

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

Decision notice

Date: 27 October 2020

Public Authority: Ealing Council
Address: Perceval House
14-16 Uxbridge Road
Ealing
London
W5 2HL

Decision (including any steps ordered)

1. The complainant has requested information regarding property development and planning held by Ealing Council.
2. Ealing Council relies on regulations 12(4)(e) (internal communications), 12(4)(d) (unfinished material) and 12(5)(f) (voluntary supply) to withhold the requested information.
3. The Commissioner's decision is that Ealing Council incorrectly relied on all the said regulations to withhold the requested information from the complainant.
4. The Commissioner requires Ealing Council to provide the complainant with the requested information, that is the correspondence it sent to the developers but it is to withhold the names and contact details of all persons therein as this information is not requested by the complainant, to ensure compliance with the legislation.
5. 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.

Background

6. The public authority has explained to the Commissioner the background of this matter and this is replicated below in paragraphs 7 to 11 .
7. There is development interest in two sites close to West Ealing mainline station and the public authority was engaged in discussions with two parties through its pre-application process.
8. The first site relates to land to the north of the station. This led to the submission of planning application 202231FUL ref. on 11 June 2020. The applicant being Southern Grove and Thames Valley Housing.
9. This is/was a live application that is currently undergoing formal assessment and is subject to consultation with the local community. It is anticipated that the application would be presented to an autumn planning committee.
10. The second site lies to the south east of the station on land at Hastings Road. This housing led development was being proposed by the residential provider A2 Dominion.
11. A planning application (ref 192864FUL) was submitted on 27 June 2019 but was not formally validated by the public authority. The submission being considered premature in relation to the ongoing discussions regarding design and affordable housing.

Request and response

12. On 2 October 2019, the complainant wrote to Ealing Council ("the public authority") and requested information in the following terms:

"It is understood the Council officers, and maybe Members, have been in discussion with the developers for some months over their proposed tower developments to the south east and northwest of Drayton railway bridge. Has the Council given any pre application advice to either developer giving any preliminary views, or requests, for additional information on their proposed developments? Please supply full details including copies of any written communication with the developers"

13. The public authority responded on 18 October 2019. It said that whilst it held the requested information it withheld it from the complainant by reference to the following exception in the EIR.
 - Regulation 12(5)(f) (voluntary supply).
14. Following an internal review, the public authority wrote to the complainant on 22 January 2020. It upheld its decision.

Scope of the case

15. On 1 February 2020, the complainant contacted the Commissioner to complain about the way his request for information had been handled. He stated his complaint to be the public authority's refusal to provide details of "pre app; officers' planning advice to developers".
16. On 19 May 2020, as part of her investigation, the Commissioner asked the public authority to answer questions regarding its reliance on regulation 12(5)(f), by saying as follows.

"Regulation 12(5)(f) Interests of information provider

Regulation 12(5)(f) sets out several criteria which must be met for this exception to be engaged, namely:

- (i) the person was not under any legal obligation to supply that information to any public authority.
- (ii) the person supplying the information did not supply it in circumstances in which the public authority is not entitled, apart from under the EIR, to disclose it; and
- (iii) the person supplying the information has not consented to its disclosure.

Therefore, please explain why the London Borough of Ealing is satisfied that the three criteria above are met in respect of the withheld information in this case.

Furthermore, please explain how disclosure of the withheld information would adversely affect the interests of the person who supplied that information. In doing so please ensure that the interests of the person are clearly identified, and that this explanation demonstrates a clear link between disclosure of the information that has been withheld and any adverse effect".

17. In the Commissioner's letter she also said as follows:

“Having revisited the request, you may decide to apply a new exception. We will consider new exceptions but it is your responsibility to tell the complainant why the new exception applies and to provide us now with your full submissions”.

18. On 30 July 2020, the public authority (in its substantive reply to the Commissioner's letter of 19 May 2020) informed the Commissioner that it also relied on the following further regulations to withhold the requested information from the complainant.
 - Regulation 12(4)(e) (internal communications)
 - and
 - Regulation 12(4)(d) (unfinished material)
19. On 26 August 2020, the complainant confirmed to the Commissioner that he was only seeking the written advice the Council gave, not the information they received.
20. On 1 October 2020, the public authority provided the Commissioner with a further submission on its use of regulation 12(5)(f).
21. On 8 October 2020, the complainant also confirmed to the Commissioner that he was not seeking the disclosure of names and contact details of all persons within the withheld information.
22. The Commissioner considers she must determine whether the public authority properly relied on the above cited exceptions (regulations 12(4)(d) and (e) and 12(5)(f)) not to provide the complainant with the information he had requested.
23. The public authority has supplied a copy of the withheld information to the Commissioner and she has read the same. The public authority also supplied a copy of information that was outside the scope of the complainant's request. The Commissioner did not consider this information .

Reasons for decision

24. Regulation 2(1) of the EIR defines environmental information as being information on:
 - (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)...as well as measures or activities designed to protect those elements.

25. In this case, the information requested concerns property development and planning. Therefore, it is information on a measure affecting the elements of the environment and is thus environmental information for the purposes of the EIR.

Regulation 12(5)(f) - voluntary supply

26. Regulation 12(5)(f) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the interests of the person who provided the information where that person –
- was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority.
 - did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - has not consented to its disclosure.

Public Authority's Submissions

27. The summary heading for this part of the regulation is 'voluntary supply'. It considers that the pre-application process is covered as a whole by this exception and has applied this consideration to all decisions made in relation to requests under the EIR or subsequent reviews.
28. Once an application for pre-application advice has been submitted it should not be regarded as an assessment process that can be disaggregated into sub process that relate solely to the information submitted by the applicant and then to that information or advice subsequently provided by the public authority in response. As with

formal planning applications, the submission, discussion/assessment, and decision can only be seen as inherent parts of the single process of the application.

29. If a landowner or developer wishes to pursue a development that requires planning consent then he/she has no options but to submit a formal planning application to the public authority as the local planning authority. If the same owner or developer wishes to receive informal advice through the pre-application process then this is done on a purely voluntary basis. It is for this reason the public authority would consider regulation 12(5)(f) as applying to all the information sought under the EIR by the requester in this particular instance.
30. The Commissioner has viewed the withheld information. It consists of information that the public authority has supplied to the developers by way of comments and observations on planning considerations raised by the developers. Though the complainant is only seeking information from the public authority to the developers, it cannot be disentangled from the information that has flowed from the developers to the public authority. The requested information therefore is concerned with information that has been voluntarily supplied to the public authority by the developers.
31. The public authority however has not explained to the Commissioner how releasing the withheld information would adversely affect the interest of the suppliers i.e. the developers. Though the Commissioner has viewed the withheld information she is not prepared to speculate as to these adverse effects. Accordingly, she cannot find the exception to be engaged.

Regulation 12(4 (e) – Internal Communications

32. 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."

The public authority's submissions

33. It is acknowledged that the need for a safe space will be strongest when the issue is still live. Once a public authority has made a decision, a safe space for deliberation will no longer be required and the argument will carry little weight. The timing of the request will therefore be an important factor. This was confirmed by the Information Tribunal in *DBERR v Information Commissioner and Friends of the Earth (EA/2007/0072, 29 April 2008)*:

34. The above paragraph is the totality of the public authority's submissions regarding its reliance on regulation 12(4) (e).
35. The public authority's submissions are plainly not sufficient to persuade the Commissioner that the exception is engaged. Indeed, it has not explained why it thought the exception was engaged. Consequently, it has not demonstrated that the withheld information constitutes internal disclosures. As the disputed information consists of correspondence which the public authority sent to the developers, by definition, the Commissioner cannot discern how it can constitute "internal" communications. The Commissioner therefore finds that this exception is not engaged.

Regulation 12(4)(d)(unfinished material)

36. Under regulation 12(4), a public authority may refuse to disclose information to the extent that:

(d) the request relates to material, which is still in the course of completion, to unfinished documents, or incomplete data.

37. As stated above the public authority raised this exception in its correspondence to the Commissioner dated 30 July 2020. However, it did not set out why it thought this exception applied, nor can the Commissioner glean the same from her reading of the withheld information. Accordingly, the Commissioner is not persuaded that this exception is engaged.

Conclusion

38. The public authority has not persuaded the Commissioner that any of its cited exceptions are engaged, thus she directs that the withheld information be communicated to the complainant. However, it is not to disclose the names and contact details of all persons therein, as this information is outside the scope of the complainant's request .

39. 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

40. 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.
41. 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

Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF