

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 27 February 2018

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

Decision (including any steps ordered)

1. The complainant has requested from the London Borough of Hammersmith and Fulham the Financial Viability Assessment it obtained in relation to the development of Five Star Car Wash, 10B Shepherd's Bush Road, London W6 7PJ.
2. The London Borough of Hammersmith and Fulham withheld the requested information under Regulations 12(5)(e) and 12(5)(f) of the EIR.
3. The Commissioner's decision is that the London Borough of Hammersmith and Fulham has not correctly applied Regulations 12(5)(e) and 12(5)(f) of the EIR.
4. The Commissioner found that the London Borough of Hammersmith and Fulham has breached Regulations 5 and 11 of the EIR.
5. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Disclose the Financial Viability Assessment commissioned by the London Borough of Hammersmith and Fulham requested by the complainant on 16 October 2016.
6. The public authority must take this step 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.

Background

7. The London Borough of Hammersmith and Fulham (the Council) has a Core Strategy Policy H2 (Affordability)¹ which sets a borough wide target that 40% of all additional dwellings should be affordable². The Council's Draft Local Plan Policy HO3 (Affordable Housing) suggests that 60% of affordable housing should be social or affordable rent with the 40% remainder as intermediate.
8. The complainant's request relates to the development of the Five Star Car Wash 10B Shepherd's Bush Road, London W6 7PJ.
9. In December 2013 a planning application (2013/04132/FUL) to develop this site by demolishing the existing car wash and building residential and office accommodation was withdrawn following significant objection from local residents. The level of intermediate affordable housing proposed in the application was 12.5%
10. In July 2014 Lansdale Holdings applied for planning permission (under 2014/03438/FUL) to demolish the site at 10B Shepherd's Bush in Bamborough Gardens and develop it into residential and office units³⁴. In November 2014 the application was refused on a number of grounds including the level of affordable housing at 19.5% which was considered inadequate.
11. In November 2015 Lansdale Holdings appealed against the Council's decision. However, the appeal was unsuccessful in December 2015 due to an inadequate level of affordable housing.⁵
12. The documents which are available to view on the Council's website regarding planning application 2014/03438/FUL include the detailed financial figures (such as the build costs, finance and fees) in the Feasibility report from Henry Riley and the Appraisal report from HEDC

¹ <https://www.lbhf.gov.uk/planning/planning-policy/local-development-framework/core-strategy>

² https://www.lbhf.gov.uk/sites/default/files/section_attachments/core_strategy_2011.pdf

³ 2014/03438/FUL

⁴ <http://public-access.lbhf.gov.uk/online-applications/applicationDetails.do?activeTab=documents&keyVal=N8ULBVB10Q900>

⁵

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Limited.⁶ The Council's appraisal of the proposed application was carried out by Carter Jonas.

13. A further application for the same site was submitted by Lansdale Holdings in July 2016 under reference 2016/03271/FUL in very similar terms to the appeal scheme⁷. On this occasion the level of affordable housing (30%) was greater than in the previous applications but still below the Council's target of 40%.
14. Lansdale Holdings' application was supported by a Financial Viability Assessment (FVA) prepared by Affordable Housing Solutions and dated June 2016.⁸⁹
15. In October 2016 Carter Jonas LLP prepared an appraisal report in respect of the planning application 2016/03271/FUL on behalf of the Council. Carter Jonas was also responsible for providing the Council with an assessment of the previous unsuccessful planning application 2014/03438/FUL.
16. On 14 December 2016 the planning application was approved subject to conditions at the Council's Planning and Development Control Committee meeting.¹⁰
17. Full planning permission for the site was granted on 6 April 2017.¹¹

Request and response

⁶ <http://public-access.lbhf.gov.uk/online-applications/applicationDetails.do?activeTab=documents&keyVal=N8ULBVB10Q900>

⁷ <http://public-access.lbhf.gov.uk/online-applications/applicationDetails.do?activeTab=summary&keyVal=OAIB7RBIMRG00>

⁸ http://public-access.lbhf.gov.uk/online-applications/files/52827F8DD6D16D1BCCBC29C1D18EF490/pdf/2016_03271_FUL-COVERING_LETTER-1717368.pdf

⁹ http://public-access.lbhf.gov.uk/online-applications/files/0BD0929FB08903E1407256FCCE97CD9F/pdf/2016_03271_FUL-AFFORDABLE_HOUSING_PLANNING_STATEMENT-1717504.pdf

¹⁰ <http://democracy.lbhf.gov.uk/ieListDocuments.aspx?CIId=117&MId=4483>

¹¹ http://public-access.lbhf.gov.uk/online-applications/files/2A4D798B14D876F4E98D8A08CE4F8B6F/pdf/2016_03271_FUL-FULL_PLANNING_PERMISSION-1853891.pdf

18. On 16 October 2016 the complainant wrote to the Council and requested information in the following terms:

"On 4 August I asked for copies of the financial viability assessments in connection with the planning application submitted for the Five Star Car Wash site in Shepherds Bush – information request reference 945658.

Your response was that part of my request could not be considered as it had not been completed and that I should wait 3 weeks or so for this to happen. This time has now elapsed and I am therefore asking again for copies of the FVAs [Financial Viability Assessments] relating to this site. Specifically, the FVA commissioned by the Council at the applicant's expense and the applicant's own FVA as amended since the original application."

19. The Council responded on 11 May 2017. It stated that it held the requested information but was withholding it under Regulations 12(4)(b) and 12(5)(e) of the EIR.
20. On 26 May 2017 the complainant requested an internal review.
21. Following an internal review the Council wrote to the complainant on 8 September 2017. It stated that it was withholding the entirety of the requested information under Regulations 12(5)(e) and 12(5)(f) of the EIR. However, it said it was withdrawing its reliance on EIR Regulation 12(4)(b).

Scope of the case

22. The complainant contacted the Commissioner on a number of occasions in 2016 and 2017 to complain about the way his request for information had been handled. In particular, on 10 September 2017, he expressed his lack of satisfaction with the Council's internal review response in terms of its contents and the time taken to complete it.
23. The scope of the Commissioner's investigation will be to assess whether the Council has correctly applied Regulations 12(5)(e) and 12(5)(f) to the requested information. The Commissioner will also assess whether the Council has breached Regulations 5 and 11 of the EIR. This Decision Notice, which relates to the Council's assessment of the FVA by Carter Jonas, should be read in conjunction with Decision Notice FS50657675 which relates to the FVA assessment produced by Affordable Housing Solutions on behalf of the developer, Lansdale Holdings.

Chronology

24. On 19 September 2017 the Commissioner contacted the Council and requested a copy of the withheld information, comprising the report by Carter Jonas and any further arguments it wished to advance in respect of its application of Regulations 12(5)(e) and 12(5)(f) of the EIR.
25. The Council responded on 6 October 2017 with a copy of the withheld information and stated it was maintaining its decision to apply EIR Regulations 12(5)(e) and 12(5)(f) for the reasons given in its internal review response dated 8 September 2017.

Reasons for decision

26. The Council has withheld the entirety of the requested information (comprising of the report from Carter Jonas) under Regulations 12(5)(e) and 12(5)(f) of the EIR. The Commissioner will now consider each exception in turn.

Regulation 12(5)(e) – commercial confidentiality

27. Regulation 12(5)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect “the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest”.
28. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She has considered how each of the following conditions apply to the facts of this case:
 - Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality provided to protect a legitimate economic interest and
 - Would the confidentiality be adversely affected by disclosure?
29. Regulation 12(5)(e) is subject to the public interest test whereby the public authority may only refuse to disclose the requested information where the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Is the information commercial or industrial in nature?

30. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity either of the public authority concerned or a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
31. The withheld information consists of a report commissioned by the Council from Carter Jonas assessing the FVA produced by Affordable Housing Solutions on behalf of the developer, Lansdale Holdings.
32. The Council has argued that this report is commercial in nature as it relates to the detailed analysis of a proposed property development.
33. Having considered the Council's submissions and the withheld information the Commissioner has concluded that the information relates to the development of land and that it is commercial in nature and therefore satisfies this element of the exception.

Is the information subject to confidentiality provided by law?

34. In considering this matter the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.
35. In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not already in the public domain.
36. The Commissioner considers that confidence can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties, and any previous or standard practice regarding the status of information.
37. The Council has stated that pre-planning application discussions usually proceed on the basis of treating commercial information provided by a developer as confidential. This is to encourage the developer to disclose the maximum amount of information.
38. In the present case the Council has argued that the report from Carter Jonas would be covered by the common law duty of confidence. It believes that it is not trivial nor is the information it contains in the public domain.
39. The complainant has disputed this and expressed a belief that some of the information in the FVA and the report from Carter Jonas is already publicly available on the Council's website. Specifically the complainant has referred to the financial data uploaded onto the Council's website at

the appeal stage for the previous application. Despite this information being publicly available on the Council's website the complainant has argued that no discernible damage has been caused to Lansdale Holdings nor is there any evidence that it has impeded the Council's negotiations about affordable housing.

40. The Council has pointed out that it refused the previous planning application which was then dismissed on appeal. Furthermore, the current application is different from the earlier one. Therefore the current FVA contains different information from the financial information relating to the previous one which is on the Council's website.
41. The Council has stated that the information in the report from Carter Jonas was taken from the FVA provided by Lansdale Holdings as part of the negotiation process on the basis that both parties expected certain information would be held in confidence by the other. The Council added that if it disclosed the information in the FVA it could face a legal challenge.
42. The Commissioner accepts that, at the very least there is a clear implied obligation of confidence in the information shared between the parties. In addition to this, it is clear to the Commissioner that the information in this category is not trivial in nature as it consists of financial details associated with a significant potential development.
43. The Commissioner accepts that, since the passing of the EIR, there is no blanket exception for the withholding of confidential information. However, for the purposes of this element of the exception, she is satisfied that the information is subject to confidentiality by law.

Is the confidentiality provided to protect a legitimate economic interest and would the confidentiality be adversely affected by disclosure?

44. The Commissioner considers that to satisfy the third and fourth elements of the exception, disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. This approach was adopted by the Tribunal in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd (EA/2010/0106)* and is consistent with the duty contained in *Article 4.2 of the European Directive 2003/4/EC* on public access to environmental information to interpret exceptions in a restrictive way. Furthermore, the Aarhus Convention states that:

*"Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure **would** significantly damage the interest in question and assist its competitors". (Emphasis added)*

45. It is therefore necessary for a public authority to demonstrate that disclosure would, on a balance of probabilities (i.e. more likely than not) harm the legitimate economic interests of the person the confidentiality is designed to protect in order to engage the exception. Unlike the Freedom of Information Act 2000 (the FOIA) there is no lesser test of 'would be likely to' adversely affect. Furthermore, taking into account the duty to interpret exceptions restrictively, the wording in the exception 'where such confidentiality **is** provided by law to protect a legitimate economic interest' (as opposed to 'where such confidentiality **was** provided...') also indicates that the confidentiality of this information must be objectively required at the time of the request.
46. The developer (Lansdale Holdings) and the Council therefore have to demonstrate that the confidentiality of the information was *required* at the time of the request and that disclosure would more likely than not have harmed their legitimate economic interests at the time of the request.
47. In this case the Council has pointed out that at the time of the request the planning application had not been determined and planning consent had not been granted.
48. However, the Commissioner notes that at the date the internal review on 8 September 2017 planning permission had already been granted. The Council has stated that the fact planning permission was granted on 6 April 2017 did not mean that the report from Carter Jonas could be released.

The interests of the developer (Lansdale Holdings)

49. The Council has stated that the report from Carter Jonas includes commercially sensitive figures regarding use returns, values and build costs, other professional costs and financing arrangements, taken from the FVA submitted by Lansdale Holdings in support of their planning application.
50. When the Council contacted Lansdale Holdings, its solicitors stated that there was a genuine risk to its client's commercial interests. If the commercially sensitive information in its FVA was disclosed, it would have an adverse effect on negotiation with prospective tenants or purchasers or tendering contracts.
51. In order for the exception to be engaged it is not sufficient for withheld information to be confidential in nature; it has to be shown that disclosure would adversely affect the legitimate economic interests of a party or parties. Lansdale Holdings has argued that disclosure of the FVA would pose a 'genuine risk' to its commercial interests resulting in an 'adverse effect' on negotiations. However, the Commissioner has not

been provided with any details of this adverse effect or the relevant parts of the withheld information which would prompt this.

52. The Commissioner found that the exception, in relation to the developer's interests, has been applied in a general way, with information deemed confidential withheld in a blanket manner with no consideration of specific harm to legitimate economic interests.

The interests of the Council

53. The Council said that disclosure of the FVA would harm its economic interests in terms of its ability to negotiate affordable housing and planning obligations. Furthermore, it has argued that disclosure of the report from Carter Jonas at the time of the request would have been likely to impede not only the effective progress of the proposed application but also the overall financial viability of the proposed development. In addition the Council said that disclosure of Carter Jonas' report might dissuade the developer from providing further information to facilitate meaningful negotiations. This in turn would mean that negotiations on affordable housing would be less comprehensive and potentially lead to the Council being less successful in securing the maximum benefits from property developers.
54. The Council, whilst emphasising the importance of maintaining the confidentiality of the information, only provided very general arguments of the specific adverse effects to its legitimate economic interests which disclosure would cause. The Commissioner accepts that the relative commercial sensitivity of information can have an impact in this context. However to assert, without explaining in detail the nature of the link between disclosure and any adverse effects, does not support engaging the exception.
55. The Commissioner accepts that damaging a public authority's ability to achieve best value for public money would be an adverse effect. However, the Council has not explained how, with reference to the specific parts of the withheld information and the precise nature of the damage, how or why disclosure would produce this effect in this case.
56. The Commissioner acknowledges that developers might prefer that information relating to their business interests should remain private. Since the coming into force of the EIR it is the responsibility of public authorities to advise third parties that any information held can be subject to disclosure. Moreover, the Commissioner does not consider it plausible that prospective developers would stop engaging or negotiating with local planning authorities where potentially lucrative development opportunities are at stake on the basis that information held might be disclosed.

57. The Commissioner accepts that there are occasions where the real potential for damage to legitimate economic interests caused by the release of information warrants non-disclosure—which is the purpose of the exception. However, in this case, despite being given an opportunity to do so, the Council has failed to explain the specific effects of disclosure and link this to specific parts of the withheld information.
58. As she has found that confidentiality in this case has not been shown to protect either party's legitimate economic interests from harm, the Commissioner has concluded that the exception is not engaged. In the light of that finding, she has not, therefore, gone on to consider the public interest.

Regulation 12(5)(f) – information provided voluntarily

59. The Council has also argued that it is entitled to withhold the report from Carter Jonas in its entirety under Regulation 12(5)(f) of the EIR.
60. Regulation 12(5)(f) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

'(f) the 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;'

61. EIR Regulation 12(5)(f) is subject to the public interest test whereby the public authority may only refuse to disclose the requested information where the public interest in maintaining the exception outweighs the public interest in disclosing the information.
62. It is the Commissioner's view that 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 disclosure when doing so would adversely affect the interests of the information provider. The wording of the exception makes clear that the adverse effect has to be to the person or organisation providing the information rather than to the public

authority that holds the information. See paragraph 22 of the Commissioner's guidance on Regulation 12(5)(f).¹²

63. With regards to engaging the exception, as recognised by the First-tier Tribunal (Information Rights), a four stage test has to be considered, namely:
- 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?
 - Would disclosure adversely affect the interests of the person who provided the information to the public authority?¹³

Adverse effects on the interests of the person who voluntarily provided the information

64. As with all the exceptions in Regulation 12(5), the threshold necessary to justify non-disclosure because of adverse effect is a high one. The effect must be on the interests of the person who voluntarily provided the information and it must be adverse.
65. 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 (i.e. more than trivial), and to explain why disclosure **would**, on the balance of probabilities, directly cause the harm.
66. There is no requirement for the adverse effect to be significant – the extent of the adverse effect would be reflected in the strength of 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. 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 [or would be likely to?] adversely affect', which is why it requires a greater

¹² https://ico.org.uk/media/for-organisations/documents/1638/eir_voluntary_supply_of_information_regulation.pdf

¹³ [John Kuschnir v Information Commissioner and Shropshire Council \(EA/2011/0273; 25 April 2012\)](#)

degree 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

Were Carter Jonas under any legal obligation to supply the information?

67. The Council has stated that 'the applicant' was not under any legal obligation to supply the assessment report to it. By 'applicant' the Commissioner believes the Council was referring to the developer, Lansdale Holdings. However, the assessment report was supplied to the Council by Carter Jonas at the former's request and instruction.

Did Carter Jonas supply the FVA with the expectation that it would not be disclosed, apart from under the EIR?

68. The Council has stated that the assessment report was provided to it 'by the applicant' on a voluntary basis in the expectation that it would not be disclosed to any other third party or the public. The report was not supplied in circumstances that would entitle it to disclose it, apart from under the EIR. Again the Council has referred to 'person' that provided the information as 'the applicant' when in fact it was Carter Jonas. The Commissioner considers that the Council is of the opinion that the information provided by Carter Jones contains information provided by 'the applicant' but it has not specifically stated this.

69. Although the Council has not advanced any specific arguments, the Commissioner has no reason to believe that the report was not provided with the expectation that it would not be disclosed other than under the EIR.

Has Carter Jonas consented to the disclosure of the assessment report?

70. The Council pointed out that it had consulted with the applicant's solicitors twice (in August 2016 and April 2017) regarding whether its client was willing to disclose the requested information. On both occasions the applicant's solicitors said its client was not prepared to consent to the requested information. Again, it is apparent to the Commissioner that the Council has mistakenly referred to the 'applicant' as opposed to Carter Jonas as the person providing the information.

71. The Council has not provided the complainant nor the Commissioner with any evidence as to whether Carter Jonas has consented to the disclosure of its assessment report. When asked by the Commissioner as to whether it wished to make any further submissions in addition to those already set out in the internal review response, the Council said it did not.

Would disclosure adversely affect the interests of Carter Jonas?

72. The Council has argued that, on a balance of probabilities, disclosure of the FVA would have an adverse effect on the 'applicant' for the same or similar reasons to those already given above in relation to the application of Regulation 12(5)(e) of the EIR. Once again the Council has referred to the 'applicant' as the person who provided the information when it was in fact Carter Jonas. Although, as stated in para 68 the Commissioner considers that the Council is of the opinion that the information provided by Carter Jones contains information provided by 'the applicant' but it has not specifically stated this.
73. The Council has not provided the complainant nor the Commissioner with any evidence as to any adverse effect disclosure of the assessment report would have on Carter Jonas or 'the applicant'.
74. The Commissioner has therefore concluded that Regulation 12(5)(f) is not engaged in respect of the report supplied to the Council as it has not been demonstrated that it was provided voluntarily, she has seen no evidence regarding whether the provider has consented to disclosure, and the adverse effect has not been sufficiently demonstrated.
75. As the Commissioner has concluded that Regulation 12(5)(f) is not engaged, she has not gone on to consider the public interest test.

Regulation 5– Duty to make available environmental information on request

76. Regulation 5(1) of the EIR provides that a public authority that holds environmental information shall make it available on request.
77. Regulation 5(2) provides that such information shall be made available as soon as possible and no later than 20 working days after the date of receipt of the request.
78. In this case the Council did not respond to the complainant's request dated 16 October 2016 until 11 May 2017 and therefore breached Regulation 5 of the EIR.

Regulation 11 – Representations and reconsideration

79. Regulation 11(1) provides that an applicant may make representations to a public authority in relation to their request for environmental information if it appears that the public authority has failed to comply with the requirements of the EIR.
80. Regulation 11(4) provides that a public authority shall notify the applicant of its decision in relation to their representations as soon as possible and in any event no later than 40 working days after receipt.

81. In this case the complainant made representations to the Council that he was dissatisfied with its response on 26 May 2017. The Council responded to these 73 working days later on 8 September 2017 and therefore breached Regulation 11 of the EIR.

Right of appeal

82. 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 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

83. 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.

84. 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

**Deborah Clark
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Wycliffe House
Water Lane
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SK9 5AF**