

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

**Date:** 10 May 2024

**Public Authority:** London Borough of Islington  
**Address:** Islington Town Hall  
Upper Street  
N1 2UD

**Decision (including any steps ordered)**

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1. The complainant submitted a request to the London Borough of Islington (the Council) seeking copies of correspondence it had exchanged with a party alleged to have committed a particular breach of planning legislation. The Council withheld the requested information on the basis of regulation 12(5)(b) (course of justice and inquiries) of the EIR.
2. The Commissioner's decision is that the information is exempt from disclosure on the basis of this exception and that in all the circumstances of the case the public interest favours maintaining this exception.
3. The Commissioner does not require further steps.

**Request and response**

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4. The complainant submitted the following request to the Council on 23 September 2023:

"Any and all communications between Islington Council and the director of [company name A redacted] (including [individual's name redacted]), [company name B redacted] (including [individual's name redacted]), and/or any other agent and/or representative of [company

name A redacted], in relation to (a) the advertising signage located at [address redacted]; (b) planning application [redacted] and (c) planning application [redacted], and any related communications in respect of the same, between the dates 1 February and 24 September 2023. This would include communications, undertakings and/or representations made by planning enforcement officer [name redacted].”

5. The Council responded on 10 October 2023 and confirmed that it held information falling within the scope of the request but considered this to be exempt from disclosure on the basis of regulation 12(5)(b) of the EIR.
6. The complainant contacted the Council on 20 October 2023 and asked it to conduct an internal review of this decision.
7. The Council informed him of the outcome of the internal review on 15 November 2023 upholding the application of regulation 12(5)(b).

### **Scope of the case**

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8. The complainant contacted the Commissioner on 18 November 2023 to complain about the way his request for information had been handled. He argued that at the point the internal review response was issued there was no open and current investigation into the advertising signage because the sign in question had now been lowered. He therefore argued that the Council’s reasoning to withhold the information fell away.

### **Reasons for decision**

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#### **Regulation 12(5)(b) - course of justice and inquiries**

9. Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect:

‘the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature’

10. ‘Adversely affect’ means there must be an identifiable harm to or negative impact on the interests identified in the exception. Furthermore, the threshold for establishing adverse effect is a high one, since it is necessary to establish that disclosure would have an adverse

effect. 'Would' means that it is more probable than not, ie a more than 50% chance that the adverse effect would occur if the information were disclosed. If there is a less than 50% chance of the adverse effect occurring, then the exception is not engaged.

### The complainant's position

11. As noted above, the complainant argued that by the point of the internal review, the enforcement case was no longer active. As a result he argued that as there is no active investigation the Council could not rely upon this as a reason not to disclose the information. Moreover, in the absence of any ongoing case, he argued that the Council had not advanced any additional basis upon which to withhold the requested information.

### The Council's position

12. The Council explained that at the time of the request there was an active enforcement case with regards to an alleged and/or potential breach of the Town and Country Planning (Control of Advertisements) (England) Regulations 2007. This being an offence under Section 224 of the Town and Country Planning Act 1990 (as amended).
13. The Council argued that disclosing such information would adversely affect the course of justice, ie its ability to investigate the alleged/potential breach, and furthermore that disclosure has the potential to prejudice any future criminal prosecution action that may be deemed appropriate.
14. Subsequent to the request being submitted, the Council explained that a site visit on 20 October 2023 confirmed that the projecting advertisement signage had not been lowered at this time. Whilst illumination was not switched on, confirmation of removal of the wires had not been given. The Council further explained that on 12 November 2023, photographs were received from the shop proprietor confirming the projecting advertisement had now been lowered. Both advertisements were not illuminated at the time and the wires were now partly exposed and confirmed to be cut. Albeit, they had not been removed. The Council explained that its last visit on 9 January 2024 confirmed the situation had not changed. Therefore, the Council explained that this case has yet to be closed, as it is being monitored to clarify if the illumination remains disconnected. Therefore, the Council argued that the complainant's assertion that because the sign had been lowered, the case must be closed, is incorrect.
15. Furthermore, the Council explained that closure of the case would not mean that it would be willing to release information relating to

enforcement matters. Disclosing such information would be likely to adversely affect the course of justice and has the potential to prejudice any future criminal prosecution action that may be deemed appropriate. The Council argued that in the interests of fairness and justice for the proprietor (and the complainant who has raised the alleged breach) it needed to be able to investigate and decide on enforcement action, in a confidential environment. If the information is disclosed, then this could prejudice the outcome of further action.

16. The Council also argued that it may also dissuade further involvement or reporting by complainants which may be needed to help build a case for prosecution if this is deemed appropriate. In addition, the Council argued that in this case disclosure of the withheld information has the potential to fuel harassment and conflict between the parties.
17. In relation to this latter point, the Council argued that the complainant may use any such disclosure to steer or exert influence over its decision-making process. It explained that notwithstanding any potential prosecution proceedings relating to the advertisements on display, the complainant wished the Council to confirm that if the advertisements that had been granted by it under this a particular planning application were to be erected, the Council would take prosecution action against the proprietor regardless, as they would potentially be in breach of a standard condition of the aforementioned Advertisement Regulations 2007. This condition being, 'No advertisement is to be displayed without the permission of the owner of the site or any other person with an interest in the site entitled to grant permission.' The Council noted that the complainant had put the proprietor on notice of his own legal action. However, the Council argued that it is for it to decide if the evidential and public interest tests are met and whether prosecution proceedings should be initiated, and not a third party.

#### The Commissioner's position

18. With regard to the issue of timing, it is important to note that the Commissioner's role in considering complaints is limited, in accordance with case law, to considering the circumstances as they existed at the time of the request. In any event, in view of the Council's submissions above, the Commissioner accepts that at the time of the request the enforcement case remained live, and that this was also the case at the internal review stage, as it was in early 2024.
19. In terms of the risks of the withheld information being disclosed, the Commissioner notes that the information in question is limited to communications with the individual who submitted the planning application (or their representatives). In the Commissioner's view disclosure of such information would not therefore reveal details of the

Council's planning enforcement case to the planning applicant, ie because they are a party to such communications. This is in contrast, for example, to a hypothetical request that sought internal Council communications about how to manage an enforcement case.

20. However, the Commissioner accepts that in order for the Council to be able to effectively consider alleged planning breaches, and in order for the interests of fairness and justice for those against such breaches have been made to be maintained, the Council requires a confidential space in which to consider such matters and liaise with the party in question. In the circumstances of this case the Commissioner accepts that disclosure of the correspondence sought by this request would undermine that confidential space and represents a genuine and real risk of harming its ability to conduct an inquiry, namely this particular planning enforcement investigation.
21. The Commissioner also accepts that disclosure of such information, during the course of an ongoing inquiry, could also dissuade further involvement or reporting by complainants or cooperation by parties, in future cases unrelated cases if the parties in question thought that their correspondence with the Council could potentially be disclosed under the EIR during the course of an ongoing investigation.
22. On the basis of the above factors the Commissioner accepts that the withheld information is exempt from disclosure on the basis of regulation 12(5)(b).

### **Public interest test**

23. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions.
24. The complainant argued that the refusal to disclose any of the information falling within the scope of his request did not instil confidence in the Council. The Council acknowledged that disclosure of the withheld information would contribute to accountability and transparency in respect of its decision making and functions.
25. However, it argued that taking into account the harmful consequences of disclosing the information at the time of the request, it was of the view that the public interest favoured maintaining the exception.
26. The Commissioner appreciates that the complainant has a particular interest in this planning matter. As a result the Commissioner accepts that he has a genuine interest in understanding all aspects of the Council's decision making in respect of this issue, including its interactions with the party alleged to have committed the planning

breach. Disclosure of the withheld information would directly address the complainant's interest in this regard. More broadly, and more relevant to the wider public interest, the Commissioner accepts that disclosure of the withheld information would allow the public to understand the actions the Council has taken in a particular planning case and contribute, as the Council itself has indicated, to ensuring that it is transparent and accountable for its decision making.

27. However, the Commissioner accepts that there is a legitimate, and strong, public interest in a local authority being able to consider and investigate alleged breaches of planning legislation within a confidential space; this is particularly the case when the matter in question remains live and ongoing, as it is here. In the specific circumstances of this case the Commissioner therefore accepts that the public interest attracts particular weight. In addition, the Commissioner considers that the public interest in maintaining the exception attracts further weight given the potential risk that disclosing correspondence from a live enforcement case has on the Council's ability to effectively investigate other, unrelated, enforcement cases in the future.
28. Whilst the Commissioner has been informed by the presumption in favour of disclosure, he is therefore satisfied that, for the reasons given above, the exception has been applied correctly.

## Right of appeal

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29. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

30. 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.
31. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**