



Access to information: from need to know to right to know

Report of the Overview Task Group

Task group members:

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December 2004

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Introduction by the Chair of the Overview Task Group



It is with great pleasure that I introduce this report on Brent Council's implementation of the Freedom of Information Act and related environmental legislation. With the deadline for implementation looming in January 2005, it has been an opportune time for a task group of members to outline the policy and resource implications faced by the council now and in the future. I thank my colleagues for their time and commitment and Michael Royce, our policy officer, for the support he gave to us.

My colleagues and I focused on two key principles: the council should proactively release as much information as it can through effective use of its publication scheme and other resources; and the council should act in a strategic corporate way to assess policy and resource implications for the effective implementation of the legislation.

Another aim of our work has been to push the debate within the council beyond simple compliance with the rules, important though that is. We were conscious that the council is embarking on the first step of a journey to change its ethos from "need to know" to "right to know" in the provision of information to the public.

The systems and attitudes adopted from January 2005 will determine the council's mindset in implementing the new access to information regime in the months and years ahead. In commending our report to the Overview Committee and the Executive, we hope it plots a positive and responsible path to openness.

A handwritten signature in black ink, appearing to read 'Neil Nerva'. The signature is stylized and somewhat cursive.

Councillor Neil Nerva

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Executive summary

General

- 1 As a task group, we were guided by two key principles during our examination of the implementation of the Freedom of Information Act 2000 (Fol Act):
 - The council should proactively release as much information as it can through effective use of its publication scheme¹ and other resources.
 - The council should act in a strategic corporate way to assess policy and resource implications for the effective implementation of the legislation.
- 2 We concentrated on those aspects of implementation that might help to promote a change in ethos in the council from “need to know” to “right to know”. Our intention was to go beyond simple compliance with the rules.
- 3 The analysis is based on the latest guidance available for implementation and on research conducted with the council’s directorates. Most of our recommendations are directed at the information implementation group² (IIG), convened by the borough solicitor, to oversee implementation of the Fol Act. The language may seem technical at times, but every attempt has been made to explain difficult terms in the main body of the report.

Publication scheme and charging

- 4 The publication scheme is a key tool for implementing the Fol Act both in practice and in spirit. We recommend that by March 2005:
 - The IIG undertakes a thorough review of the council’s scheme, in particular in consultation with partners who share information with the council.
 - The reviewed publication scheme contains a much more comprehensive listing of the information that the council will make available as a matter of routine, and by doing so, will reduce the need to deal with special requests under the Fol Act.
- 5 Promoting public awareness of the Fol Act in print, through posters and online will be a key component of effective communication. We urge that:
 - The IIG works with the council’s communications unit to devise effective ways of communicating the Act to the public and other interests in general and of communicating the publication scheme’s contents in particular.

¹ The Fol Act requires the council to adopt and maintain a publication scheme of the information it makes available; the scheme also explains how the public can access this information. The Information Commissioner, the Fol Act’s watchdog, gave formal approval to the council’s current publication scheme in March 2003. It is subject to renewal every four years.

² The information implementation group, convened by the borough solicitor, will meet bi-monthly and report to the Corporate Management Team. Its members, made up of nominated officers from each directorate, will have the responsibility for dealing with enquiries that relate to their department; disseminating training and good information practice throughout their service area; updating and maintaining service area input into the publication scheme; and providing input to the formulation of corporate records management.

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- 6 To further enhance the publication scheme as a working tool, we recommend that:
 - The IIG works with the corporate IT unit to evaluate the resources necessary to establish and maintain an indexed version of the scheme online.
- 7 Charging for information is a discretionary option for the council. We believe it is reasonable for the council to charge for complex requests, in accordance with the rules. A clear statement on vexatious requests will be necessary to ensure that the delivery of front line services is not adversely affected. However, we recommend that:
 - The IIG sets out how the charging regime will operate in practice.
 - Brent Financial Services indicates how it will disburse the charges collected among the directorates.

Records management

- 8 The Fol Act sets out in its Code of Practice the requirement for a corporate lead on good records management. We recommend that:
 - The IIG produces a clear action plan that the council will adopt, and the resource implications the council will face, to improve its records management processes.
 - The Corporate Management Team and the Executive each nominate one of their members to take lead responsibility for records management.
- 9 We consider that it is essential that work on records management should proceed expeditiously, not only to reduce the costs of complying with the Fol Act, but also to ensure that the council has the information it needs to manage its activities. Management of paper-based records is as important as any proposed IT solutions.

Qualified exemptions and EIR exceptions

- 10 Our investigation of the preparations made by council departments concerns us, as parts of the authority may rely on past customer practices and may not understand the limited scope of some of the exemptions. There is some risk that a failure by officers to understand the extent of the public's right to know will lead to breaches of the Fol Act.
- 11 From time to time, the council will need to invoke exemptions to prevent the disclosure of certain information, depending on the circumstances of the case and in accordance with the rules. We have chosen to concentrate on four exemptions that may have policy and resource implications for the council.
- 12 The qualified exemption under section 36 of the Fol Act, prejudice to the effective conduct of public affairs, risks becoming an excuse for non-disclosure of information, even though only a "qualified person" may apply it. We recommend that by January 2005:
 - The Corporate Management Team works with the borough solicitor to

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identify the limited range of information (as opposed to documents) held within the council that might be exempt under FoI section 36. This should be kept under review as case law develops and should be mindful of the separate legal basis under which much environmental information must be considered.

- 13 Section 39 of the FoI Act is an exemption that provides a link to the Environmental Information Regulations 2004 (EIRs), which will run in parallel with the FoI Act. Although processes employed to respond to requests for information will be very similar, those responsible for replies will have to apply the correct legal basis. Given this fundamental point and the wide definition of “environmental information” in the EIRs, we recommend that:
- The implications for the council are fully taken into account in legal, policy and resource terms.
 - The IIG disseminates appropriate guidance and training to all staff, in particular to those who are expected to develop FoI expertise in their directorates.
- 14 In respect of the FoI exemption on personal information about a third party, and its link to the Data Protection Act 1998, we recommend that:
- The IIG works with the Human Resources and Diversity team to prepare a written and accessible policy statement on the implications of the FoI Act on staff.
 - Legal and Democratic Services perform a similar exercise for members.
- 15 The exemption on commercial interests is certain to cause debate within the council. We recommend that:
- Non-prejudicial tendering information should be made routinely available, once a contract has been let, in order to ensure public accountability.
 - The council’s procurement unit should work with Legal Services to support the directorates in reviewing confidentiality clauses in existing contracts. This may require a revision of the template for tenders to ensure that prospective contractors are aware of their potential obligations under the FoI Act and related legislation.

Public interest and the public interest test

- 16 As adjudicating on the public interest will require consistent application, sound judgment and clear objectivity, we believe that:
- It is essential that council directorates, reluctant to disclose certain information, should present their cases to the council’s corporate information manager, who in consultation with Legal Services, will determine where the public interest lies.
 - The decisions reached by the corporate information manager should be binding on the department holding the information.
- 17 In respect of the editing of documents that contain both disclosable and non-disclosable information, we believe that:
- Decisions on what to edit out require objective human judgment and ought to be made, in general, by the person with FoI expertise rather than the

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person with policy responsibility for the document in question.

- 18 On the occasions when it is determined that it would not be in the public interest to disclose certain information, we believe that:
- Refusal notices to applicants should be in the name of the director responsible for the information being requested.
 - In the event of the Fol section 36 exemption being applied, the refusal notice should be in the name of the chief executive or borough solicitor, as the “qualified person” for that exemption.
- 19 In preparing guidance on application and review of exemptions and the public interest test, we recommend that by January 2005:
- The IIG adopts clear and transparent procedures.
 - The procedures should indicate the standard format of refusal notices and in whose name they will be issued if exemptions apply.
- 20 Where the different legal bases for the Fol Act, EIRs and Schedule 12a of the Local Government Act 1972 have a similar or identical exemption, we recommend that:
- The IIG works with Legal Services to ensure a seamless and not overly complicated implementation of the public interest test in such cases.

Internal review and complaints

- 21 The Fol Act requires the council to employ internal complaints and review procedures that applicants can use, before they take their cases to the Information Commissioner. By the end of January 2005, we recommend that:
- The IIG devises transparent, simple and consistent processes for internal review, in line with those adopted at the first stage of decision making.
 - Refusal notices issued to applicants after internal review should be in the name of the chief executive.

Members’ rights and responsibilities

- 22 Elected members will have the same rights as anyone else to request information from January 2005; they will also retain their long-held common law “need to know” rights. In addition to any constitutional amendments, we recommend that:
- Members are issued with straightforward advice on how they can reasonably exercise their “need to know” rights in light of the new access to information regime.

Publication scheme and charging

- 23 Every public authority, from central government departments, local authorities, NHS Trusts to individual schools, is required to adopt and maintain a publication scheme. In the words of the Information Commissioner, "A publication scheme is both a public commitment to make certain information available and a guide to how that information can be obtained."
- 24 The Information Commissioner approved Brent Council's publication scheme for four years from March 2003, with the expectation that it would be reviewed periodically before being subject to renewal. The council's publication scheme has not been reviewed since March 2003.
- 25 Our task group undertook some email research with the borough's schools. It appears that most schools have either a publication scheme or Fol policy in place. However, we believe that the council's education department should confirm that all schools are complying with the Act, and should offer guidance where appropriate.

Review of the Publication scheme

- 26 The publication scheme is the key tool for the council to implement the Freedom of Information Act 2000 (Fol Act), both in spirit and in practice. Its revision and maintenance should allow the council to:
- consult with the public, its partners and local interests;
 - explain how freedom of information works within the council; and
 - release as much information as possible into the public domain.
- 27 By consulting with the public, its partners and local interests, the council will be able to ensure that all information it can make available matches their requirements and is included in its publication scheme. It will be a way to demonstrate that the council is committed to implement the spirit of the Fol Act. Learning from partners' schemes is another important factor.
- 28 Consultation and information sharing with the public takes many forms. Area consultative forums and service user consultative forums reach a growing number of residents. The Brent Magazine, posters and the council's web pages allow the council to disseminate information more widely within the whole borough. The council also consults individual organisations linked to the borough. Not only can the use of such consultation and media feed into the review of the publication scheme's contents, it can also be used to promote general public awareness of the new access to information regime.
- 29 The council shares information with a number of key partners. Most partners are represented, along with the council, on the Local Strategic Partnership. Of particular importance is the information shared between the council and the Metropolitan Police, the NHS Trust and the Primary Care Trust. The council also has important relationships with housing associations. Some directorates within the council share information with central government departments and

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agencies. In our view, the council's publication scheme should indicate how information sharing works between the council and its partners and how inter-agency requests will be dealt with.

- 30 Our research³ indicates that the council's directorates have a mixed record to date in consulting their partners about implementing the FoI Act:

The Education, Arts and Libraries directorate has consulted all its key partners and will be signing up to the Brent information sharing protocol⁴.

Social Services and Human Resources and Diversity, although recognising the need to consult with partners about information sharing, have not done so yet.

Most departments in Environmental Services have not consulted with partners. However, the Parks Service is investigating whether it has the necessary resources and systems to participate in the sharing of biodiversity information, through the proposed '*Greenspace Information for Greater London*', which would act as a biological records centre for London.

Corporate Services has indicated that it will consult partners as and when a request for shared information is received.

- 31 An information implementation group⁵ (IIG) has been convened to oversee the council's compliance with the Act. Part of its work will be to investigate information sharing between partners. We believe this work is a vital component of the review of the publication scheme.
- 32 Overall, the publication scheme ought to be a working document for council officers and members, as well as a reference tool for councillors, members of the public, partners, community groups and the media. A simple, but complete explanation of the processes used to answer a request for information, including procedures for exemptions, charging, inter-partner requests and appeals/complaints, should help to embed cultural acceptance of the FoI ethos within the council and show the community it represents and serves of its good intent.
- 33 We recommend that the IIG undertakes a thorough review of the council's publication scheme by March 2005, in particular in consultation with partners who share information with the council. In addition, we urge that the IIG works with the council's communications unit to devise effective ways of communicating periodically with the public and other interests in respect of the publication scheme's contents and in respect of promoting general awareness of the Act.

³ We asked a series of questions to the council's directorates during September and October 2004. Full details are held with the Policy and Regeneration Unit.

⁴ The draft protocol outlines the framework and standards for sharing information about service users between the public sector partner agencies in the London Borough of Brent. Part seven of the draft protocol deals with the application of inter-agency Freedom of Information requests.

⁵ An explanation of the information implementation group can be found in the executive summary.

Indexing the publication scheme online

- 34 A key policy for the council should be to release as much information as it can through its revised publication scheme. A beneficial consequence should be a reduction in the number of individual requests for information, and the staff time and resource costs associated with them.
- 35 Our research⁶ indicates that much more information could be added to the revised publication scheme. Those council directorates replying to our questions identified several classes of information that they receive requests for, but which do not form part of the existing publication scheme. In addition, the directorates listed the classes of information they expect to receive requests for from January 2005. This research will be a good basis on which to begin a review of the publication scheme.
- 36 We believe that the council should develop its online publication scheme in tandem with its printed version. Electronic reading of publicly available information, if accurately indexed, would enable staff and applicants to search for information. Nonetheless, the publication scheme will only be as good as the information it classifies.
- 37 We recommend that the IIG works with the corporate IT unit to evaluate the resources necessary to establish and maintain an indexed version of the publication scheme online.

Charging applicants for information

- 38 The Lord Chancellor issued a statement in October 2004 regarding charging for information. He made a distinction between central government departments/agencies and other public authorities, including councils. From the guidance available it appears that charging will be a discretionary option for the council in responding to individual requests for information⁷. The council will have the option to charge applicants after the first two and a half days of searching for the information they request. At this point the charge to the applicant can be £450⁸ plus disbursement costs, such as postage and packaging. However, legal and consultation costs cannot form part of the charge. Further guidance from the Department of Constitutional Affairs is imminent for searching and retrieval costs above £450.
- 39 We expect that most individual requests for information will not incur a charge. However, it seems reasonable to charge applicants for complex inquiries that will take more than two and a half days to answer⁹. A clear statement on vexatious requests will also be necessary to ensure that the delivery of front line services is not adversely affected. The council must, nonetheless, guard against taking a complacent attitude towards standards of records management. In addition, the council will need to take care not to use

⁶ The compiled results are held with the Policy and Regeneration Unit.

⁷ It seems that the publication scheme may quote charges for information contained within it.

⁸ The charge is based on two and a half days, or 18 hours, of searching for requested information at £25 per hour.

⁹ The council will have to advise applicants of any charges; applicants will have 3 months to pay.

charging to discriminate against those on low incomes.

- 40 Council departments will need to consider how they can communicate effectively with applicants to scale down their requests to a level where charging does not come into play. It will not be acceptable to members if most requests have £450-plus charges levied on them with no attempt to advise and assist the applicant to scale down requests to a reasonable level. The Information Commissioner has also indicated that he will be examining information charging policies in public authorities.
- 41 We assume that members will not be charged for making requests for information in the course of their duties. However, simple procedures will be necessary so that members exercise their rights in a reasonable manner under the access to information regime¹⁰.
- 42 We recommend that the IIG sets out how the charging regime will operate. Brent Financial Services should indicate how the council will disburse charges collected among the directorates.

Records management

- 43 “Any freedom of information legislation is only as good as the records to which it provides access”. This statement appears in the Section 46 Code of Practice on Records Management, issued by the Department for Constitutional Affairs, as required by the FoI Act.
- 44 Adoption of the Code by the council is not statutory. However, the Information Commissioner has the power to issue a practice recommendation to the council if it is not following the Code. This might become apparent, for example, during an investigation following a complaint.
- 45 The Section 46 Code makes three key requirements:
 - The records management function should be recognised as a specific corporate programme within the [council] and should receive the necessary levels of organisational support to ensure effectiveness.
 - The [council] should have in place an overall policy statement, endorsed by top management and made readily available to staff at all levels of the organisation, on how it manages its records, including electronic records.
 - A designated member of staff of appropriate seniority should have lead responsibility for records management within the [council]. This lead role should be formally acknowledged and made known throughout the [council].
- 46 Ideally, a records management policy statement and practices ought to have been in place before the deadline of January 2005. Some initial work on records management has commenced in the council, but it will only begin in

¹⁰ The council's constitution will be amended to reflect the implementation of the FoI Act.

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earnest after the formal date of implementation of the Act. Obvious risks to the council abound, the following examples of which the Information Commissioner would undoubtedly censure:

- Inability to locate all the necessary records, in particular for cross-council issues;
 - Inability to meet the 20 working-day deadline for requests; and,
 - Charging the applicant because records management is poor and creates excessive costs to locate information.
- 47 A powerful corporate lead needs to gain momentum in the next few weeks and months to galvanise the council to adopt an overarching management system for written and electronic records to meet the requirements of the Code. Minimum standards for the creation, retention and destruction of records are paramount and long overdue. Different services need to keep a disparate range of records, but a piecemeal approach to records management will no longer be satisfactory. After all, most applicants will only comprehend that they are making a request for information to Brent Council and not to its constituent parts.
- 48 Resource implications for records management have not yet been estimated; nor has an action plan been formulated for the months ahead. The council needs to evaluate, as a matter of urgency, budgetary implications, both short-term and long-term, in its drive to set records management standards. In our view, the management of paper-based records is as important as any proposed IT solutions.
- 49 There is a clear business case in knowing, as accurately as possible, what information the council holds and where it holds it for service development and delivery. The drive to CPA excellence is another powerful impetus.
- 50 We recommend that the IIG sets out a clear action plan that the council will adopt and the resource implications the council will face to improve its records management processes. To this end, the Corporate Management Team and the Executive should each nominate one of their members to take lead responsibility for records management.

Qualified exemptions under the FoI Act and EIR exceptions

- 51 Although the FoI Act contains 23 exemptions, both absolute and qualified, it is highly unlikely that any public authority will need to rely upon more than a handful of them. Brent Council is no exception. We have chosen to concentrate on four qualified exemptions in the FoI Act that we consider will have important policy and/or resource implications for the council:
- Prejudice to the effective conduct of public affairs (section 36 of the FoI Act)
 - Environmental information (section 39)
 - Personal information concerning a third party (section 40)

- Commercial interests (section 43)

Prejudice to the effective conduct of public affairs (FOI section 36)

- 52 A “qualified person” is required to exercise this exemption: either a government minister or a person authorised for this purpose by a minister. The Office of the Deputy Prime Minister and the Local Government Association are in discussions to decide whether the “qualified person” for local authorities will be the chief executive or the borough solicitor. He or she will not be able to delegate this responsibility within the council.
- 53 Given the wide scope of this exemption, and the potential for its misuse as an excuse for non-disclosure for all types of information, we believe that the council needs to be extremely cautious in its application. Circumstances and case law will change over time; however, it seems sensible for the council to set out the exceptional classes of information where it believes disclosure would prejudice the effective conduct of public affairs.
- 54 We recommend that by January 2005 the Corporate Management Team works with the borough solicitor to identify the limited range of information (as opposed to documents) held within the council that might be exempt under Fol section 36. This should kept this under review as case law develops and should be mindful of the separate legal basis under which much environmental information must be considered.

Environmental information (Fol section 39)

- 55 We chose to highlight this exemption because of its links to the Environmental Information Regulations 2004, which have been revised to implement into national law the international Aarhus Convention on access to environmental information and the related European Directive on public access to environmental information.
- 56 Although, in practice, the Fol Act and EIR processes can be closely aligned, officers will still need to receive adequate guidance for them to determine under which set of rules the access request has been made, as Fol and EIR will run in parallel. The Information Commissioner will be keeping a close eye on which legal basis public authorities use to answer requests for information and may issue a practice recommendation where appropriate.
- 57 Key differences between the two legal bases are:

Freedom of Information Act 2000	Environmental Information Regulations 2004
Request must be in writing	Request need not be in writing
Information held on behalf of another person is not included	All information held is included, whether or not it is held on behalf of another person
Absolute exemptions are not subject to the public interest test	All “exceptions” are subject to the public interest test

- 58 **Environmental Information within the meaning of EIR 2004**
Environmental information within the meaning of the 2004 regulations may mean any information in written, visual, aural, electronic or other material form on¹¹:

- a. the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements,
- b. factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a),
- c. measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements,
- d. reports on the implementation of environmental legislation,
- e. cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c), and
- f. the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)."

Definition of EIR terms

- 59 Clearly, requests for access to environmental information will have implications for the council, in particular for its environmental services. However, other service areas will need to be aware that the EIR rules may apply to any information they hold. The following definition of terms of some of the categories in points (a) to (f) gives an indication why:

AIR: air within buildings and other natural and man-made structures above or below ground and in air conditioning systems.

WATER: underground and surface waters (both natural and in man-made structures) sewage and foul water.

¹¹ The Department for the Environment, Food and Rural Affairs is the responsible central government department for implementation of the Environmental Information Regulations 2004 into national law. The department is still producing guidance for public authorities.

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LAND AND LANDSCAPE: all land surfaces, buildings, caves and underground strata. Land covered by water is also included.

HUMAN HEALTH AND SAFETY and CONDITIONS OF HUMAN LIFE: human response to physical, chemical and biological agents delivered through environmental media of water, air, land, and biodiversity etc.

BUILT STRUCTURES: structures, roads and other infrastructure created by mankind and includes ancient and historic monuments.

EMISSIONS, DISCHARGES AND OTHER RELEASES INTO THE ENVIRONMENT WHEREVER THEY OCCUR: direct or indirect release of substances, liquids, gases, radiation, vibrations, light or noise from individual or diffuse sources into or onto air, water or land.

MEASURES (INCLUDING ADMINISTRATIVE MEASURES): environmental management programmes, procurement plans and programmes, permit schemes, management contracts, housing maintenance programmes, land-use planning regimes and permits, regeneration and transport development plans and proposals as well as the policies of central and local government.

AFFECTING OR LIKELY TO AFFECT: Assessments that may help the council identify the potential impacts of policies, plans and programmes, including any unintended environmental effects, as well as assessments of desired outcomes.

Examples “affecting or likely to affect” include schools admissions policies that may have the effect of either increasing or reducing travel to school; congestion charging schemes that may result in a greater use of public transport; policies that relate to the locations of hospitals, GP surgeries, waste and recycling facilities; controlled parking zones; traffic calming measures; and the availability of funds for crime reduction work, cultural activities and the arts, or the provision of business infrastructure.

EIR exceptions

- 60 Environmental information falling within the scope of the EIRs may be defined very broadly, both at the national and the European levels. In contrast, EIR exceptions are less numerous than exemptions in the FoI Act. All EIR exceptions will require the council to apply a public interest test.
- 61 It is important to note that if EIR rules are applicable, then the council may **only** have recourse to EIR exceptions. The council cannot use FoI exemptions to suit its needs in these cases. Clear guidance is needed for all staff on this fundamental point.
- 62 EIR exceptions are split into two sections¹². The first section refers to refusals, which can be made if:

¹² Information in brackets has been added to clarify the exception.

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- Information is not held (but refer request on)
 - Request is manifestly unreasonable (in terms of cost, for example)
 - Request is too general (but offer advice and assistance)
 - Request is for unfinished documents or data (give estimated time for completion)
 - Internal communication (this includes policy deliberation)
- 63 The second section refers to refusals that can be made if disclosure would adversely affect:
- Confidentiality of proceedings (includes committee/board minutes)
 - Course of justice and right to a fair trial (until decision is made)
 - Commercial confidentiality
 - Intellectual property rights
 - Personal/voluntary data (gateway to Data Protection Act 1998)
 - Environmental protection (to prevent harm or damage to habitat)
- 64 Information on emissions, broadly defined, must be disclosed by the council if the applicable exception falls under section two, apart from the one concerning the course of justice and right to a fair trial. The assumption is that the public interest in disclosure is already inherent in such cases.
- 65 Pointedly, in the case of confidentiality of proceedings and commercial confidentiality, no guarantees of absolute confidentiality are possible under EIRs. Confidentiality must be weighed against the public interest within the meaning of the EIRs. This will become more apparent as case law develops.
- 66 We recommend that the implications of the EIRs are fully taken into account in legal, policy and resource terms. We urge that the IIG disseminates guidance and training to all staff, in particular to those who are expected to develop Fol expertise in their directorates and who will be determining the correct legal basis to answer requests for information.
- Personal information concerning a third party (Fol section 40)**
- 67 Third party requests for personal information about somebody else are decided in accordance with the eight data protection principles, but within the overall framework of the Fol Act. A third party in the case of the council could be an officer or a member, as well as a partner or the recipient of a service. A similar gateway exception exists under the EIR rules.
- 68 The data protection principles were put in place by the Data Protection Act 1998 to make sure that personal information is handled properly. The public interest test that applies to personal information concerning a third party will have to keep to these principles. They are that data must be:
- Fairly and lawfully processed;

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- Processed for limited purposes;
 - Adequate, relevant and not excessive;
 - Accurate;
 - Not kept for longer than is necessary;
 - Processed in line with your rights;
 - Secure; and,
 - Not transferred to countries without adequate protection.
- 69 Others factors the council will need to consider when applying the public interest test to this exemption concern fairness and the potential harm that disclosure might do to the third party. Here we discuss requests for information that may affect officers and members.
- 70 In terms of fairness the question to ask is whether the information relates to the private or public life of the officer or member. In general, it might be argued that the more senior a person is in the council, the less likely it will be unfair to disclose information about that person acting in a work or official capacity. However, it will obviously be legitimate to exempt the disclosure of information that might put the officer or member at risk of physical or mental harm.
- 71 There may be a strong public interest in the provision of information about how the council has spent public money, such as for salaries and expenses. The extent to which such information is broken down or made anonymous will be a matter of judgment within the data protection principles.
- 72 Another example relates to contact details. The photos, home addresses and contact details of councillors are posted online as a direct link between them and their constituents; such an interface between public and private is a necessary part of local democracy. Conversely, it is not routine to publicise the names, photos and addresses of council officers.
- 73 As part of the council's corporate standards it will be good practice to develop a policy in consultation with staff and members as to what information will be routinely disclosed about them, as a result of the implementation of the FoI Act, and what might be withheld depending on the circumstances of the case.
- 74 We recommend that the IIG works with the Human Resources and Diversity team to prepare a written and accessible policy statement in consultation with staff on the implications of the Act on them. A similar exercise should take place with members, most appropriately through Legal and Democratic Services¹³.

¹³ See also the section on members' rights and responsibilities

Commercial interests (Fol section 43)

- 75 This exemption applies to trade secrets, and to information which if disclosed would, or would be likely, to prejudice the commercial interests of any entity, including the council's own commercial interests. A similar exception applies under the EIR rules and also under the revised Schedule 12a of the Local Government Act 1972 in respect of key meetings and decisions of the executive.
- 76 A commercial interest relates to a person's ability to successfully participate in a commercial activity, i.e. the purchase and sale of goods and services. Sources of a company's competitive edge include production methods. The level of competition within an industry will affect whether the release of information will prejudice someone's commercial interests.
- 77 Very often, in a commercial environment, the timing of the disclosure will be of critical importance. Simply because a request was refused at one point in time does not mean that the information can be permanently withheld. Market conditions will change and, for example, information relating to costs may very quickly become out of date.
- 78 A case in point is the tendering process for contracts. Once the tendering process has been completed and the contract awarded, it becomes less obvious to maintain the exemption for commercial interests. The exercise of judgment is in determining the level of prejudice: the nature and likelihood of harm to commercial interests; or whether there is a significant risk of prejudice rather than a remote possibility of it.
- 79 It might be legitimate to argue, for example, that disclosure of tendering details might prejudice the commercial interests of a contractor if the same contractor has submitted a similar bid to another public authority at the same or intervening time. The timing and nature of the second bid will be the important factors to consider. However, in general, we believe that non-prejudicial tendering information, which does not divulge trade secrets, ought to be made routinely available, once a contract has been let, in order to ensure public accountability¹⁴.
- 80 The commercial interest exemption will often overlap with that relating to information provided in confidence (Fol section 41). In practice, an indication of whether or not interests of a third party are prejudiced may be answered by considering the likelihood of the third party being able to successfully take action against the council in the courts for breach of confidence. An example might be professional advice received from a consultant¹⁵.
- 81 As a matter of principle the council ought to be wary of accepting arguments that the potential for commercial information to be released would reduce the

¹⁴ Transport for London already employs the practice of publishing tender results.

¹⁵ It is important to note, however, that a breach of confidence can only occur if the council receives information in confidence from a third party; it does not refer to confidential information the council has generated itself through its internal activities.

number of companies willing to do business with it, leading to reduced competition and increased costs. A powerful counter-argument says that the opposite may result as procurement processes become more transparent.

- 82 Following a request for information the council will need to consult with its contractors, within the permitted time limit, but the ultimate decision on whether to apply the exemption will rest with the council. Being proactive is, once again, the key policy driver. As well as developing a new approach to confidentiality clauses in the future, the council may also wish to review its existing contracts with third parties. In addition, consultation with contractors now may reduce the need to consult with them following a request for information and speed up response times to the applicant¹⁶.
- 83 We are concerned, therefore, to learn through our research¹⁷ that few areas within the council have proactively consulted with contractors to inform them of their obligations under the Act.
- 84 We recommend that the procurement team in Brent Financial Services works with Legal Services to support the council's directorates in reviewing confidentiality clauses in existing contracts. We urge, in addition, a revision of the template for tenders to ensure that prospective contractors are aware of their potential obligations under the FoI Act and related legislation.

Public interest and the public interest test

- 85 The public interest test will apply to all qualified exemptions that the council wishes to invoke under the FoI Act following a request for information. As already mentioned, it will apply to all exceptions applied under the EIRs. It will also apply to four out of five exemptions permitted under Schedule 12a of the LGA 1972 in respect of the executive's key decisions and meetings.

What is the public interest?

- 86 The public interest is not defined in the Act; neither is the public. This is deliberate and commonplace in all similar jurisdictions. The implication is, therefore, that the public interest will change over time, as case law develops, and according to the circumstances of each case.
- 87 When applying the public interest test, the council will be deciding in each case whether it serves the interests of the public better to withhold or to disclose information. It is worthwhile stressing, though, that the public interest is not necessarily the same as information in which the public is merely interested¹⁸.

¹⁶ These suggestions are set out in the Section 45 Code of Practice prepared by the Department for Constitutional Affairs, as required by the FoI Act.

¹⁷ The collated results are held by the Policy and Regeneration Unit.

¹⁸ Other jurisdictions have highlighted this distinction through their case law.

- 88 Nonetheless, there are some key factors to consider when determining where the public interest lies:
- Potential “harm” of disclosure;
 - Level of information already available to the public to make an informed decision;
 - Timing of disclosure.
- 89 Harm in this context does not mean using an exemption to hide official embarrassment over an administrative decision. It refers to the potential risks, such as physical or mental harm, that members of the public, as well as officers and members of the council, may face through disclosure of information. More widely, harm may include prejudice to effective governance within the council and prejudice to the council’s commercial interests.
- 90 Information already released to the public ought to assist their understanding of an issue that is subject to local debate. In such cases, the public interest test might conclude that enough information is already in the public domain to ensure sufficient transparency and accountability. The public interest will inevitably become stronger for information requests related to high profile issues in the media and those related to issues of good public administration.
- 91 The temptation may be to advance the argument that information once released will be misinterpreted by those in possession of it. But by not releasing the information without an adequate explanation the council risks being labelled with a “need to know” mentality, instead of a “right to know” mindset that the Act is supposed to promote. The solution, in our view, is for the council to put sensitive information into a proper context, rather than to retain a default position of withholding it.
- 92 Members as well as the public may benefit from being supplied with information placed into a proper context. An example includes information on the pre-application stages of planning decisions within the borough. This is particularly relevant regarding significantly large development proposals.
- 93 The timing of disclosure will often be a critical factor when considering the public interest. There are legitimate reasons to apply an exemption if the timing of disclosure might be prejudicial: a future publication date might already exist; a procurement exercise might be ongoing. However, once the decision to proceed with any proposed action is taken, the need to withhold the release of information weakens over time.

Who decides what is in the public interest?

- 94 For our research, the council directorates were asked to specify what classes of information they would be reluctant to disclose and why. The replies indicated a wide range of understanding in how to apply the exemptions and the public interest test within and between directorates¹⁹. We find this

¹⁹ The compiled results are held with the Policy and Regeneration Unit.

worrying as the deadline approaches for implementation, despite recent initiatives to make staff aware in general and to train key staff in particular.

- 95 To illustrate our point we wish to highlight replies received from separate units within Environmental services. StreetCare, quite sensibly, would not wish to disclose patrol timetables of its town centre wardens (although we trust that the service will consult its police partners who may also share this information). By way of contrast, we find it difficult to understand why the transportation service would be reluctant to disclose inspection reports on roads and pavements. And no service unit within Environmental Services made reference to the Environmental Information Regulations.
- 96 Adjudicating on the public interest requires, in our view, consistent application, sound judgment and clear objectivity. We are reassured that council directorates, reluctant to disclose certain information, will present their cases to the council's corporate information manager, who will consult with Legal Services to determine where the public interest lies. We believe that decisions on whether to disclose or not should be binding on the information holder.
- 97 We extend this recommendation in respect of the redaction of documents that contain both disclosable and non-disclosable information. Decisions on what to delete require objective human judgment and ought to be made, in general, by the person with FoI expertise rather than the person with policy responsibility for the document in question.
- 98 On the occasions when it is determined that it would not be in the public interest to disclose certain information, we believe that refusal notices to applicants should be in the name of the director responsible for the information being requested. In the event of the FoI section 36 exemption being applied, then the refusal notice should be in the name of the chief executive or borough solicitor, as the "qualified person" for that exemption.
- 99 We recommend that the IIG adopts clear and transparent procedures for applying and reviewing the public interest test. In particular, the procedures should indicate the standard format of refusal notices and in whose name they will be issued if exemptions apply.

Public interest test and the different access regimes

- 100 Access to information is a complex regime to implement. Each legal basis has a public interest test for some or all of the exemptions/exceptions. It is imperative, therefore, that systems employed to determine the public interest are no more complicated than they need to be.
- 101 For example, FoI, EIR and Schedule 12a (access to information in the executive forward plan) each have an exemption for commercial interests. Similarly, FoI and EIR have exemptions for personal information that offer a gateway to the Data Protection Act. It is sensible, in our view, for the council to adopt a well thought-out and consistent approach to how the public interest

test will be applied in such instances. A legal labyrinth should be avoided: it will make the process overly resource intensive and burdensome; and it will not demonstrate a transparent regime to the public at large.

- 102 We recommend that the IIG works with Legal Services to ensure a seamless and not overly complicated implementation of the public interest test in all cases where the different legal bases have a similar or identical exemption.

Internal review and complaints

- 103 The Section 45 Code of Practice specifies that applicants who are unhappy with the publication scheme or with how their requests have been processed should use the council's internal complaints' procedure in the first instance. Applicants unhappy with refusal notices on information they have requested, and where the council has applied exemptions, must have recourse to an internal review process. Applicants in both instances may then refer their cases to the Information Commissioner if they remain unsatisfied with the response. In both cases the Code states that the council's procedure should have the power to overturn the original decision²⁰.
- 104 For complaints about the way in which a request has been handled or about the publication scheme, it seems appropriate to maintain a system in line with the council's current procedures. However, it might be excessive, both to the applicant as well as to the council's resources, to go through three stages. One stage may be sufficient before referral to the Information Commissioner if the issue remains unresolved.
- 105 Appeals against refusal notices will require a different approach. The Code expects an internal review mechanism with the power to revise a decision not to disclose. Clearly, the person reviewing the decision should not have played a part in coming to the original judgment. This would seem to preclude the corporate information manager from reviewing decisions. A solution might be to train the proposed FoI representatives from each directorate to the required level of expertise in FoI and EIR. We believe that reviews of FoI section 36 exemptions should be undertaken by either the chief executive or the borough solicitor (whoever is not the "qualified person"). In all cases, the review decision should be binding.
- 106 Refusal notices issued to applicants after internal review, should, in our view, be in the name of the chief executive. In addition to the symbolism this demonstrates of the council's serious intent, there is also a practical reason: the Information Commissioner will send formal notification of a complaint he receives to the lead officer in the public authority subject to the FoI Act.
- 107 By setting out what we believe to be an appropriate mechanism for internal review, we are trying to make the point that minimum and consistent

²⁰ The council has separate routes for members of the public and elected members.

standards are a vital element of successful implementation of the Act. The same applies to the processes employed to arrive at the original decision. In our view, it goes beyond technical compliance with the Act; it also shows serious intent on behalf of the council to implement the spirit behind it.

- 108 We recommend that by the end of January 2005 the IIG devises an appeals process that is transparent, simple and consistent, in similar vein to that devised for the first stage of decision making.

Members' rights and responsibilities to access information

- 109 The legal rights of elected representatives to information are covered partly by statute and partly by common law. For example, councillors have long held common law "need to know" rights in respect of information held by the council. These ensure that members have access to all information they need to know to carry out their role, for example as a member of a committee, even if the council is not otherwise obliged to disclose the information in question.
- 110 In the context of the FoI Act, Schedule 12a and the EIRs, members will have the right to request information in the same way as anyone else. However, a member's common law rights still exist: if the information requested falls within one of the exemptions, but the member can establish an additional "need to know" that information, then he or she will still be entitled to gain access to it.
- 111 Nonetheless, with rights come responsibilities: it would be improper, for example, for members to exercise their "need to know" rights and then disclose information to others, if a legitimate exemption applied to it.
- 112 We recommend that, in addition to any constitutional amendments, members are issued with straightforward advice on how they can reasonably exercise their "need to know" rights in light of the new access to information regime from January 2005.