

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

Date: 5 March 2020

Public Authority: The Ministry of Housing, Communities, and
Local Government

Address: 2 Marsham Street
London
SW1P 4DF
United Kingdom

Decision (including any steps ordered)

1. The complainant has requested information regarding a Call In Direction made to the Secretary of State for a planning application.
2. The Commissioner's decision is that the Ministry of Housing, Communities and Local Government correctly applied the exception for internal communications at Regulation 12(4)(e) of the EIR to the requested information.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 15 April 2019, the complainant wrote to the Ministry of Housing, Communities, and Local Government ('the MHCLG') and requested information in the following terms:

"Please provide us with the following information, held by you, or by others on your behalf:

- 1. Any recorded information requesting a direction by the Secretary of State under section 77 of the Town and County Planning Act 1990 ("**Call in Direction**") that the application for planning permission for development at Newcombe House, 45 Notting Hill Gate, 39-41 Notting Hill Gate and 161-237 (odd) Kensington Church Street, London (RBKC ref: application PP/17/05782, MHCLG ref: PCU/RTI/K5600/3213569) ("**Planning Application**") should be referred to him for determination, including but not limited to recorded information between (a) members or officers of the Royal Borough of Kensington and Chelsea and (b) the Ministry of Housing, Communities and Local Government (including staff and civil servants of the Ministry), the Secretary of State or the Minister of State for Housing and Planning.*
- 2. Any recorded information responding to a request for a Call in Direction in relation to the Planning Application, including but not limited to recorded information between (a) members or officers of the Royal Borough of Kensington and Chelsea and (b) the Ministry of Housing, Communities and Local Government (including staff and civil servants of the Ministry), the Secretary of State or the Minister of State for Housing and Planning.*
- 3. Any recorded information, including but not limited to any submissions, advice or recommendations, provided to Ministers and/or the Secretary of State regarding whether or not a Call in Direction should be made in relation to the Planning Application.*
- 4. Any other recorded information relating to the decision to make a Call in Direction in relation to the Planning Application, including but not limited to recorded information between (a) members or officers of the Royal Borough of Kensington and Chelsea and (b) the Ministry of Housing, Communities and Local Government (including staff and civil servants of the Ministry), the Secretary of State or the Minister of State for Housing and Planning that does not fall within the scope of (1) to (3) above."*

5. The MHCLG responded on 14 June 2019. It provided some information within the scope of the request but refused to provide the remainder. It cited the following exceptions the basis for doing so: EIR 12(3) by virtue of regulation 13 – Personal Data, and regulation 12(4)(e) – Internal Communications.
6. On 18 July 2019 the complainant requested an internal review of the decision to withhold a document entitled "*181025-Newcombe_House_Submission_Redacted*" [‘the Document’]. The MHCLG had indicated in the request response that this was to be included in the released information, however it subsequently changed its position to withhold the Document in its entirety on the basis of regulation 12(4)(e).
7. Following an internal review the MHCLG wrote to the complainant on 15 August 2019 and revised its position. The MHCLG provided a redacted version of the Document, citing regulations 12(3) by way of regulation 13, and regulation 12(4)(e), as the basis for the redactions.

Scope of the case

8. The complainant contacted the Commissioner on 5 September 2019 to complain about the way the request for information had been handled. Specifically, that the MHCLG has incorrectly applied regulation 12(4)(e) to withhold information from the Document. The complainant accepted the exceptions applied to redact information classed as personal data.
9. The Commissioner considers that the scope of the case is to establish whether the MHCLG has correctly engaged the exception at regulation 12(4)(e). If it has, then she will consider where the balance of public interest lies.

Background

10. The MCHLG provided the following background regarding the request:

"This involves a live planning application which is under consideration, and as such, it is extra sensitive at the current time. The planning case was referred to this Department by the Local Planning Authority on 18 October 2018. After careful consideration, the application was called-in for public inquiry and the Secretary of State's own decision on 14 March 2019.

The Secretary of State has a quasi-judicial role in the planning process. This planning application has been considered at public inquiry. The Inspector is now preparing her report and recommendation to the

Secretary of State. The forecasted date for the report to be received is March 2020 (subject to change).

When a Planning Inspector prepares a report into a called-in planning application for the Secretary of State to consider after a public inquiry, the Inspector sets out his/her conclusions on the main issues; and a recommendation. This does not conclude the matter. It is then for the Secretary of State to either accept or reject the Inspector's recommendations.

In other words, Inspector's reports form the basis of the decision by the Secretary of State as to whether to grant planning permission for called-in applications. Once a formal decision has been issued, the main parties to the application will be sent a copy of the Inspector's report along with the formal decision letter and the decision is then made available on line. A challenge to a decision can be made within 6 weeks by way of an appeal to the High Court under Section 288 of the Town and Country Planning Act 1990. The Inspector's report is intended for public release following a formal decision being made.

After the Inspector's report has been fully scrutinised, and the decision made, both the report and the decision letter will be published on the Department's website.

Timeline and Schedule of Planning Application

<i>18 October 2018</i>	<i>Planning application referred to the Secretary of State by the Local Planning Authority.</i>
<i>14 March 2019</i>	<i>Planning application called-in for public inquiry and the Secretary of State's own decision.</i>
<i>November 2019</i>	<i>Public Inquiry held.</i>
<i>Ongoing</i>	<i>The Inspector is preparing her report and recommendation for the Secretary of State.</i>
<i>(Forecasted) March 2020</i>	<i>Inspector's Report due to be received and considered by the Secretary of State.</i>
<i>Approx 3 months hence.</i>	<i>Expected decision issued to parties, followed by publishing of the decision letter and the Inspector's Report on the Department's website."</i>

Reasons for decision

11. Regulation 12(4)(e) states:

'12.-(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—

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

12. The MHCLG advised *"the Document forms an internal communication from MHCLG officials to the Minister and was handled solely within the Department. It has not been shared with any external parties. Therefore regulation 12(4)(e) is engaged, subject to the public interest test. For the reasons given later in this response we consider, given the "live status" of the planning application that we have been as open and as transparent as possible."*

13. Regulation 12(4)(e) is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. Rather, as long as the requested information constitutes an internal communication then it will be exempt from disclosure.

14. As already stated the Document is a Ministerial submission, which was provided to the complainant at review stage, with a small number of redactions. The MHCLG state that the redacted information *"specifically relates to advice and/or an official's opinion."*

15. The Commissioner has reviewed the Document and is satisfied that the it clearly falls within the description of an internal communication and therefore engages regulation 12(4)(e).

The public interest test

16. Regulation 12(1)(b) requires that, where the exception under regulation 12(4)(e) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. The Commissioner is mindful of the provisions of regulation 12(2) which state that a public authority shall apply a presumption in favour of disclosure.

Public interest in favour of disclosing the information

17. The complainant provided the following statements to support their view that the Document should be released in full:

- A. *"the Call-in Direction relates to a planning application for a development that will deliver critical public benefits and will have a significant impact on the public (including through the provision of much needed affordable housing, a new GP surgery which will serve 18,000 patients and new step-free access to public transport). Stakeholders who are relying on the delivery of the scheme include the NHS and local GPs, Transport for London, London Underground Limited and local resident's groups;*
- B. *these critical public benefits have already been delayed for over three years and the Call-in Direction will create further delays;*
- C. *a previous application for planning permission for development that was substantially the same as the Application has already been considered in detail at a four day appeal inquiry by an Inspector appointed by the Secretary of State in February 2017. The Secretary of State did not call-in that previous application, enhancing the confusion of the Complainant as to why the Secretary of State believes that the Application meets the relevant tests for a Call-in Direction but the earlier, substantially similar, application did not;*
- D. *as set out above, there is no public information as to the reason for the Call-in Direction, which is contrary to the Secretary of State's published policy at the time of the Call-in Direction;*
- E. *there is significant public interest in a transparent decision-making process in such circumstances so that people can understand the reasons why the Call-in Direction was made, notwithstanding that it will cause further delay to a project with substantial public benefit;*
- F. *moreover, the features of the planning regime require local community involvement in decision making which requires the public to be given sufficient information to engage in debate and discussion effectively;*
- G. *the Secretary of State has a longstanding and published policy setting out when he is likely to exercise his discretion to call-in planning applications, including a policy that such power should be exercised "sparingly". It is necessary to see the documents that informed his decision in order to understand how that decision relates to the published policy;*
- H. *considerable weight should be attached to the fact that disclosure will assist those members of the public who have already engaged in the debate surrounding the Application in understanding the*

matters taken into account by decision makers and how their concerns have been addressed; and

I. disclosure of information will allow the public to make better, more informed comments in relation to the Application during the inquiry process which will follow the Call-in Direction."

18. The Commissioner asked the MHCLG to respond to the complainant's public interest arguments C, D and G:

- *The Secretary of State has the power to call in any planning application and the fact that he did not call in a previous proposal on the same site does not affect or limit his ability to exercise his call-in power... there are no 'tests' for call-in: the call-in policy makes clear that all cases are considered on their merits.*
- *Section 77 of the Town and Country Planning Act 1990 empowers the Secretary of State to call in any planning application so that he makes the decision, rather than the local planning authority. The Act does not qualify this power; the Secretary of State can call in any application and the Act does not require him to give reasons. The Secretary of State's policy on call-in is set out in a written ministerial statement made by Nick Boles MP on 26 October 2012. This states that that he will, in general, only consider the use of his call-in powers if planning issues of more than local importance are involved and goes on to set out examples of the sort of cases that might be considered for call-in. These examples are not criteria or tests and the policy goes on to make clear that each case will be considered on its individual merits. The issue before the Secretary of State at the time was not whether the application should be granted planning permission but whether it should be called in to be fully considered at a public inquiry. Anyone may attend such an inquiry.*
- *...the redacted Ministerial submission which the applicant has informed the Secretary of State in order for him to make his decision.*
- *...there is no public information as to the reason for the Call-in Direction. This is not contrary to the Secretary of State's published policy at the time of the Call-in Direction."*

Public interest in favour of maintaining the exception

19. The MHCLG provided that the following statements in favour of maintaining the exception:

- *"All called-in planning applications are, by their very nature controversial, with strong views on both sides.*
- *The requested information does not directly relate to the merits of the planning application but whether it should be called-in for public inquiry and the Secretary of State's own decision.*
- *If considerations about a planning case are released before the Secretary of State has made a formal decision, there is a risk that this will undermine the efficiency, transparency and impartiality of the planning process, and delay the decision-making process. This could lead to individuals making further representations on the basis of the submission's content that, in the interests of fairness, the Secretary of State might then have to consider and possibly circulate to other interested parties to the planning applications in order that they have an opportunity to respond and for all parties to get a fair and equal hearing.*
- *This might lead to a re-opening of the public inquiry and a further Inspector's report, making it difficult to bring a case to a close. Our existing way of handling information requests on live planning cases, balances the need to facilitate public debate and participation in planning decisions against the public interest in an efficient and effective planning system where plans and decisions are made within reasonable timescales.*
- *While a planning case is under consideration, we consider that there would be a breach in "equality of arms" in providing additional information to one party. We acknowledge that releasing such information under EIR ostensibly puts information into the public domain, but we consider that it is unlikely that this would be shared with parties of opposing views."*

Balance of the public interest arguments

20. The Commissioner's guidance on the exception¹ explains that although a wide range of internal information will be caught by the exception, public interest arguments should be focussed on the protection of internal deliberation and decision making processes. This reflects the underlying rationale for the exception being that it protects a public authority's need for a 'private thinking space'.

¹ https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf

21. With regard to attributing weight to the public interest arguments in favour of maintaining the exception, the Commissioner accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This may carry significant weight in some cases. In particular, the Commissioner considers that the need for a safe space will be strongest when the issue is still live.
22. The Commissioner considers that there will always be some public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding of environmental matters, a free exchange of views, and more effective public participation in environmental decision making, all of which ultimately contribute to a better environment.
23. The weight of this interest will vary from case to case, depending on the profile and importance of the issue and the extent to which the content of the information will actually inform public debate. However, even if the information would not in fact add much to public understanding, disclosing the full picture will always carry some weight as it will remove any suspicion of 'spin'.
24. In this case the complainant has identified significant public benefits of the proposed development. The Commissioner observes that the requested information does not directly relate to the public benefits of the Planning Application, rather the question of whether it should be called-in for public inquiry and a decision by the Secretary of State. The Commissioner, however, also acknowledges the possibility that the Call in Direction could delay the achievement of public benefits.
25. The MHCLG have identified the timeline for the formal decision to be made, from which it is clear that at the time of the request the planning issue was live, being still under consideration.
26. The Commissioner considers that if the matter was closed then the risk of prejudicing the planning process would be reduced. However, this is not the case, therefore the need to maintain the safe space gives more weight to the argument for maintaining the exception.
27. The complainant raises public interest arguments regarding the Call in Direction, and whether it is being used consistently across other planning applications. They also dispute whether it was done in adherence with the published policy, stating that the reasons for the Call in Direction are required in order to assess this point. The MHCLG has rejected the assertions, stating that previous proposals for the same site do not affect or limit future call-ins and outlining the basis for its processes in legislation and policy.

28. The Commissioner, whilst not having any role in examining how the MHCLG apply policy or legislation, can appreciate the public interest argument here for transparency. However she is also mindful that on completion of the process, the Inspectors report will be made available to the main parties and the decision published on line. At this time a challenge can be made by way of an appeal. The Commissioner therefore considers that the judicial review process provides a legal mechanism for challenging the decision made.
29. The Commissioner is mindful that the public interest is time and context sensitive and accepts that, with the passage of time, the sensitivity of the information may diminish. However she is also cognisant of the live status of the Planning Application, being that, although the public inquiry is completed, the Inspectors report and subsequent Secretary of State's decision are ongoing.
30. The Commissioner considers that the public interest in maintaining a safe space for decision making and averting disruption to the process outweigh the arguments for transparency, and therefore, on balance, favours maintaining the exception.
31. Having considered the balance of the public interest arguments, the Commissioner has concluded that the MHCLG correctly applied regulation 12(4)(e) to withhold the information and that the public interest in this case favours maintaining the exception.

Right of appeal

32. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

33. 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.
34. 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

Andrew White
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