

DRAFT - PROTECT

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 5 June 2024

Public Authority: Westminster City Council
Address: 64 Victoria Street
London

Decision (including any steps ordered)

1. The complainant has requested the costs and completion date for a housing development. Westminster City Council ("the Council") provided some information but withheld cost details on the basis of Regulation 12(4)(d) (materials in the course of completion).
2. The Commissioner's decision is that the Council has failed to demonstrate the exception is engaged.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the request that does not cite regulation 12(4)(d).
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 8 September 2023, the complainant wrote to the Council and requested information in the following terms:

DRAFT - PROTECT

"I would like to request the following information in relation to the building development of 14 affordable homes and a community space on the previous play space next to [redacted]:

- The likely completion date for project completion i.e. When do you intend to hand the site over for occupation?
- The current estimate of the total cost for the new affordable homes and community space with separate itemisation relating to:
 1. The building works including not only contractually incurred expenses but also expenses that will be additional thereto as they fall outside the agreed contractual scope of work. This should encompass amounts payable to any and all contractors including Wates and any sub-contractors of Wates or any other contractor employed by WCC
 2. Any other costs and expenses incurred by any WCC departments involved in the project
 3. The professional fees incurred, including surveyor, solicitor and other costs
 4. Any other related costs not listed above
 5. The costs incurred to date analysed by the above categories (and whether they include VAT).
- 6. The Council responded on 13 October 2023. It provided information within the scope of the first, un-numbered part of the request, and stated information in relation to parts 1, 3 and 5 were exempt from disclosure. It did not cite an exception. Lastly, it stated it did not hold any information within the scope of parts 2 and 4.
- 7. At internal review, the Council provided a link to a 2021 Cabinet Member Report which provided some financial forecasts for the project, but no further information.
- 8. In the course of the Commissioner's investigation, the Council revised its position to state any information held was exempt under Regulation 12(4)(d) (incomplete materials) of the EIR.

DRAFT - PROTECT

Reasons for decision

Regulation 12(4)(d) – material in the course of completion

9. Regulation 12(4)(d) of the EIR states that a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
10. Regulation 12(4)(d) is a class-based exception. This means that there is no requirement to consider the sensitivity of the information in order to engage the exception, the only question is whether the withheld information falls within the class described in 12(4)(d). The exception is subject to a public interest test under regulation 12(1)(b), and the exception can only be maintained should the public interest test support this.
11. The Council has applied regulation 12(4)(d) to estimated costs associated with the housing development. In its submission to the Commissioner, it stated it considered the request unclear, as it could refer to estimated final costs, estimated costs incurred to date, or estimated costs paid to date. However, it considered any information within scope of the request to be exempt due to project delays and current negotiations with the contractor about these delays. Due to this, the Council stated, the costs of the project have not been finalised.
12. As stated in paragraph 9 of the Commissioner's guidance on regulation 12(4)(d), the fact that a public authority has not completed a particular project or other piece of work does not necessarily mean that all the information the authority holds relating to it is automatically covered by the exception.
13. Furthermore, that the Council is currently engaged in further negotiations with the contractors is not relevant. While the estimated cost may be subject to change, the Council must only consider what information it held in relation to this at the time the request was made, in September 2023.
14. The Council has not provided any evidence to indicate that documents held at the time of the request would have been considered incomplete or in draft format.
15. In order for the exception to be engaged, the information must be the material itself which is in the course of completion, rather than any wider 'project' or 'process'. As the exception is not engaged there is no requirement to consider the public interest test.

DRAFT - PROTECT

Right of appeal

16. 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

17. 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.

18. 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

Susan Duffy
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF