

Environmental Information Regulations 2004 (EIR) Decision notice

Date: 19 August 2024

Public Authority: Birmingham City Council
Address: Council House
Victoria Square
Birmingham
B1 1BB

Decision (including any steps ordered)

1. The complainant asked for a copy of any documents produced and presented to Birmingham City Council (the Council) by developers St Joseph/Berkeley Homes as part of its bid for a major contract. The Council stated that there is no indicative masterplan developed by Berkeley Homes for the said project.
2. However, the Council later relied on regulation 12(5)(e) of the EIR to withhold information in scope of the request.
3. The Commissioner's decision is that the Council was entitled to rely on regulation 12(5)(e) to withhold the requested information. The Commissioner finds a breach of regulation 5(2) regarding the delay in responding to the request.
4. The Commissioner does not require any steps to be taken as a result of this decision.

Request and response

5. On 3 January 2024, the complainant wrote to the Council and requested information in the following terms:

“You responded on January 3 2023 to refuse to provide a copy of any documents produced and presented to Birmingham City Council by developers St Joseph/Berkeley Homes as part of its bid for a major contract to redevelop and build new homes in Ladywood, Birmingham.

In your response you acknowledged that an outline scheme had indeed been produced by St Joseph as part of its procurement bid. I am separately aware that a detailed proposal including a breakdown of plans for demolition and new builds was submitted which clarified the precise number of homes that would be built in each part of the estate, the precise number of which of those would be affordable or social, drawings and details of the types of housing, details of where demolition would occur, and a draft timeline.

At the time of the procurement process developers would rightly have wanted to ensure confidentiality of their proposals from other potential bidders.

However, Birmingham City Council has now accepted the proposal. I would therefore submit that the council is now obliged to be open and transparent about the basis on which the bid by St Joseph was accepted, and to share those proposals with residents in Ladywood. Birmingham taxpayers have a right to see and read the basis on which the city council accepted the bid put forward by Berkeley Homes and there is a strong public interest in sharing the basis of the agreed contract with residents, particularly those directly impacted in Ladywood.

The council has directly promised to residents and in media statements that it will be open and transparent, and share full details of the proposals and plans, yet we would argue it has failed to do so. I am therefore requesting you reconsider this application.”

6. On 5 February 2024, the Council responded stating: “There is no indicative masterplan developed by Berkeley Homes. Proposed plans developed by Berkeley Homes did form part of the confidential discussion documents which were prepared for the structured negotiations which took place with Berkeley Homes, as part of the formal procurement process leading to the recommendation that they be appointed, but there does not exist any ‘indicative masterplan’ document to share.”

7. At internal review on 3 May 2024 the Council said that the language used around a 'Masterplan' was misleading and not the right language to use. However, it reiterated that there is no document to share until the proposals are formulated.
8. The Council had initially stated that no information was held in relation to a 'Masterplan' and during its internal review it reiterated this stance despite clarifying the word Masterplan was misleading. However, during the Commissioner's investigation the Council changed its reliance to withhold information under regulation 12(5)(e) of the EIR as it had clarified that the scope of the request was wider than just one document i.e. a "masterplan" as previously suggested and encompassed any document held by the Council in the terms outlined in the complainant's request, which is at paragraph 5.

Reasons for decision

Regulation 12(5)(e) - confidentiality of commercial or industrial information

9. Regulation 12(5)(e) of the EIR states 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.
10. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of regulation 12(5)(e) of the EIR, the authority must demonstrate that:
 - the information is commercial or industrial in nature;
 - the information is subject to confidentiality provided by law;
 - the confidentiality provided is required to protect a legitimate economic interest; and
 - that the confidentiality would be adversely affected by disclosure.
11. The Council advised within its response that its view is the regeneration scheme concerned is commercially sensitive and remains confidential.
12. The Council explained that with regard to the four-point test at paragraph 10, the information is commercial in nature given it concerns the regeneration scheme. The information consists of details of design proposals, construction methodologies and cost estimates received by the Council for the project. The bid document was accepted on a

confidential basis to protect the commercial interests of St Joseph's to ensure a fair and competitive bidding process which has an inherent duty of confidentiality in tendering exercises. During and after the procurement exercise finished the bid document has retained the necessary quality of confidentiality as the information is not trivial and has not been shared more widely within the Council nor put in the public domain. "We are of the view; the tender documents are covered by a common law duty of confidentiality. St. Joseph consider the information included in their bid document is on a 'commercially confidential' basis for the council's evaluation, and if released would damage their commercial economic interests. The bid documents comprise of several pieces of information which if released would be likely to prejudice commercial interests of both the Council and St Joseph, and adversely affect the confidentiality of commercial information."

13. The Commissioner understands the points raised by the Council and considers they carry significant weight with regard to reputation and future negotiations which may be damaged, as well as potential legal action against the Council if disclosure were to take place.
14. The complainant provided their views which centre around the Council's obligations for transparency and accountability, as well as obtaining best value with regard to the public purse, and the underlying public interest of those affected by the regeneration scheme and beyond.

Public interest test

15. The Council has considered the following arguments with regard to the public interest test:
 - There is a general public interest in transparency, accountability, and openness of the Council's processes and some benefits of disclosure of the tender documents submitted and its ability to inform the public. However, it states that:
 - There is also an existing public interest to protect the integrity of public procurement exercises which involves a relationship of trust and confidentiality with bidders, and the reputation of the Council as a public body to allow for fair competition to best serve the protection of public funds.
 - And considers in all the circumstances that maintaining the confidentiality of the bid document outweighs the public interest in disclosing the information, and disclosure in this case would impact engagement, views and input of the community into the consultation process, thinking there is a plan already agreed, which is not the

case, thus not engaging in the consultation process which is essential to develop and agree a masterplan for the area.

16. In conclusion it was satisfied that the balance of the public interest lies in favour of withholding the information, although it accepts that the argument is finely balanced.
17. The Commissioner's view is that the arguments made by the Council are weighty factors in favour of maintaining the exception in this case. He is satisfied that disclosure would be likely to prejudice the consultation process, which may lead to difficulty in obtaining engagement from the community in the process. Any detriment to the full consultation of the community would not be in the public interest.
18. Having considered all the arguments presented, the Commissioner's decision is that the public interest in maintaining the exception outweighs that in disclosure, therefore the Council was entitled to rely on regulation 12(5)(e) to withhold the requested information.

Procedural matters

19. The public authority breached regulation 5(2) of the EIR as it failed to issue its response within 20 working days of receiving the request.

Right of appeal

20. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

21. 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.
22. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Deirdre Collins
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF