether a data set contains copyright information. If it only contains our copyright information we must release it under a licence that permits re-use in accordance with the terms of the specified licence. This would either be the Open Government Licence (OGL) – where we are permitting users to freely use and re-use our information, only requiring that they attribute - or a specified licence under the UK Government Licensing Framework .

If it is not our copyright we must name the owner where possible.

The UK Government Licensing Framework provides full details of licensing options including the Non-Commercial Government Licence for non-commercial use.

Open Licence

An open licence allows anyone - businesses, individuals, charities and community groups - to re-use information without having to pay or get permission. The Open Government Licence (OGL) for public sector information is a standard licence for use across the UK and covers a broad range of information, including acknowledgement and attribution, Crown Copyright, and databases and source codes. Barnet already uses the OGL for its publication scheme information.

Publishing. Once the data set and its licence has been cleared by the relevant manager you should publish the data set to the open data disclosure log.

(c) Copyright London Borough Barnet 2015

APPENDIX 6

COPYRIGHT AND REQUESTS FOR INFORMATION UNDER FOI AND EIR and ORDNANCE SURVEY DATA

"I can't release this information – it's copyright"

The Council may receive requests for information under FOI or EIR which is marked as copyright – usually by a ©. This can be council created information, or information we have bought or been given. This note gives some guidance on how to deal with this information.

Copyright is one of the Intellectual Property rights (IP). It covers items of literary merit, usually written documents but also songs, photographs etc. The legal regime is contained in the Copyright, Design and Patents Act 1988 (CDPA).

It might be thought that copyright protected documents would be automatically exempt from disclosure. However, this is not the case. Section 50 of the CDPA says that where copying or publication is specifically authorised by an Act of Parliament then copyright is not infringed.

Responding to a FOI or EIR request is an act authorised by an Act of Parliament and so there will be no breach of copyright legislation in disclosure.

FOI : Section 44 of the FOI exempts from disclosure information whose release is prohibited by law but this does not apply to copyright protected material due to s 50 CDPA.

EIRs – for EIRs the position is stated clearly in the Regs: Reg 5(6) says that "any enactment or rule of law that would prevent the disclosure of information in accordance with these regulations shall not apply".

"So copyright is worthless if you can get the information through FOI or EIR?"

(c) Copyright London Borough Barnet 2015

- No, the copyright still attaches to the documents.
- The copyright owner's IP rights still exist and can be enforced by them.
- So the recipient cannot use this information as they wish, but only in accordance with the CDPA.

    - For example, they may use it for private study as that is permitted, but they could not to put into a commercial document and sell it as their own work.
    - The original IP holder would be able to take action against the user for breach of copyright.
    - The action would be against the person unlawfully using the information, not against the council for releasing it under FOI/EIR.

What do I say in the FOI/EIR response?

FOI/EIR responses that disclose copyright protected information need to make it clear that :

- The information released is copyright protected
- the use of the information is subject to the CDPA,
- if the recipient breaches this they may be liable to legal action by the IP holder.
- It is up to the person using the information to decide if they will be in breach of copyright or not and if they are not sure they need to seek their own independent advice

"What if disclosure will cause harm, to the council or the IP holder, do I still have to disclose?"

No, the other exemptions/exceptions in the FOI/EIR can still be applied. These are different depending whether it is a request for environmental information under EIR or non environmental information under FOI.

Freedom of Information. Section 43(2) (disclosure would or would be likely to prejudice commercial interests) may apply.

- If publication of the copyright protected material would, or would be likely to adversely affect the commercial interests of the council of a third party then it may be exempt under section 43(2). This exemption is subject to the Public Interest Test . The ICO guidance says that copyright attaching to information that has a commercial value may actually facilitate disclosure

(c) Copyright London Borough Barnet 2015

as copyright infringement is something that can be enforced. Their guidance suggests that section 43(2) arguments may be difficult to maintain where the copyright holder would be able to take effective action against a breach of copyright.

- If publication of the material would be prejudicial to commercial interests then this exemption may be applied.

<u>Environmental Information</u>. EIR Reg 12(5) (c) exempts information from disclosure where there would be an adverse effect on IP rights.

To establish this we would have to show that it was more probable than not that:

- The material is protected by IP rights and
- The IP rights holder would suffer harm – it's not enough to show that IP rights have been infringed. It must be some **real loss**; and
- The identified harm must be as a **consequence** of the infringement or loss of control
    - Where it is argued that disclosure will result in the IP rights holder losing the opportunity to exploit information commercially the ICO will expect us to provide evidence there is a market for it; **AND**
- The potential harm or loss could not be prevented by the IP holder enforcing their IP rights.
    - The ICO will take account of an IP right holder's ability to do this. This will be based on the practicality of taking action not the personal circumstances of the IP holder
    - If it can be shown that the IP rights holder could not effectively enforce their IP rights then if the other conditions are met the exception will be engaged (subject to the public interest test)
    - The fewer people likely to breach the IP rights the easier it would be to detect the infringement.

The ICO summarises this as meaning it has to be more probable than not that:

(c) Copyright London Borough Barnet 2014

- Someone would wish to exploit the protected material
- They could successfully do so; and
- Infringements would go undetected or could not be prevented.

The exception is subject to the Public Interest Test which means that the public interest in maintaining the exception must outweigh the public interest in disclosing the material. There is a presumption favour of disclosure under the EIR. .

Regulation 12(5) (e) commercial confidentiality might be a relevant exception. This applies where the information is:

- Commercial or industrial; and
- Subject to confidentiality provided by law e.g. in a contract; and
- Is confidentiality protecting a legitimate commercial interest; and
- Disclosure would adversely affect the confidentiality.

- If you think you have a request where this exemption would apply to copyright protected material you should contact the Information Management Team for specialist help on foi@barnet.gov.uk

OS (Ordnance Survey) Data – an overview.

If you receive a request for information included in OS data there are some slightly different rules to dealing with the request, because of the license agreement we have with OS to use their maps and data. There are different forms of licenses for different types of data, and what actions are permitted will depend on the license type. This is not always straightforward! Some licenses will permit some manipulation of raw data and others will not.

How will you know if the request is for OS licensed data? It will probably include a request for a map, or mapping data or geographic information such as boundaries.

How do you then deal? Firstly, which category does the request fall into?

A request for just OS licensed data- with no additional information added or overlaid by the Council, e.g. just the map extract.

(c) Copyright - London Borough Barnet 2015

FOI – refuse under section 21 as this information is publically available. People can buy a map from OS, direct them to www.ordnancesurvey.co.uk. The fact that payment is required doesn't stop it being readily available under section 21.

EIR – maps won't fall within the definition of 'environmental information' under the Regs so refuse as an EIR and deal as a FOI as above.

A request for OS licensed data which contains content created by the council – e.g. an OS Map with information of schools overlaid.

Is this already publically available? E.g. on the website, or in a documents on the website, or publically available on any of the links from the map pages of the council's website http://www.barnet.gov.uk/info/940326/interactive_maps/912/interactive_maps

If so, then refuse under section 21 FOI as above, or under Reg 6 (information readily available) under EIR.

If it isn't readily available publically but is held by the council then we need to consider if we could meet the requester's needs by putting the licensed information onto a map and giving them a hard copy, or scanning a hard copy and emailing it so they cannot manipulate or reuse the data then this is an option.

If this cannot be done, or if this would not meet the requester's needs, as they are asking for raw data they can manipulate then we will need to consider the exact terms of the OS license agreement. The terms will allow us to see what information can and cannot be released and in what format. Contact IMT for specialist case specific advice as early as possible, with full details and an offering of cake.

(c) Copyright London Borough Barnet 2015

Appendix 7 **Planning Financial Viability Documents**

Background and scope

Developers who have applied for planning permission may have submitted a financial viability assessment (FVA) to the council which contains their calculations for affordable housing and the viability of the scheme proposed.

Developers generally regard these as ‘commercially sensitive’ or ‘confidential’ and wish to restrict their dissemination.

The council may receive a request for their disclosure from members of the public.

Members may need to view these FVAs as part of their role in determining planning applications at committee. They may have occasions where they wish to view them as part of other duties for example ward Member case work.

This note sets out the general approach to be taken in dealing with requests for disclosure of FVAs by members of the public. It is important to note that definitive guidance cannot and must not be given and every case must be determined on its individual merits, in accordance with the legislation. This note is intended as a general guide only.

This note also sets out the council’s general approach to requests by Members for access to FVAs, following the general approach in the Members Information Management Policy.

1. Summary

- Each request for disclosure of a FVA must be decided on its individual merits which will be unique to each case and definitive binding guidance cannot be given in advance of any particular request.

- FVAs are unlikely to be considered wholly exempt under the Environmental Information Regulations, and are likely to be disclosed in full or in a redacted form. This is likely to be the case even where the developer concerned considers the information to be ‘commercially sensitive’ and where the developer has established they may be adversely affected by disclosure. This is entirely proper under the relevant legislation.

(c) Copyright London Borough Barnet 2015

- Members may request access to FVAs under information rights legislation in the same way as the public. They may also be able to obtain access by virtue of their rights as Members but the use to which they may put the information in this case is very restricted.

- The planning link officer and the Information Management Team are available for guidance on specific cases.
-

2. Freedom of Information/ Environmental Information Regulations.

FVAs are considered to be environmental information and therefore come under the Environmental Information Regulations 2004 ('EIRs' and 'the Regs') rather than the Freedom of Information Act 2000 (FOIA and 'the Act').

The Regs are based on an EC Directive and operate subtlety differently from the Act which is domestic legislation. For FVAs these differences affect how the council has to approach requests for disclosure of FVAs.

a. Considering the Request

The Regs have a presumption in favour of disclosure. This means the starting point is that the council **MUST** release all the information unless an exception applies **and** the public interest test is met.

For FVAs the most usual exception is Reg 12(5) (e): commercial confidentiality. To come under this exception the information must be commercial or industrial in nature which means it needs to be concerning commercial activity, whether the council's or a third party's. Commercial activities usually involve the sale or purchase of goods or services, usually for profit. Most FVAs will fall into this category. If they do then <u>each</u> of the following must also be met:

- The confidentiality must be provided by law
- The confidentiality must be protecting a legitimate economic interest
- The confidentiality would be adversely affected by disclosure

The appropriate FOI link officer will write to the developer concerned inviting them to make representations as to whether they consider the information falls within Reg 12(5)(e), and if so how. The developer must make these arguments itself, and they cannot be assumed by the council.

(c) Copyright London Borough Barnet 2015

The council will set a deadline for the developer to respond. As there are statutory time limits for responding to EIR requests, which cannot be extended, it is likely that the deadline given to the developer will not be extended. If it does not respond by the deadline then the information must be released in full.

Developers may make arguments that the whole of the documents is to be considered exempt. However it is highly unlikely that FVA will be wholly exempt: much of the information contained within them will be publically available. Some of it will be in the planning application, site descriptions will be common knowledge, comparisons with other properties available for sale or rent locally will be publically available. Under the Regs this information cannot be considered to be exempt from publication and must be released.

The link officer, with assistance from IMT will assess any representations made and will decide whether the information comes within the exception.

They will consider relevant precedents. There have been a number of First Tier Tribunal (Information Rights) ('FTT') decisions considering whether FVAs are exempt under Reg 12(5)(e). Although these give guidance on general principles and show how the FTT generally approaches and views cases, they are not binding cases. Every case must be decided on its individual merits and the public interest factors (see below) will naturally always be unique to each case. However, the general theme of FTT cases has been that FVAs are generally not wholly exempt. In some cases they have been ordered to be released with no redactions at all.

Therefore the most likely outcome will be that *at least parts* of the FVA may be considered under Reg 12 (5)(e), depending on the precise arguments made by the developer.

b. Public Interest Test

If it is considered that some of the information may fall with the exception the council then will apply the public interest test.

This is where the public interest factors in favour of maintaining the exception (withholding the information) are balanced against those in favour of releasing. This test is undertaken by the link officer in conjunction with IMT. Planners may be asked to assist in identifying public interest factors based on their knowledge of the particular planning application etc.

(c) Copyright London Borough Barnet 2015

It is important to note that it is the council's responsibility to undertake the public interest test. Developers may make suggestions as to where the balance of the public interest should lie as part of their submissions. However the test is for the council alone to undertake. There is also a presumption in favour of disclosure in the Regs, meaning that in borderline cases the decision will be made to disclose.

It is also important to note that it is entirely proper for information which would commercially damage a developer to be released – lawfully and properly- if the balance of public interests requires it. This is sometimes unpalatable for developers who view commercial sensitivity with a very wide commercial view point and often do not have the appreciation of the statutory regime under which the council operates.

c. Release and reuse

Where the information is to be released in full this will be undertaken by the link officer. Where some information is to be withheld and some released the link officer will undertake the necessary redactions and release the redacted information to the requester.

Where a FVA has been released (either wholly or in a redacted form) under the EIRs this information is considered to be in the public domain and anyone can comment on, discuss, disseminate and re-use (subject to any copyright issues) the information.

3. Access by Members

a. Categories of access

When determining whether members may access these documents and the use to which they may put the information in them it is important to consider the how the Member has been given the information. This is because Members may receive information in their role as Members, or in the same way as the general public e.g. through committee documents or FOI/EIR. The uses Members can make of the information will depend on the route through which the information was obtained.

b. EIRs

Members may make FOI or EIR requests in the same way as members of the public. Generally they are encouraged to request information through their usual Members' channels rather than the statutory process. However, there may be occasions when

(c) Copyright London Borough Barnet 2015

Members wish to request information through the statutory process to provide them with certainty over what may be disclosed and what must be kept confidential. Requests from Members are dealt with in exactly the same way as requests from members of the public.

Where a FVA has been released (either wholly or in a redacted format) under the EIRs this information is considered to be in the public domain and anyone can comment on, discuss, disseminate and re-use (subject to any copyright issues) the information.

This means that Members are free to use information released under the EIRs as part of their role as this information is considered to be disclosed to the whole world.

c. Members' rights of access

Members have rights of access to information by virtue of their roles. This is covered in the Members Information Management Policy.

This policy says the council's Access to Information Procedure Rules, part of the council's Constitution, provide Members with details of their rights to inspect council documents concerning meetings of the Council.

Beyond these, a Member has a right to request information where they can show a 'need to know' that information in order to perform their duties as a councillor. Access to information under this common law right necessitates a Member demonstrating their 'need to know', and this requirement has been covered in case law.

In many circumstances a Member's 'need to know' will normally be presumed, such as a committee member wishing to inspect documents or briefings relating to the functions of that committee. However, the law does not allow a 'roving commission' and in some circumstances the motive for requesting information will be relevant and a Member will be expected to justify their request for information. The determination of the need to know will initially be carried out by the relevant service, who may seek advice from the Information Management Team.

It may be that a member can demonstrate a need to know the full contents of a FVA, which will be determined on a case by case basis.

(c) Copyright London Borough Barnet 2015

Where a need to know has been demonstrated the Member can be provided with a copy of the FVA. How they may use it is covered below.

d. **Use of the information**.

If a FVA is provided under the Member's right to access the information they may use it only for the purposes for which the council have provided it. The right of access is not the same as the right to publish or make public. This means that Members cannot disclose the FVA to others and must keep the contents confidential. The FVA cannot be disclosed to other Members (because they would need to individually demonstrate their need to know the information).

This is covered in section 4 of the Members Code of Conduct:

You must not:-

(a) disclose information given to you in confidence by anyone, or information acquired by you which you believe, or ought reasonably to be aware, is of a confidential nature, except where:—

(i) you have the consent of a person authorised to give it;

(ii) you are required by law to do so.

Disclosing confidential information may be considered a breach of the Members Code of Conduct.

Therefore if a Member has established a need to know the information and has been provided with a copy of the FVA they should not disclose it unless given permission to do so.

When providing copies of FVAs to Members under the Members' right to access it would be helpful to include a statement to them to remind them they cannot disclose the confidential information.

This is consistent with the provisions of the EIRs. If a FVA has been disclosed under the EIRs the developer has been given the opportunity to make representations as to what information should be withheld from the public, and the council will have undertaken

(c) Copyright London Borough Barnet 2015

a comprehensive assessment of the situation and the public interest test. Any decision to release under Members' rights of access will not have afforded the developer the same opportunity and therefore the member cannot disclose the information.

If a member is provided with a FVA under the Members' right to access information and the FVA is later released under EIR the Member may disclose, publically discuss the publically released information as this is publically available. Any information redacted from the EIR disclosed version will remain bound by the code of conduct requirement for confidentiality.

(c) Copyright London Borough Barnet 2015