

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 27 May 2021

Public Authority: London Borough of Islington
Address: Municipal Offices
222 Upper Street
London
N1 1XR

Decision (including any steps ordered)

1. The complainant has requested correspondence between "Better Archway Forum" (BAF) and the London Borough of Islington (the council) regarding proposals for a specified site.
2. The council disclosed some of the information and withheld the remainder under regulation 12(5)(f) of the EIR.
3. The Commissioner's decision is that the council is not entitled to rely on regulation 12(5)(f) to withhold this information.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the remainder of the requested information previously withheld under regulation 12(5)(f).
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 Freedom of Information Act¹ and may be dealt with as a contempt of court.

¹ Regulation 18 sets out that the appeals provisions of the Freedom of Information Act shall apply for the purposes of the EIR

Background

6. The request relates to the Archway Methodist Hall in Islington. The building is owned by Flowervale UK Ltd who have submitted planning applications for a change of use of the building and to allow partial or full demolition. These applications have been rejected by the council.
7. BAF is a volunteer-led organisation² with the aim of improving the Archway area in Islington. BAF has submitted a planning application regarding the Archway Methodist Hall to retain its current classification with the intention of creating a community theatre and hub. At the time of the request and the council's submissions to the Commissioner, the application has not yet been determined.

Request and response

8. On 19 May 2020, the complainant wrote to the council and requested information in the following terms:

"This is a request for the London Borough Council of Islington ("the Council") to make available to me, [complainant] all emails and all other written correspondence between officers within the Council's Planning Department (both the development management and plan making teams) and either (A) [named individual] or (B) any other representatives of the Better Archway Forum ("the Forum") in relation to:

- 1. Better Archway Forum's proposals for the future use of the site known as Former Part of the Archway Methodist Central Hall ("the Site"), whether*
- 2. as advanced in relation to Planning Appeal APP/V5570/W/19/3229738³ or*
- 3. in relation to proposed policy ARCH3 within the emerging Local Plan Review*

² <https://www.betterarchway.org.uk/>

³ This appeal was in relation to the council's decision to refuse planning permission to demolish the building as set out in the background section.

- 4. Proposals made by other parties (including Flowervale UK Ltd) for the use of the Site;*
- 5. Any other comments made by [named individual] or the Forum in relation to the content or future use of the Site."*
9. The council responded on 30 June 2020 and provided the information requested in elements 3 and 5 of the request and confirmed that it was withholding the information requested under elements 2 and 4⁴ under regulation 12(5)(e), commercial confidentiality, and regulation 12(5)(f), interests of the person who provided the information.
10. The council explained that the withheld information had been provided in good faith for private discussion and contains commercially sensitive information. The council explained that disclosure would affect the business interests of the person providing the information as they were not under an obligation to provide the information and it was supplied under an expectation of confidence which was agreed as part of the pre-application contract. The council confirmed that BAF had not agreed to the disclosure.
11. The council considered that it was in the public interest to allow the council to continue to engage in private discussions with potential developers to steer them towards delivering a development that provides the greatest benefit to the borough's residents, in line with the council's set objectives, goals and policies.
12. The council considered that this outweighed the public benefit of making information about commercially sensitive planning pre-applications publicly available, thereby losing the trust and confidence of developers and preventing publicly beneficial future discussions.
13. The council explained that if a planning application is subsequently brought forward following pre-application discussions, at that point the details of the discussions are disclosed and made available.
14. On 15 July 2020, the complainant wrote to the council and disputed its position in relation to elements 2 and 4 only.
15. The complainant explained that in relation to element 4 (proposals made by other parties) they would accept that a pre-application contract is potentially capable of giving rise to an expectation of confidentiality but

⁴ Element 1 of the request does not form part of the four criteria of information sought.

this would depend on the circumstances. The complainant therefore made a further request for the pre-application contract which gave rise to BAF's expectation of confidentiality.

16. The complainant confirmed that in relation to element 2 of the request, they did not accept that there was any such expectation of confidentiality as such discussions would not have been covered by any pre-application contract and stated that *"discussions around the prosecution of a planning appeal are clearly very different in kind from the "private discussions with potential developers" which you say are in the public interest"*.
17. The complainant disputed the council's assessment of the public interest. The complainant acknowledged that while there may be commercially sensitive details within a proposal, they considered that the *"mere intention"* to make an application is not sensitive except that it indicates interest in a site. The complainant set out that this interest was made public through the appeal process and they considered that the only information being withheld is the detail of what kind of development is proposed and the encouragement which the council's officers have given to particular forms of land use.
18. The complainant considered that there is a clear public interest in disclosure of this information as it allows other parties to also shape development proposals to reflect the council's aspirations for their sites.
19. The complainant considered that the council's refusal to disclose this information runs contrary to the spirit of the planning system which is intended to set public aspirations for the development of private land in a transparent and even-handed way.
20. On 12 August 2020, the council provided a response to the request for the pre-application contract and confirmed that a formal pre-application request to engage in the council's pre-application service was not made. The council considered that this does not negate the fact that information was supplied in the expectation that it would not be disclosed to a third party and therefore it considered that its reliance on regulation 12(5)(f) still applied. The council repeated its public interest arguments in relation to the original request.
21. On 25 August 2020, the complainant wrote to the council to dispute its position in relation to regulation 12(5)(f). They stated that the council appeared to accept that it has engaged in discussions with BAF about the proposals which the council would favour at the Archway Methodist Hall site and these discussions were not part of any formal pre-application process.

22. The complainant disputed the council's position that it is in the public interest to allow discussions to remain confidential so that developers can be "*steer[ed]...towards delivering development[sic] that provides the greatest benefits to the borough's residents*". They considered that this made "*little if any sense*". They considered that the council has a statutory duty to promote good development but that interest would be better served by publication of its preferences for the Site which would allow other parties (including the landowner) to respond to them.
23. The complainant considered that the council's fear that disclosure of these kinds of informal discussions would result in a loss of trust is similarly flawed. They considered that potential developers cannot have an expectation that the preferences of the local planning authority will be kept confidential and any concerns over disclosure of specifically sensitive financial information can be addressed by appropriate redaction.
24. The Commissioner issued a decision notice on 10 November 2020 requiring the council to provide the complainant with the outcome of its internal review⁵.
25. On 18 December 2020, the council provided the outcome of its internal review. It upheld its reliance in regulation 12(5)(f) to withhold the disputed information.
26. The council stated that it had checked with its Planning Department who confirmed that the developer had refused their consent to disclose this information, which they consider to be confidential, and they consider disclosure to be prejudicial to their interests.
27. The council addressed the complainant's position that the public interest lies in "*the publication of its [the council's] preference for the Site*". Although it had stated in its original response that it believed the public interest lay in steering developers towards a proposal that fulfilled the council's objectives, it stated that it is not the role of the council to predetermine any particular preference. It explained that it is essential that the council remains impartial and simply determines whether any proposed development fits its published planning policies.
28. The council explained that the purpose of pre-planning advice is made clear on the council's website in that it is in order to save developers'

⁵ <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2618614/ic-60896-q2h4.pdf>

time and money in not making inappropriate planning applications. The council stated that it is not for the purpose of potential rival developers to benefit from the time and energy invested in development plans submitted by another.

29. The council explained that the planning process is one which is conducted in the public domain. The council stated that it is at that stage that the general public and any interested parties are allowed to view and comment on applications. The council set out that the provision of pre-planning advice is not a statutory function and it is made clear via its website that pre-planning advice is confidential.
30. The council did not reference its reliance on regulation 12(5)(e).

Scope of the case

31. The complainant contacted the Commissioner on 19 January 2021 to complain about the handling of their request for information.
32. The complainant confirmed that the complaint was regarding the council's response to elements 2 and 4 of the request.
33. The complainant did not complain about a lack of response to element 1 of the request and having reviewed the request, the Commissioner considers that element 1 forms the set up to the request rather than a request in itself.
34. During the course of the investigation, the council confirmed that it was no longer relying on regulation 12(5)(e) and relied solely on regulation 12(5)(f) to withhold the disputed information.
35. The council also confirmed that it had originally interpreted element 4 of the request too widely. It confirmed that it had included any pre-application discussions and planning applications made by other parties including applications that had not been the subject of communications with BAF.
36. The council also confirmed that as the request was for the correspondence between BAF and officers in relation to those proposals, it no longer considered the third party proposals in isolation fell within the scope of the request.
37. The council confirmed that a more appropriate response to element 4 would have been as follows:

- *"For planning applications made by other parties including Flowervale, refers to: P2015/1144, P2018/4068 and P2019/0214. Two earlier applications, P20587 and P2014/3733 were withdrawn and there are no recorded objections or comments to these schemes in the council's digital records.*
 - *BAF's responses to P2014/1144 and P2018/4068 are contained (summarised) within the case officer's delegated reports which are publicly available online using the planning application search".*
38. The council provided the Commissioner with copies of the withheld correspondence between BAF and officers for each application P2015/1144, P2018/4068 and P2019/0214.
39. The Commissioner considers that the scope of the investigation is to determine whether the council is entitled to rely on regulation 12(5)(f) to withhold the information identified by the council as falling within elements 2 and 4 of the request.
40. The complainant has not disputed the council's position in relation to the fresh request dated 15 July 2020.

Reasons for decision

Regulation 12(5)(f): Interests of the person who provided the information⁶

41. 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 to disclose the requested information when it would adversely affect the interests of the information provider. The wording of the exception make it clear that the adverse effect has to be to the person or organisation providing

⁶the 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;

the information rather than to the public authority that holds the information.

42. The exception can be broken down into a five stage test, as recognised by the First-Tier Tribunal in *John Kuschnir v Information Commissioner and Shropshire Council* (EA/2011/0273; 25 April 2012)⁷:
- Would disclosure adversely affect the interests of the person who provided the information to public authority?
 - 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?
 - Does the public interest in maintaining the exception outweigh that in disclosure?
43. Where the first four stages of the test are satisfied, a public authority will owe the person that supplied the information a duty of confidence. The public interest test will then determine whether or not the information should be disclosed.
44. As with all the exceptions in regulations 12(5) of the EIR, the threshold necessary to justify withholding the information is a high one. The effect must be on the interests of the person who voluntarily provided the information and it must be adverse.
45. In considering whether there would be an adverse effect in the context of this exception, a public authority needs to identify harm to the third party's interest which is real, actual and of substance (i.e. more than trivial), and to explain why disclosure **would**, on the balance of probabilities, directly cause the harm.
46. There is no requirement for the adverse effect to be significant – the extent of the adverse effect would be reflected in the strength of

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https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i750/2012_04_25%20Mr%20Kuschnir%20decision.pdf

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.

47. 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 degrees 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.

The council's position

48. The council explained that pre-application requests are not merely an intention to make an application. The council explained that the information submitted along with a pre-application request can be as comprehensive as for a planning application and may include commercially sensitive financial information. The council quoted the complainant's argument that the pre-application information should be disclosed "*to allow other parties to shape development proposals to reflect the Council's aspirations for their sites*". The council considers that this would mean that other developers could take advantage of the time, effort and expense of those making the pre-application request.
49. The council explained that on two separate occasions, BAF outlined their expectations that the information that was provided to them by the owners of the site was done so in confidence and should be kept confidential. The council therefore considered that the information was not to be shared or disclosed. The council directed the Commissioner to the specific correspondence which set out this expectation.
50. The council explained that whilst BAF had not explicitly identified why disclosing the withheld information would disadvantage them, it "*would be assumed*" that the financial costings for re-use of the existing building and structural engineers' reports would likely contain sensitive commercial information.
51. The council explained that the costings of any remedial work to the building could have influenced the decisions of a prospective purchaser as the site is being actively marketed.
52. The council also explained that as some of the information had been provided to BAF in confidence by the owner, BAF, in turn, would not have wished to damage the trust shown by the owner as this could have affected working relationships in the future.

53. The council confirmed that pre-application guidance could be found on its website⁸. Section 13 of the pre-application request form sets out the council's obligations under the Freedom of Information Act 2000 and applicants are advised to make it clear if they consider information to be confidential. The council explained that the inference of this is that applicants are conducting the discussions with the local planning authority in the expectation that those discussions are not publicised at least at the point of discussion.
54. The council confirmed that more general guidance and information on the pre-application process can be found on the GOV.UK website⁹.
55. The council explained that it has accepted pre-application information without an accompanying pre-application request form as there is no statutory or legal requirement for this form to be completed.
56. The council confirmed that where a pre-application contract has not been entered into, as in this case, it would still apply the same principles as the contract.
57. The council confirmed that anyone can submit planning application for a proposed site or empty piece of land regardless of ownership. A person does not need to own land in order to make an application on it. When making a planning application, the applicant is required to serve notice on the owner(s) and any leaseholders with at least seven years' lease remaining.
58. The council confirmed that BAF's planning application, P2019/0214/FUL, was registered on 1 February 2019 and full details can be viewed online using the application search function¹⁰.
59. The council explained that the details of any pre-applications discussions are normally made within the case officer's report on determination of the application. The council explained that as it had not yet made a determination on the application at the time of the request or at the time of providing its submissions, there is no case officer's report in which to refer to the pre-application process.

⁸ <https://www.islington.gov.uk/planning/applications/permission-check/need-planning-advice/formal-pre-app-advice>

⁹ <https://www.gov.uk/guidance/before-submitting-an-application>

¹⁰ <https://www.islington.gov.uk/planning>

The Commissioner's position

60. The Commissioner is concerned at the handling of this request and the application of regulation 12(5)(f) seemingly without evidence of the harm disclosure would cause. The Commissioner is also concerned that the council appears to have withheld a significant proportion of the requested information when it was already in public domain and therefore does not appear to have considered the information itself before applying the exception.
61. The council has only provided arguments relevant to pre-application communications and does not appear to have provided arguments specific to element 2 of the request.
62. The Commissioner is not persuaded that the council has demonstrated that disclosure of the withheld information would adversely affect BAF. The council appears to have speculated and made assumptions regarding the nature of any harm that may be caused.
63. Whilst BAF did confirm that information should be kept confidential, this was in relation to specific documents which had been provided to it by the owners of the site. The Commissioner notes that these documents were submitted as part of the planning application on 19 February 2019 and are publicly available on the council's planning application portal.
64. In considering whether there would be an adverse effect in the context of this exception, a public authority needs to identify harm to the third party's interests which is real, actual and of substance (ie more than trivial), and to explain why disclosure **would** directly cause harm.
65. The Commissioner's published guidance¹¹ on regulation 12(5)(f) explains:

"Public authorities should be able to evidence the harm that would arise as a result of disclosure. In many cases this will stem from direct consultation with the person who supplied the information. This is most likely to have been at the time the information was provided. However... there may be instances in which it is necessary to consult the information provider at the time of the request".

¹¹ https://ico.org.uk/media/for-organisations/documents/1638/eir_voluntary_supply_of_information_regulation.pdf

66. In this case, the Commissioner has not been provided with evidence that BAF told the council of any importance attached to the withheld information. Nor has the council provided any evidence that, having received the request for information, it consulted BAF regarding disclosure.
67. The Commissioner notes the council's position that it applies the same principles of confidentiality regardless of whether the pre-application discussions took place via a formal or informal route. However, she disagrees with the council that section 13 of its formal pre-application request form infers that the default position is that the information will be considered confidential and not disclosed.
68. Section 13 of the form states:
- "Please note that the confidentiality of information held by the council cannot be guaranteed as we may receive requests under the Freedom of Information Act to disclose information about pre-application advice requests and the advice that we have provided. If you consider your enquiry to be confidential, please set out the reasons why, and for what period, any information about the enquiry needs to remain confidential. If you submit a request for confidentiality and we receive an application for disclosure, we will take your request into account when deciding whether to release the information. More information about the Freedom of Information Act can be obtained from the Department of Constitutional Affairs on the following website: <http://www.foi.gov.uk>."*
69. The Commissioner considers that this form makes clear that the information may be disclosed and applicants should set out their reasons regarding why they believe it to be confidential. The Commissioner considers that, in fact, the inference of this passage is that disclosure is the default position and the council must receive convincing arguments for withholding the information.
70. In relation to the small amount of information that BAF did confirm should remain confidential, as set out in paragraph 63, this was published as part of the planning application on the council's website following its submission in February 2019. As the request was made in May 2020, it is not apparent how disclosure of information which is publicly available could adversely affect BAF's interests.
71. Regarding the remainder of the withheld information, in light of the council's position that its disclaimer applies to both formal and informal pre-application discussions, the Commissioner considers that in the absence of any proactive refusal by BAF to disclosure or any consultation with BAF at the time of the request, the council is unable to demonstrate that BAF has refused consent to disclose the information or

that disclosure would adversely affect BAF. The Commissioner also has considered the content of the withheld information in determining whether an obligation of confidence may still exist and whether disclosure of this information would cause an adverse effect. Having reviewed the withheld information, the Commissioner is unable to ascertain any such adverse effect.

72. The Commissioner considers that the council has failed to demonstrate that disclosure in this case would have an adverse effect on the information provider. Accordingly, she finds that regulation 12(5)(f) is not engaged.

Other Matters

73. The Commissioner notes that the council's pre-application disclaimer confirms that information may be disclosed under the Freedom of Information Act 2000. The council should ensure that the disclosure includes reference to the Environmental Information Regulations as planning applications are likely to comprise environmental information.
74. The Commissioner also notes that the Department for Constitutional Affairs and the website link www.foi.gov.uk no longer exist. The council may wish to update its disclaimer.

Right of appeal

75. 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 123 4504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

76. 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.
77. 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

Victoria Parkinson
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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SK9 5AF