

From: Tony Mason [REDACTED] >
Sent: 28 December 2020 15:38
To: Tony Mason
Subject: EIR Request submitted to LBB to obtain the Hendon Hub Regeneration "Outline Business Case" (Agenda item 17 @ the P&RC meeting on 8th Dec 2020)

Hi,

I am sending this email to those of you who requested additional information after seeing my message on the Egerton Gardens WhatsApp Group.

As I do not have permission to share your email address with others, I am sending this email as BCC. If this email ends up in your spam folder then please add me to your safe list to prevent further emails going to your spam folder. As we move forward with monitoring the "Hendon Hub" Development it might be helpful to set-up an opt-in mail list, but for now new individuals can email me to be added to my email list.

This email is not confidential and may therefore be forwarded to others if necessary.

WhatsApp Message (26th Dec 2020)

"I have submitted (on behalf of all Hendon residents) a formal "Environmental Information Regulation" (EIR) Request asking that Barnet Council releases into the public domain the FULL "Outline Business Case" (OBC) related to the Hendon Hub Development. This EIR request is intended to challenge the decision by Barnet Council to withhold approximately 400 pages of the OBC by claiming that agenda item 17 of the council meeting on 8th Dec 2020 was "exempt" from public access under Schedule 12A of the Local Government Act 1972 (LGA). I am not yet convinced that ALL of Item 17 is "exempt" under Schedule 12A and it is impossible to explain why in a short WhatsApp message. If you want more information, please send me a text message with your email address and I will provide more details by email."

The focus of this email is to explain (i) what actions I have taken following the 8th Dec 2020 Council Meeting, (ii) why I have taken these actions, and (iii) possible LBB responses and our next steps.

This email does not cover items such as (i) my previous experience in submitting information requests to LBB, or (ii) the email exchange I had with LBB to agree that an EIR request was the best way forward to obtain information that LBB claim is exempt, or (iii) details of my EIR research that will be useful if LBB refuses to release the requested information without adequate reason and I/we decide it is appropriate to make a formal complaint to the [ICO](#).

If you have additional questions after reading this email then please contact me directly.

1. MY "HENDON HUB" DOCUMENT LIBRARY IS NOW AVAILABLE ON "BOX.COM"

- a. I have started to collect a library of useful documents related to ALL aspects of the Hendon Hub (e.g. "The Burroughs & Middlesex University Supplementary Planning Document (SPD)" & "Hendon Hub Outline Business Case" and any other relevant information).
- b. There are too many documents to include in a single email and so I have placed key documents on BOX.COM. These documents can be downloaded from:
<https://app.box.com/s/cpbaz59v84x7avjxpuup1cm19pye6ik7>
- c. This URL can be used by ANYONE to view and download the documents I have placed in my shared "Hendon Hub (Tony Mason)" folder (I will place additional relevant documents in this shared public folder over time). Please send me any documents you would like me to add to our residents BOX folder.
- d. BOX also includes functionality that allows authorised users collaborate (upload, edit, delete) on documents held in a restricted folder. We might wish to make use of this collaboration functionality as we move forward.

- e. Other Hendon Hub information is also available on the Barnet Planning Website. However because the Planning website includes all areas of planning I found it overwhelming which is why I have copied relevant documents to my BOX folder
 - i. <https://www.barnet.gov.uk/planning-and-building/planning-policies-and-local-plan/local-plan/burroughs-and-middlesex>
 - ii. <https://www.barnet.gov.uk/planning-and-building/planning-policies-and-local-plan/local-plan-review>
 - iii. <https://www.times-series.co.uk/news/18932357.barnet-councillors-agree-first-stage-hendon-redevelopment/>

2. EIR REQUEST (BACKGROUND & CONTEXT)

- a. When requesting information under FOI or EIR legislation, certain rules need to be followed, and one such rule is that LBB is only required to provide the information as requested. In this EIR I have only requested information related to the 8th Dec P&RC meeting.
- b. The EIR request to LBB (that I submitted on behalf of all Hendon Residents) requests access to copies of both:
 - i. *The original (signed-off) Public Interest Test (PIT) document that supports the Schedule 12A exemption decision related to Item 17 of the 8th Dec P&RC Meeting. I cannot find this mandatory Schedule 12A PIT on the website and I am doubtful that this document was ever created by LBB Officers, and reviewed by LBB Councillors, prior to the Councillors confirming the motion to exempt (agenda Item 15). I reviewed a number of other LBB committee meetings where exempt items were claimed and it appears to be standard LBB practice to use standard wording to claim the exemption without documenting a PIT for the exempt items. I therefore assume that the LBB response to this part of the EIR request will be "Requested Information is not Held" and this then raises the question of whether there has been a breach of Schedule 12A when claiming the exemption. However, there may be another explanation for the apparent lack of a PIT.*
 - ii. *The full "Outline Business Case" (i.e. information that supports Item 17 of the 8th Dec P&RC Meeting). I assume that LBB Councillors were provided with a full copy of the "Outline Business Case" (400 pgs) and had time to review, consider and comment on, this document before voting. As I cannot locate copy of the Schedule 12A PIT it is impossible to assess whether the Outline Business Case is truly exempt under both Schedule 12A of LGA legislation and also under EIR Legislation (which also requires that a PIT to be undertaken). It is self-obvious that a decision to make certain information exempt should have consistent and aligned outcomes (disclose Vs do not disclose) under both Schedule 12A of LGA and also EIR legislation for if this was not the case then information could be withheld under one legislation and then forced to be disclosed under the other.*
- c. The context for this EIR is the statutory process set out in the "*The Town and Country Planning (Local Planning) Regulations 2012*" which sets out the way in which Barnet Council must engage with impacted residents in the formulation of the Barnet "*Local Plan*" and specifically the "*The Burroughs & Middlesex University Supplementary Planning Document (SPD)*". The LBB's "Statement of Community Involvement" (SCI) documents are available in the BOX folder "[01 LBB Statement of Community Involvement \(SIC\)](#)".
- d. In Feb 2020 local residents were consulted as part of the Draft "Local Plan" (Reg 18) and in particular those parts of the draft plan that impacted Hendon (site plans 34 to 42). See BOX folder "[02 LBB Local Plan & Hendon Hub \(Jan 2020\)](#)".
 - i. This consultation with local residents is required by law and explains why we received notification via a paper mail-drop through our front door,
 - ii. The draft local Plan (Reg 18) refers to the "*Emerging Middlesex University and The Burroughs SPD*" (SPD = Supplementary Planning Document),
 - iii. As far as I am aware, the "SPD" itself does not make specific reference to a "Business Case" (but I might be wrong). We therefore need to be careful not to confuse these two documents (i.e. the "SPD" and the associated "Business Case")
- e. In Dec 2020 (8th Dec) there was a regular meeting of the 'Policy and Resource Committee' (P&RC)
 - i. Only Agenda items 5, 9, 10, 15 & 17 at this meeting related to the "Hendon Hub" (other items on the Agenda are not of concern to this EIR,

- ii. The P&RC meeting included a formal discussion/vote on the two Hendon Hub components (i.e. the draft "*The Burroughs and Middlesex University Supplementary SPD*" and the "*Outline Business Case*"),
- iii. Note: The legal obligation for LBB to consult local residents are different for the "Local Plan" and any associated "SPD". This difference is described in the SIC. We need to be aware there are differences on how the "consultation process" works at each stage of the planning process. The reason we did not get notified of this P&RC meeting (by a paper mail-drop to our homes) is because this P&RC meeting is not part of the statutory engagement process with local residents related to the creation of the "Local Plan", or any "SPD" (it is part of LBB's own internal process),
- iv. Even though the P&RC meeting is not part of the formal SPD engagement process, this meeting is subject to legislation related to: Local Government Transparency (See BOX Folder "[05. Local Government Transparency \(Leg & Guides\)](#)"). The starting point for this legislation is that all Council Committee meetings/decisions (including information supporting these meetings) must be made available to the public unless there is a lawful reason to make the meeting/information "exempt" (under Schedule 12A of the LGA),
- f. Note: It is not clear to me whether the "Outline Business Case" (referred to as part of the 8th Dec P&RC agenda) is essentially the same as a formal "[Financial Viability Assessment](#)" (FVA). If it is, then there is already established information rights case law where the ICO & Tribunal have ruled that FVA's should be made public as part of the consultation process. As a relevant example see the 2016 ICO Decision Notice ([FER0610052](#)) instructing LBB to provide the requestor with the FVA related to the Sweets Way Estate. It will be noted that the original Sweets Way information request was made in August 2015 and LBB deliberately withheld this information until the ICO instructed to LBB to release the information Aug 2016 (i.e. 12 months later). In short, LBB will need to have a very strong lawful reason under EIR to justify withholding all 400 pages of Hendon Hub "Business Case" claimed as exempt.

3. EIR REQUEST (CORE ISSUE & GOAL)

- a. Issue
 - i. The core issue (for now) is that LBB claims the underlying "Business Case" for the proposed Hendon Hub is "exempt" information and should not be disclosed to the public (as of 8th Dec 2020). By claiming Schedule 12A exemption LBB are effectively saying that it is not in the "Public Interest" to release this information into the public domain. By means of this EIR I/we challenge LBB's claim that all of item 17 is exempt information under Schedule 12A.
 - ii. Note: There is a clear distinction between the information published under the earlier non-exempt item (items 9 & 10) Vs 400 pages identified as exempt (Item 17). As I have not seen the exempt information I cannot assess whether ALL of the Outline Business Case does truly fall under the category of legally exempt information under Schedule 12A of LGA and also EIR. However, it is unlikely that all 400 pages could be classed as legally exempt.
- b. Goals
 - i. To require LBB to release the information (claimed as exempt) related to the Hendon Hub "Outline Business Case" (400 pgs.) into the Public Domain,
 - ii. To send a clear message that LBB will not be allowed to cut corners by:
 - Possibly breaching the checks and balances built into Local Government Legislation related to transparency of decision making
 - Possibly applying the whip to local councillors to force through certain policies that may disadvantage local residents
 - iii. To demonstrate that Hendon Residents wish to play an active part in the Hendon Hub SPD (as encouraged by the LBB's own Statement of Community Involvement)
- c. Point of View 1: LBB officers and councillors
 - i. LBB claim that the Outline Business Case is "confidential" and should therefore not be made public (now or any time in the future)
 - ii. LBB officers are responsible for making the recommendation to make item 17 exempt
 - iii. LBB councillors are responsible for authorising the recommendation to make item 17 exempt (Note: As far as I recall there was no formal vote to make items 17 exempt at the meeting; there was simply an assumption that it was exempt)
- d. Point of View 2: Local Residents

- i. Residents claim that the full Outline Business Case should be published to allow for full transparency and accountability of the Hendon Hub SPD (as required by law)
- ii. Residents claim that established case law already support the need for a local authority to make public the equivalent "Financial Viability Assessment".
- e. Note: These 2 POV's are mutually exclusive. However there is a possible middle ground where only legitimately "commercially sensitive" information identified as exempt under both LGA and EIR is withheld.

4. INFORMATION RIGHTS (the overlap between: Planning Legislation / Schedule 12A of LGA legislation / EIR Legislation)

- a. I briefly describe here why I have agreed with LBB to obtain the information claimed as exempt under Schedule 12A of LGA by making an EIR request.
- b. Local authorities are subject to various primary legislation (as well as formal "guidance"). The key legislation relevant here are:
 - i. *The Town and Country Planning (Local Planning) (England) Regulations 2012* (see [here](#)). This includes the mandatory requirement for LBB to issue a "Statement of Community Involvement" (SCI). The SCI applies to the creation of the Barnet "Local Plan" and any "Supplementary Planning Documents" (SPD). The SCI is a "policy document" and therefore if LBB wishes to breach the spirit of their own SCI (for example by simply ignoring input by local residents) then I doubt that this SCI breach can be challenged in a court of law.
 - ii. *Section 100A of the Local Government Act 1972 (LGA)* (see [here](#)) and it's exemptions given in Schedule 12A (see [here](#) and [here](#)). Before LBB can use Schedule 12A to claim an exemption to full disclosure a "Public Interest Test" must first be completed by LBB. It is not easy to challenge a Schedule 12A exemption as this incurs costs of taking the dispute to the High Court (as opposed to escalating first to the ICO and if justified then appealing to the Information Rights Tribunal, both of which are free)
 - iii. *Freedom of Information (FOI), Environmental Information Request (EIR) & Personal Information (GDPR)*. It is already established case law than any information request related to major development projects falls under EIR (and not FOI) legislation. Before LBB can refuse a request for information under EIR legislation they must claim an exemption under a specific EIR "Regulation". In most cases, this exemption must be further justified by undertaking a formal "Public Interest Test".
- c. Public Interest Test (PIT)
 - i. The PIT is a method for weighing up the pros and cons of releasing the disputed information into the public domain.
 - ii. The legal starting point for a PIT (under both Schedule 12A of LGA and EIR) is that information should be disclosed unless there is a very good justification for not disclosing it. Legally valid reasons for non-disclosure are specific to the particular context and our context is the statutory process for generating the Barnet "local plan" and associated SPDs.
 - iii. As stated previously, it is self-obvious that a decision to make certain information exempt should have consistent and aligned outcomes (disclose Vs do not disclose) under both legal regimes (Schedule 12A of LGA and also EIR). For various 'technical' reasons, it is only necessary to consider the Information Rights case law related to the EIR PIT. Once the EIR PIT is lawfully undertaken, then the Schedule 12A PIT issue 'falls away' (ie is no longer relevant)
 - iv. In most Schedule 12A and EIR PIT evaluations, it is likely to be clear whether information should be "released" or should be "exempt" (based on existing case law). However, where there is clear disagreement (for example if LBB wants to keep the "outline business case" as exempt) then an independent party (ie ICO investigator or Tribunal Judge) makes the final decision after having seen all the information which is claimed to be exempt.

5. POSSIBLE NEXT STEPS

- a. LBB have until 12th January to formally respond to my/our EIR request (I hope that LBB will respond earlier but this is unlikely).
- b. Possible LBB Responses and associated next steps:
 - i. *Complete Refusal*. This a decision by LBB (officers and councillors) not to provide any of the requested information. This refusal needs to be supported by a justification based on the EIR

- legislation. If I/we disagree with LBB's justification for withholding the information then we have a right to escalate to the ICO.
- ii. *Partial Refusal*. This a decision by LBB (officers and councillors) to provide some (but not all) of the requested information. This partial refusal needs to be supported by a justification based on the EIR legislation. If I/we disagree with the LBB's justification for withholding some of the information then we have a right to escalate to the ICO.
 - iii. *Full Disclosure*. This is an LBB decision to provide all of the requested information. Job done & EIR request closed.
- c. Note: Only individuals who (i) have seen the withheld information (ie Item 17) and who (ii) fully understand the EIR case law related to the PIT decisions that are able to make the "disclose vs do not disclose" decision. As I have not seen the withheld information I am unable to have an opinion as to whether LBB is correct in their decision to withhold the Full Outline Business Case. My best guess (based on my knowledge of relevant EIR case law) it that it is unlikely that every single word contained in Item 17 is exempt.
- d. Note: The normal process is that IF LBB decides to completely, or partially, refuse an information request then the requestor 1st asks for the refusal decision to be "reconsidered" and only after a 2nd refusal would a formal complaint be made to the ICO. **However, in our case I have already escalated this matter to LBB senior management and therefore there is no reason to ask that the 1st refusal be reconsidered as this just delays matters on an issue that is already subject to the statutory planning process time-scales. Therefore, IF there is reasonable justification to make a formal complaint to the ICO then I/we will do this immediately after the 1st refusal. LBB also has the option of overturning any initial refusal decision based on the information provided to the ICO in the escalated complaint.**