

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 10 January 2023

Public Authority: London Borough of Hammersmith and Fulham
Address: King Street
Hammersmith
London
W6 9JU

Decision (including any steps ordered)

1. The complainant submitted an information request to London Borough of Hammersmith and Fulham ("the Council") for a copy of a report and related correspondence in reference to a specific planning application.
2. The Commissioner's decision is that the Council was entitled to withhold the requested information under regulations 12(4)(d) and 12(5)(d). However, in failing to respond to the request and internal review within the statutory timescale, the Commissioner has determined that the Council has breached regulations 5(2) and 11(4) of the EIR.
3. The Commissioner does not require the Council to take any further steps.

Request and response

4. On 6 December 2021, the complainant wrote to the Council and requested information in the following terms:

“Please accepted this letter as a request under the Freedom of Information Act 2000 to provide the following information.

Please provide us:

 - A copy of the BPS Report that assess the affordable housing viability report submitted in respect of planning application ref: 2021/00933/FUL [address redacted].
 - Provide all correspondence including emails, letters and telephone call records between the Council, their appointed agents and BPS in respect of planning application ref: 2021/00933/FUL.”
5. On 25 January 2022, the Council responded to the request confirming that the information was being withheld under regulations 12(4)(d), 12(5)(e) and 12(5)(f).
6. The complainant requested an internal review on 8 February 2022. The Council provided the complainant with its response to the internal review request on 19 April 2022 in which it upheld its response and also applied 12(5)(d) in relation to the correspondence.

Scope of the case

7. The complainant contacted the Commissioner on 17 June 2022 to complain about the way their request for information had been handled.
8. In line with his usual practice, the Commissioner contacted the Council on 25 October 2022 to ask to see a sample of the withheld information in relation to the exemptions applied. The Commissioner also stated that it was his preliminary view that in relation to the report regulation 12(4)(d) was engaged.
9. In response the Council provided samples of the withheld information and withdrew its reliance on 12(5)(f).

10. The Commissioner's investigation has focused on whether the Council is entitled to rely on regulations 12(4)(d) and 12(5)(d) of the EIR to refuse to disclose information within scope of the request, and the balance of the public interest. The Commissioner will also go on to consider whether regulation 12(5)(e) applies, should regulation 12(5)(d) not apply.

Reasons for decision

11. The following analysis sets out why the Commissioner has concluded that the Council was entitled to rely on regulations 12(4)(d) and 12(5)(d) of the EIR.

Regulation 12(4)(d)-information in the course of completion

12. Regulation 12(4)(d) of the EIR allows a public authority to withhold information which is in the course of completion, unfinished documents, or incomplete data.
13. The Commissioner's guidance on regulation 12(4)(d)¹ examines the concept of incomplete data in paragraphs 11 and 12.
14. In decision notice IC-161236-C9S5² the Commissioner found that the Council was correct to rely on regulation 12(4)(d) to withhold the information, which was in draft form, in relation to a planning application.
15. The Commissioner notes the complainant's comments that they "fail to understand how the report is still in draft...and what further work needs to be done on the report". However the Commissioner is satisfied that, the withheld information can be categorised as incomplete data for the report is in draft form and has not been finalised. He is also aware that once it has been completed, the report will be published on the Council's planning database.
16. As such, the Commissioner has decided the Council was entitled to apply regulation 12(4)(d) of the EIR to the first part of the request.

¹ https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4023471/ic-161236-c9s5.pdf>

17. When considering whether the public interest test favours maintaining the exception or disclosing the withheld information, the Commissioner is mindful that regulation 12(2) of the EIR instructs authorities to apply a presumption in favour of disclosure.
18. The Council has acknowledged that the processing of planning applications should be "transparent, where possible, to ensure applications are being processed fairly and in line with relevant legislation, local and national policy". However it also states that as the report is in draft form, the document could be misleading as it is not complete and that the release of the information before the application or appeal has been determined "could be detrimental to the overall process".
19. The Commissioner considers the public interest in the Council being open and transparent would be served if the information was to be disclosed. However he finds the public interest in the data being complete and reliable, and that openness and transparency would be served by the eventual publication of the report. As such, the Commissioner is satisfied that, in this case, the public interest test favours maintaining the exemption.

Regulation 12(5)(d)-confidentiality of proceedings

20. Regulation 12(5)(d) of the EIR says that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.
21. In determining whether the exception applies in this case the Commissioner has referred to his own guidance, previous decision notices and the Council's submissions.
22. The Commissioner's guidance³ explains that proceedings could include, for example, the consideration of a planning application by a planning authority.

3

https://ico.org.uk/media/fororganisations/documents/1626/eir_confidentiality_of_proceedings.pdf

23. In decision notice IC-115533-Y4T6⁴, the Commissioner found that the Council was correct to rely on regulation 12(5)(d) to withhold information the correspondence in relation to a planning application. In paragraphs 22-34 he sets out why the exception is engaged. He relies on the same reasoning here and has concluded that the exception is engaged as disclosing the information would adversely affect the confidentiality of the proceedings identified.
24. On this basis, the Commissioner has decided that disclosure would have an adverse effect on the confidentiality of proceedings Therefore, regulation 12(5)(d) is engaged.
25. The Commissioner must next consider the balance of the public interest. In doing so, he has taken into account the EIR's express presumption in favour of disclosure.
26. The Council accepts that there is a public interest in planning applications being transparent where possible, but that there is also an inherent public interest in protecting commercially sensitive information.
27. The Commissioner accepts that it is very important for the public to have a voice in planning matters, which is part of the general public interest in openness and transparency, however it is important for third parties to have a relationship of trust with the Council and that there is a considerable public interest in ensuring that the effectiveness of the planning application process is not undermined.
28. The Commissioner has therefore decided that, in all the circumstances, the public interest in maintaining the application of regulation 12(5)(d) outweighs the public interest in disclosure.
29. As the Commissioner considers that both 12(4)(d) and 12(5)(d) applies, he has not gone on to consider the application of 12(5)(e).

Procedural matters

30. The Council breached regulation 5(2) of the EIR because it failed to inform the complainant, within 20 working days, whether or not it held any information within the scope of their request.
31. The Council also breached regulation 11(4) of the EIR as it failed to carry out its internal review within 40 working days.

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022697/ic-115533-y4t6.pdf>

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: 0203 936 8963

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

Phillip Angell
Head of Freedom of Information Casework
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF