

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 15 January 2024

Public Authority: London Borough of Ealing
Address: Perceval House
14/16 Uxbridge Road
Ealing
W5 2HL

Decision (including any steps ordered)

1. The complainant asked for information in relation to pre-application planning advice from the London Borough of Ealing (the Council). The Council gave links and supplied some information within scope of the request citing regulation 13 of the EIR for its redactions to personal information; however, it failed to clarify its position with regards to the Twyford Court pre-application information requested.
2. During the Commissioner's investigation, and after further prompting, the Council cited its reliance on regulation 12(5)(d) of the EIR to withhold information in relation to the Twyford Court pre-application.
3. The Commissioner's decision is that the Council's reliance on regulation 12(5)(d) is appropriate in the circumstances of this case and he considers that the balance of the public interest favours maintaining the exception in this case. The Council breached regulation 14 by failing to provide an appropriate refusal notice or rely on a relevant exception for this information within 20 working days.
4. The Commissioner does not require the Council to take any steps as a result of this decision.

Request and response

5. On 28 July 2023, the complainant wrote to the Council and requested information in the following terms:

"A full record of all the Twyford Court (W3 9QE) pre-application meetings - whether they were held face to face or electronically, including the dates they were held, all the participants, their agendas and the full minutes, records and notes taken by the Local Authority or by its individual officers.

I would also be grateful for complete copies of the notes and records of all one-to-one discussions between the applicants or their agents and the Local Authority whether they took place face to face or by telephone, letter, or email.

I am also looking for the same information listed above, in relation the current planning application - 230905FUL.

I am as well looking for any information the Local Authority holds around Twyford Court in relation to the Creffield Conservation Area."

6. The Council failed to cite the exception it was relying on to withhold the specific requested information with regard to the Twyford Court pre-application in its 25 August 2023 response. In its internal review of 20 September 2023 it stated it had not found any further information relating to the request.

Scope of the case

7. The complainant contacted the Commissioner on 29 September 2023 to complain about the way their request for information had been handled.

8. The complainant challenged the Council's response to their internal review request:

"I have been advised by the Planning Officer, and this is within the emails between the Planning Officer and developers agent, that the developer is not willing to share the information, therefore the Council are withholding it. I do not believe the developer should have such power."

9. The Council explained:

"The Council provided some information between the planning officer and developer's agent in relation to the current planning

application 230905FUL but did not disclose information in relation to the pre-application planning advice.

Pre-application advice was provided on a confidential and 'without prejudice' basis and proposed schemes can only be formally decided within the context of a planning application, having taken into account planning policy and other material considerations, which include the views of local residents and third parties.

The pre-application advice was provided to applicants/developers on a voluntary and confidential basis and was not disclosed in a EIR request."

10. During the Commissioner's investigation, the Council further explained its position regarding the withheld information: "The reason it has not been disclosed is that it was received and advice given in a letter dated 07.03.2018, which pre-dates LBE's decision (effective from 1st February 2021) to change the Pre-application process to enhance transparency by publishing pre-application material at the time a formal planning application is submitted for the proposed development amendment.

The Council is applying Regulation 12(5)(d) – Confidentiality of proceedings to this part of the request which 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."

11. Based on the Council's submissions, and its responses to the Commissioner's requests for clarification, the Commissioner's investigation will therefore focus on the Council's reliance on regulation 12(5)(d) of the EIR.

Reasons for decision

Regulation 12(5)(d)

12. Regulation 12(5)(d) of 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.
13. The engagement of the exception rests on three conditions being met.
14. First, the confidentiality referred to by a public authority must specifically relate to the confidentiality of proceedings. In his guidance

'Confidentiality of proceedings (regulation 12(5)(d))¹', the Commissioner interprets 'proceedings' as possessing a certain level of formality. They will include but are not limited to formal meetings to consider matters that are within the authority's jurisdiction; situations where an authority is exercising its statutory decision-making powers; and legal proceedings.

15. The information withheld under this exception relates to a pre-application advice process offered by the Council. The Commissioner has previously acknowledged in a range of decisions (e.g., FER06996769², FER0900414³, IC-115533-Y4T6⁴, IC-206377-X4X4⁵) that such a process represents a 'proceeding' for the purposes of the exception.
16. The Commissioner is therefore satisfied that regulation 12(5)(d) of the EIR is engaged because the information relates to the Council's pre-application advice process.
17. Second, this confidentiality must be provided by law. The Council has explained that it considers the information to meet the threshold for the common law of confidentiality. This is because the information is not trivial and was submitted to it voluntarily as part of the pre-application advice process.
18. Having considered the context in which the information has come to be held, the Commissioner is satisfied that this information is subject to the common law of confidentiality.
19. Third, it must be demonstrated that disclosure would have an adverse effect on the confidentiality of the proceedings.

¹ https://ico.org.uk/media/for-organisations/documents/1626/eir_confidentiality_of_proceedings.pdf

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2173203/fer0696769.pdf>

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2618026/fer0900414.pdf>

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

⁵ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4024160/ic-206377-x4x4.pdf>

20. The Council has explained that: "Prior to 1st February 2021 there was an expectation that the pre-application advice process was confidential, and that the publication of the information would therefore undermine this expectation." All applications during this period would have the expectation that any information would be subject to confidentiality.
21. On this basis, the Commissioner has decided that disclosure would have an adverse effect on the confidentiality of proceedings. Regulation 12(5)(d) is therefore engaged.
22. The Commissioner must next consider the balance of the public interest. In doing so, he has taken into account EIR's express presumption in favour of disclosure and the public interest in transparency and accountability.
23. The Commissioner recognises in this case that there is a public interest that public authorities are appropriately open and transparent about their decision making processes. This is particularly so in respect of concerns about planning matters.
24. However, and as noted in the above cited decisions, the Commissioner also recognises that there is a strong public interest in ensuring that the Council is able to provide a robust pre-application advice process to prospective planning applicants, the purpose of which is to improve the efficiency and effectiveness of the planning application system, and reduce wasted resources by helping to prevent planning applications being made that are unlikely to be approved. In the Commissioner's view disclosing the specific information requested in this case would discourage engagement with the pre-application process, or similar processes both from this applicant and others, for fear of the public dissemination of such information.
25. 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. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019): "If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).
26. The Commissioner has decided that, in the circumstances of this particular case, rather than being equally balanced, the public interest in maintaining the exception at regulation 12(5)(d) outweighs the public interest in disclosure.

27. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(5)(d) is cited correctly.

Procedural matters

28. In its response the Council failed to cite the appropriate exception from the duty to provide the requested information. Regulation 14 of the EIR requires a public authority wishing to withhold information to issue a refusal notice within 20 working days. The Council failed to issue an appropriate refusal notice within 20 working days and consequently breached regulation 14 of the EIR.

Right of appeal

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

Website: 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.

Signed

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