

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 25 May 2023

Public Authority: London Borough of Merton Council

Address: Merton Civic Centre
London Road
Merton
SM4 5DX

Decision (including any steps ordered)

1. The complainant has requested for copies of all plans and drawings relating to the proposed development of Mitcham Gasworks by St William. London Borough of Merton Council ("the Council") disclosed some of the information to the complainant but withheld the remaining information under regulation 12(5)(f) of EIR.
2. The Commissioner's decision is that the Council is not entitled to rely on regulation 12(5)(f). He also finds that the Council failed to respond to the complainant's information request within the statutory timeframe of 20 working days. On this basis the Commissioner finds that the Council breached regulation of 5(2) of EIR.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information to the complainant. OR
 - Issue a fresh response to the request, which does not rely on regulation 12(5)(f) of EIR.
4. 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.

Request and response

5. On 29 July 2022, the complainant wrote to the Council and requested information in the following terms:

“Please will you provide copies of all the plans and drawings which have been received by members and officers since January 2020 relating to the proposed development of Mitcham Gasworks by St William”.

6. The Council responded on 20 October 2022 and provided some of the information falling within the scope of the complainant’s request. The Council explained that the information disclosed contains plans and drawings that show the evolution of the scheme and presented at public exhibitions. It confirmed that it did not hold plans and drawings that pre-date September 2021. The Council also confirmed that correspondence from the prospective applicant’s town planning advisors in September 2021 was marked ‘confidential’ and hence the remaining information was exempt from disclosure. The Council originally withheld the information under section 41 of FOIA on the basis that the information was shared with the expectation that it would not be shared further.
7. On 20 October 2022 the complainant requested an internal review of the Council’s decision.
8. The Council responded on 10 March 2023. It revised its position confirming that the original request for information should have been considered under the EIR regime and not the FOIA regime. On this basis it sought to rely on regulation 12(5)(f) of the EIR, on the basis that disclosure of the remaining information would adversely affect the interest of the person who provided the information.

Scope of the case

9. The complainant contacted the Commissioner on 18 October 2022 to complain about the way their request for information had been handled.
10. When the complainant raised their complaint with the Commissioner, they had not received a response to their request for internal review. On 7 February 2023, the Commissioner wrote to the Council requiring it to issue an internal review response by 21 February 2023. However, on 28

February 2023, the Commissioner granted the Council a further extension of time until 10 March 2023 to issue its response.

11. Following the internal review the Council maintained its position. It stated that it was satisfied that the exception at regulation 12(5)(f) of the EIR applied to the withheld information for the reasons set out in its original response and the public interest in maintaining the exception to ensure the efficiency of the Council's planning function, outweighs the public interest in openness and transparency to understand the Council's planning function.
12. Regarding the use by the Council of the confidential information as its evidence base in Local Plan Proceedings, the Council argues that the complainant's information request submitted on 29 July 2022 pre-dates the Council's Topic Paper on the Mitcham Gasworks site which was issued in September 2022. It contends that the point raised by the complainant would not be applicable to the Council's handling of their request for information. Nevertheless, the Council clarified that the information used as its evidence base for the Local Plan remains confidential and that extracts from the pre-application stages had been used to justify the Council's policies on tall buildings on site allocation Mi16, Mitcham Gasworks.
13. The Council confirmed that information that is readily available in the public domain is not subject to a duty of confidentiality. It also stated that it considers the public interest has been served as part of the confidential information is available to the public.
14. The Commissioner therefore considers that the scope of his investigations to be to establish whether the Council is entitled to withhold the remaining information under regulation 12(5)(5)(f) of the EIR.

Reasons for decision

15. The Commissioner agrees that the requested information is environmental information falling within the scope of regulation 2(1) of the EIR and therefore the Council was right to handle the request under EIR.
16. **Regulation 12(5)(f)- interests of the person who provided the information to the public authority.**
17. Regulation 12(5)(f) provides an exception from the duty to make information available if this would adversely affect the interests of someone who supplied the information, and that person:

- was not under, and could not be put under, any obligation to supply it;
 - supplied it expecting that it would not be disclosed to a third party; and
 - has not agreed to the information being supplied.
18. The Council has confirmed that the withheld information comprise of third party plans and drawings supplied to the Council for pre-application negotiations advice.
19. The Commissioner notes that the third party in question submitted the information voluntarily, that there is no expectation on the part of the third party that the information would be disclosed and that they have not consented to its disclosure.
20. For this exception to apply, the Council needs to demonstrate the harm that would arise from disclosure to the person(s) that supplied the information and explain why disclosure would, on the balance of probabilities, directly cause the harm.

Would disclosure of the information have an adverse effect on the person that supplied the information.

21. The Council argues that the third party will be adversely affected by disclosure of the withheld information. It contends that resources would be diverted to address public representations on incomplete, unsettled and therefore possibly misleading development propositions. The Council says that negotiations with others who may have a commercial interest in the planning application may be adversely affected.
22. The Commissioner rejects the Council's view that the disclosure of the pre-application plans would distract from the live planning application that was submitted in January 2023. He does not consider this to fall within scope, given that the complainant's request for information predates the planning application.
23. The Commissioner acknowledges that pre-application planning is not part of a formal planning application process and that the information associated with it is not routinely published. However, the Commissioner considers that this does not provide a blanket exception from the duty to disclose information to a request simply because information falls into this category. It is for the Council to demonstrate why, in any given case, disclosure of the information would produce the specific adverse effects described in the exception.
24. In this case the Commissioner considers that the arguments provided by the Council are generic. While he acknowledges the points presented,

there is no explanation of the causal relationship between disclosure and the adverse effects likely to be suffered by the information provider. The conclusions reached by the Council do not appear to be predicated on any specific argument or linked to a particular context.

25. The Commissioner has carefully considered the withheld information together with the information that was disclosed to the complainant. He does not consider that the information that is already in the public domain is significantly distinct from the withheld information. In the absence of a substantive and coherent argument and given the presumption in favour of disclosure under the EIR, he does not consider that the Council has provided adequate evidence of the adverse effect that the third party is likely to suffer.

Right of appeal

26. 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

27. 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.

28. 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

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