

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 19 April 2018

**Public Authority:** London Borough of Hammersmith & Fulham

**Address:** Hammersmith Town Hall  
King Street  
London W6 7NX

#### **Decision (including any steps ordered)**

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1. The complainant has requested information in relation to planning applications in respect of a specific property. London Borough of Hammersmith & Fulham ("the Council") has disclosed most of the requested information to the complainant, however it refused to disclose the remainder, citing regulations 12(4)(e) and 13 as a basis for non-disclosure.
2. The Commissioner's decision is that the Council has correctly applied regulation 13 of the EIR to the information specifically withheld under it. The Commissioner has further decided that the Council has incorrectly applied regulations 12(4)(e) and 12(5)(f) (which latter regulation it applied during the course of the Commissioner's investigation) to the information it withheld under those regulations. The Commissioner also finds that the Council breached Regulation 11(4) of the EIR.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation:
  - To disclose the information previously withheld under regulations 12(4)(e) and 12(5)(f) of the EIR to the complainant.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the

Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Request and response**

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5. On 16 May 2016 the complainant requested information from the Council in the following terms:-

"I wish to be provided with (electronic) copies of documents relating to 3 planning applications relating to 124A Becklow Road W12. The application reference numbers are as follows:

2015/01001/PD56

2015/03042/PD56

2015/05153/PD56

By documents I mean the following:

- notes of site visits;
- notes of meetings;
- file notes;
- photographs;
- results of internal and external consultations; notes of telephone conversations; any correspondence any material considerations taken into account with these applications.

In addition, I wish to see the documents relating to any pre-application meetings or advice given to the applicant or the agent.

Further I also wish to see documents relating to enforcement investigations and actions relating to this property within the last two years."

6. The Council responded to the complainant on 12 July 2016, confirming that it held information which fell within the scope of the complainant's request. It disclosed some information to the complainant, however some was withheld, citing regulations 12(4)(e), 12(5)(e), 12(5)(f) and 13 of the EIR.

7. The complainant sought an internal review, as he disagreed with the Council's decision not to disclose the following information ("the withheld information"):

- personal information
- pre-application advice
- internal communications

and a response to that request for internal review was provided to the complainant in January 2017. The reviewer upheld the original decision, except that, in relation to pre-application advice, the Council no longer sought to apply regulations 12(5)(e) and 12(5)(f) to that specific information, as it considered that regulation 13 of the EIR was a more appropriate basis for non-disclosure. The Council later contacted the Commissioner to inform her that it now wished to apply regulation 12(5)(f) to part of the withheld information and submitted its specific reasons to the Commissioner.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 10 October 2016 to complain about the way his request for information had been handled.
9. The Commissioner has considered the Council's application of the exceptions as set out in regulations 12(4)(e), 12(5)(f) and 13 to the complainant's request.

### **Reasons for decision**

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#### **Regulation 12(4)(e) of the EIR**

10. Regulation 12(4)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that it involves the disclosure of internal communications.
11. Various internal communications were withheld from the Council's response to the complainant. These internal communications are e-mails which contain consultee comments regarding the planning applications.
12. The concept of a communication is broad and will encompass any information someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others may consult it. In this case the communications are emails which were all sent internally between members of the Council's staff in relation to a planning application. This information clearly falls within the definition of an internal communication and the Commissioner is satisfied that regulation 12(4)(e) is engaged. The Commissioner has

now gone on to consider the public interest test, balancing the public interest in maintaining the exception against the public interest in disclosure.

### **Public interest arguments in favour of maintaining the exception**

13. The Council further argues that it needs a 'safe space' to properly carry out its functions away from outside pressure and interference and to have free and frank discussions without fear of these being disclosed. It states that disclosure of the information withheld under regulation 12(4)(e) would affect the ability of council officers to have such full and frank discussions, which may ultimately damage the quality of advice provided and lead to poorer quality decision-making.

### **Public interest arguments in favour of disclosure of the withheld information**

14. The Council accepts that there is a public interest in retaining the openness and transparency of planning decisions which will ultimately affect the local community. It considers that planning decisions and the process leading to those decisions should be as open and transparent as possible. Ideally all parties should be fully informed about the issues considered by the Council. The public should be satisfied that the final decisions have been made openly and have been fully explained.
15. The Council also considers that the public affected by planning decisions should know all the facts and reasoning which lies behind them and thus have a greater ability to participate in the decision making process.
16. The Council also considers that disclosure could further understanding of planning decisions, in this particular case with regard to car parking, which can be a contentious issue.

### **Balance of the public interest arguments**

17. The Commissioner considers that public interest arguments in maintaining the exception at regulation 12(4)(e) should be focused on the protection of internal deliberation and decision making processes.

She accepts the Council's "safe space" argument in principle, but considers that it must be properly examined in the context of the actual withheld information.

18. The complainant is of the view that, since the proposal now has planning consent, revealing reasoning behind policy decisions, in internal communications, will not be prejudicial. In other words, since the issue is now largely historic, information released to the public cannot change the outcome.
19. The complainant has also made the point that it is important to understand the reasoning contained in the planning officer's report which recommends approval of the proposal, particularly in his view as the Council has departed from normal planning policy as regards areas of car parking stress and disregarded its own stated standards on what constitutes a viable car parking space. This decision, in his opinion, needs to be open to public scrutiny.
20. The Commissioner has noted the public interest arguments both for and against disclosure, and has considered the arguments put forward by both the Council and the complainant regarding this issue. The Commissioner accords significant weight to the public interest in openness and transparency regarding important planning decisions and in enabling the public to better understand the Council's decision-making process. The Commissioner also notes the Council's 'safe space' and 'chilling effect' arguments against disclosure, and has considered these in the context of the withheld information.
21. The Commissioner notes that planning consent has already been granted and so the Council would no longer require a 'safe space' in order to discuss issues in relation to this particular planning application. However, she accepts that the Council's concern relates to having a 'safe space' for free and frank discussions in the future, and that such discussions may be inhibited by fear among Council officials that their views and deliberations may be disclosed to the public – this is known as the 'chilling effect.'
22. The Commissioner recognises that disclosure of the withheld information could make individuals less free and frank in the expression of their views and in the provision of advice, if they believed that their opinions would not be kept confidential. She has considered

this in the context and purpose of the discussions that took place and she accepts that the individuals' contributions to these exchanges were provided to assist in the decision-making process regarding the planning application under discussion.

23. However, both the Commissioner and the Information Tribunal have frequently been unconvinced of a wide-ranging chilling effect as alleged by public authorities, expressing scepticism that the disclosure of information on one issue or policy would affect the frankness of exchange of views on another unrelated issue or policy. For example, in *Friends of the Earth v Information Commissioner and Export Credits Guarantee Department*<sup>1</sup> (para 61), the Tribunal commented: *"It is not enough in this Tribunal's view to fall back on a plea that revelation of all information otherwise thought to be inviolate would have some sort of 'chilling effect'.*
24. The Commissioner tends to agree with this view and as such has not accorded the 'chilling effect' argument significant weight when weighing up the balance of the public interest arguments. Council officials are likely to be robust and accustomed to expressing their views with frankness and candour and the Commissioner does not accept that disclosure of the withheld information in this instance would lead to a 'chilling effect' in respect of all future such discussions.
25. The Commissioner notes the Council's statement that the consultees' comments are summarised in the planning officer's report which is publicly available. However, having perused the information withheld under regulation 12(4)(e), she notes that the comments are much more detailed than the summary and would provide the public with a much better insight into how the Council reached its decision. The Council has already disclosed the majority of consultees' comments to the complainant, however some have been withheld. As the proposal has now received planning consent, and the Commissioner accords more significant weight to the need for openness, transparency and furthering public understanding than she does to the Council's 'safe space' and 'chilling effect' arguments, the Commissioner considers that, in all the circumstances of the case, the public interest in disclosure of the remaining information withheld under regulation 12(4)(e) outweighs that in maintaining the exception.

## **Regulation 12(5)(f) of the EIR**

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<sup>1</sup> EA/2006/0073

26. Regulation 12(5)(f) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

*'(f) the interests of the person who provided the information where that person –*

*(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;*

*(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and*

*(iii) has not consented to its disclosure;'*

27. The purpose of this exception is to protect the voluntary supply to public authorities of information that might not otherwise be made available to them. In such circumstances a public authority may refuse disclosure when it would adversely affect the interests of the information provider. The wording of the exception makes it clear that the adverse effect has to be to the person or organisation providing the information rather than to the public authority that holds the information.

28. With regard to engaging the exception, as recognised by the First-Tier Tribunal (Information Rights), a four stage test has to be considered, namely:

- Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?
- Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?
- Has the person supplying the information consented to its disclosure?
- Would disclosure adversely affect the interests of the person who provided the information to the public authority?

29. ***Were the applicant/agents under, or could they have been put under, any legal obligation to supply the information to the public authority?***

The Council states that the applicant/agents who provided this information to the Council were under no legal obligation to any public authority to provide the information.

30. ***Did the agents supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?***

The Council states that, as the Local Planning Authority, it is not entitled to disclose the information supplied in the withheld email and attachments apart from under EIR and where no exception from disclosure applies to the information. The same is true for other public authorities in the circumstances in which the withheld information was supplied to the Council. The legislation which governs the planning application and enforcement processes does not require the Local Planning Authority to disclose the withheld information.

31. ***Have the applicant/agents consented to disclosure of the information?***

The Council has informed the Commissioner that the applicant/agents have not consented to disclosure of the information and the Commissioner has seen correspondence to that effect.

32. ***Would disclosure adversely affect the interests of the person who provided the information to the public authority?***

33. In considering whether there would be an adverse effect on the interests of the person who voluntarily provided the information, the council needs to identify harm to the third party's interests which is real, actual and of substance, and to explain why disclosure would, on the balance of probabilities, directly cause the harm.

34. There is no requirement for the adverse effect to be significant – the extent of the adverse effect would be reflected in the strength of arguments when considering the public interest test (i.e. once the application of the exception has been established). However, the public authority must be able to explain the causal link between disclosure and the adverse effect, as well as why it would occur. The need to point to specific harm and to explain why it is more probable than not that it would occur reflects the fact that this is a higher test than 'might adversely affect', which is why it requires a greater degree of certainty. It also means that it is not sufficient for a public authority to speculate on possible harm to a third party's interests.

35. The withheld information consists of correspondence to the Council by the agent on the applicant's behalf (the applicant is copied into the email), which the Council deems to have been sent to it on the assumption that this would remain confidential. This allowed the agent/applicant's concerns to be shared with the council, freely and



frankly. The email relates to discussions regarding a specific planning application. These discussions form part of the planning application process for that particular planning application. The Council argues that disclosing the information would adversely affect the applicant/agents who supplied this information, as it would make correspondence that they would have expected to have been private and treated with a duty of confidence available to the world at large. It states that this invades their privacy and breaches their rights under the Human Rights Act 1998. The Commissioner has viewed correspondence where the agent agrees with this argument.

36. The Commissioner's guidance provides that the Council needs to demonstrate a causal link between the information requested and the adverse effect on the provider of that information. The Council simply asserts that disclosure of the information would cause harm to the provider through their loss of privacy and would be contrary to the Human Rights Act 1998. However, it has failed to demonstrate why this would occur and the Commissioner considers that, in the circumstances, the applicant/agent should have been aware that any such correspondence may be disclosed in response to a request under the EIR. She finds the Council's arguments regarding adverse effect to be weak and that it has not demonstrated that the effect would be real, actual and of substance. Therefore, the Commissioner is of the view that regulation 12(5)(f) is not engaged in relation to the information being withheld under it.

### **Regulation 13 of the EIR – personal data**

37. The Council has confirmed its reliance on Regulation 13(1) of the EIR in respect of the pre-application advice and any other personal data contained within the requested information.
38. Regulation 13 of the EIR provides an exception to disclosure of personal data where the applicant is not the data subject and where disclosure of the personal data would contravene any of the data protection principles.
39. In order to engage regulation 13, the information sought by the applicant must satisfy the definition of personal data provided by section 1(1) of the Data Protection Act 1990 ("the DPA").
40. Section 1(1) of the DPA defines personal data as:  
"data which relate 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."

41. Here, the Council argues that the first data protection principle would be breached if it disclosed the information which the complainant seeks. The first data protection principle states:

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

(a) at least one of the conditions in Schedule 2 is met, and  
(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”

42. The Commissioner must first consider whether the withheld information is personal data. If she is satisfied that it is, she then needs to consider whether disclosure of this information would be unfair and unlawful. If she finds that disclosure would be unfair and unlawful the information should not be disclosed and the consideration of regulation 13 of the EIR ends here. However, if she decides that disclosure would be fair and lawful on the data subject concerned, the Commissioner then needs to go on to consider whether any of the conditions listed in schedule 2 and 3, (sensitive personal data) if appropriate, of the DPA are also met.

### **Is the withheld information personal data?**

43. The information withheld by the Council under Regulation 13 of the EIR consists of a) personal details contained generally within the requested information and b) pre-application advice.
44. In respect of the personal details in the requested information, these consist of the names of the applicant, the applicant's agents and the planning officer. The Commissioner is satisfied that these constitute personal data as individuals can be identified from them.
45. In respect of pre-application advice, the withheld information is a letter from the Council responding to a request for pre-planning advice. The letter discusses features of the relevant property, the proposals for redevelopment, and whether this would be acceptable. The letter contains information from which the owner of the property can be identified by the property address, or from the contents of the letter itself, or from a combination of this information and other information which may be publicly available. The Commissioner is satisfied that this information constitutes personal data.

### **Would disclosure be unfair?**

### **Personal details of applicants, agents and planning staff**

46. The complainant stated that the names of the applicant, the applicant's agents, and the planning officer should not have been redacted from the material disclosed, because this information is in the public domain on the Council's website. He stated that revealing similar information is not prejudicial to the applicant or agent as, in any event, an applicant and their agent know in advance that information is made available to the public when submitting a planning application so that it is possible to view and comment on the proposal.
47. In considering fairness, it is necessary to balance the reasonable expectations of the data subject and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.
48. The Commissioner has first considered the application of regulation 13 to the planning applicant and/or agent's personal information. She has then considered the application of regulation 13 to the planning officers' personal information. She has then gone on to consider the application of regulation 13 to the pre-application advice.

### **Planning applicant/agent's and planning officers' personal information**

#### ***What would be the reasonable expectations of the data subjects in the circumstances?***

49. The Council considers that there is a reasonable expectation that applicants for planning consent, and/or their agent would not expect their addresses in correspondence with the Council, discussing a planning application, to be disclosed to the wider public, in response to an information request. The Council has informed the Commissioner that the applicant's name is already contained in the files for the planning applications, which are in the public domain, so it has now disclosed this to the complainant. It is continuing to withhold the applicant's address, however, as this is not in the public domain.
50. The Council also considers that its junior planning officers' reasonable expectations would be that their names, even in the context of work correspondence regarding planning applications, would not be disclosed in response to requests for information under information rights legislation. The Council's policy is that junior officers (that is officers below the grade of Head of Service) do not have their personal information disclosed to the wider public in response to requests for information. The junior officers are fulfilling the functions of the Council and it is the Council as an organisation, and, in this particular case as a Local Planning Authority, that is the recognised party. The junior officer's actions are on behalf of the organisation not on their own behalf and as they are not senior officers, the Council does not

consider it reasonable to make their personal details public. In relation to the planning officer involved in the application, the name and contact details of the officer are already in the public domain via the Council's website as part of the electronic files for the specific planning applications. However, in respect of the planning enforcement officer, the Council has continued to withhold that officer's name and contact details, as they are not in the public domain. The Council considers that the officer, a junior officer, would have reasonable expectations that their name and contact details in this context would be kept confidential.

### ***Consequences of disclosure***

51. The Council considers that disclosure of the withheld information may cause damage and distress to the individuals concerned.

### ***Is there a legitimate public interest in disclosure?***

52. Any legitimate public interest in personal data being disclosed must be weighed against any prejudice disclosure would cause to the rights, freedoms or legitimate interests of the individual concerned. The Council has considered whether there is a legitimate interest in the public (as opposed to the private interests of the requester) accessing the withheld information. The Council acknowledges that the requester has an interest in the requested information. However, it has considered the legitimate public interest in the withheld personal information rather than the interests of the requester.
53. The Council considers that there are some public interest factors in favour of disclosure, e.g. disclosure would result in a full uninterrupted account of events, and comments, associated with the relevant developments. This would further understanding of how the Council reaches planning decisions, which would serve the general public interest in developments within the borough.
54. The Council has informed the Commissioner that, in view of the reasonable expectations of the relevant individuals regarding their personal data in this context, and also in view of the fact that the requester should be able to understand from the redacted correspondence and from other information in the public domain that the individual writing to the council is the applicant or their agent, without needing to establish the address of the individual, any legitimate public interest which would be met by the disclosure of the information would be outweighed by the prejudice which would be caused to the individuals concerned, i.e. distress at the loss of privacy in this context. The requester should also be able to understand from the correspondence that a planning enforcement officer is involved, it

is not necessary to specify the name and contact details of a junior planning enforcement officer involved.

55. After considering the nature of the withheld information, and the submissions of the Council and of the complainant, the Commissioner is satisfied that disclosure under the EIR would be unfair and in breach of principle 1 of the DPA, and that any legitimate public interest would not outweigh the rights of the data subjects in this case. Therefore, the Commissioner considers that regulation 13 of the EIR is engaged in respect of the names of the applicants/their agents in correspondence with the Council regarding these applications.

### **Pre-application advice**

#### ***What would be the reasonable expectations of the data subjects in the circumstances?***

56. The Council has informed the Commissioner that its pre-planning advice service is a paid service, which provides individuals who are considering filing a formal planning application with preliminary advice. Users of the service may not always subsequently file a formal planning application, or may alter their proposals before doing so. There is no statutory requirement to make such advice public. The Council therefore considers that users of the pre-planning advice service expect that any advice received during this pre-application process will remain private and confidential. For this reason, the Council considers that applicants for pre-planning application advice hold a reasonable expectation that pre-application advice will remain private and confidential. While applicants for pre-planning advice are likely to be aware that planning applications are subject to public scrutiny, they are unlikely to expect such scrutiny at the pre-planning application stage. Therefore, they would not expect their pre-planning application advice reports to be disclosed to the wider public, in response to an information request.
57. Since these service users have an expectation that the informal advice they receive will remain private and confidential, the Council considers that, in this instance, disclosure of the pre-application advice would be unfair.

#### ***Consequences of disclosure***

58. The Council considers that disclosure of the withheld information may cause damage and distress, and constitute an unwarranted intrusion into the private life of the individual concerned.

#### ***The legitimate public interest***

59. The public's legitimate interests in obtaining the withheld information must be weighed against the prejudices to the rights, freedoms, or legitimate interests of the individual concerned. The Council has considered whether there is a legitimate interest in the public (as opposed to the private interests of the requester) accessing the withheld information.
60. The Council acknowledges that the requester has an interest in the information. However, it has considered the legitimate public interest in disclosure of the information rather than the interests of the requester.
61. The Council considers that there is a general public interest in ensuring that planning advice is in accordance with local plans and statutory obligations. It also considers that disclosure may assist in providing a full and uninterrupted, account of events, and comments, associated with these planning applications and may further public understanding of how planning decisions are reached.
62. The Council also considers that, when individuals request pre-application advice, they do so without the expectation that such correspondence will be made publicly available. Disclosing such advice could cause distress to the individuals concerned.  
The Council has also considered the fact that the information is about a proposal, which may not become the content of a formal planning application, or could change before the application is registered.
63. Since formal planning applications are subject to public scrutiny, and therefore transparency, the Council does not believe disclosure of informal pre-planning application advice would benefit the general public.
64. The Commissioner notes that there is no statutory requirement to make any informal advice offered via this service public. She also acknowledges that users may not always proceed to a formal application which is subject to public consultation or may alter their proposals before doing so. The Commissioner is therefore of the opinion that users will have the expectation that any correspondence shared with the council during this pre-application process and any advice received will remain private and confidential. Users will only expect any formal application made and supporting documentation to be made publicly available. The Commissioner considers that disclosure of this information may cause distress and upset and

constitute an unwarranted intrusion into the private life of the individual concerned.

65. For the above reasons, the Commissioner is satisfied that disclosure would be unfair and in breach of the first data protection principle and therefore regulation 13 of the EIR applies.

### **Regulation 11 – Internal review**

66. Regulation 11(1) provides that an applicant may make representations to a public authority, if he or she considers that the authority has failed to comply with the requirements of the EIR in relation to the request.
67. Regulation 11(3) requires that the public authority consider the complainant's representations, along with any supporting evidence provided by the complainant, and to decide whether it has complied with the requirements of the EIR. Finally, Regulation 11(4) requires that the authority notify the applicant of its decision in relation to the applicant's representations no later than forty working days after receipt of those representations.
68. The complainant requested an internal review on 13 July 2016. The Council did not provide the outcome of this until 10 January 2017. As this is well outside the prescribed 40 working day time frame, the Commissioner finds that the council failed to comply with Regulation 11(4).

### **Other matters**

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69. The Commissioner experienced several significant delays in receiving a response from the Council. This reached the point where an Information Notice had to be served to compel the Council to respond. The Commissioner trusts that the Council will work to ensure that there is not a repeat of such a delay in the future.

## Right of appeal

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70. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504  
Fax: 0870 739 5836  
Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

71. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
72. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Deirdre Collins**  
**Senior Case Officer**  
**Information Commissioner's Office**  
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**Water Lane**  
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