

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 21 February 2020

Public Authority: London Borough of Hammersmith and Fulham
Address: Town Hall
King Street
Hammersmith
London
W6 9JU

Decision (including any steps ordered)

1. The complainant requested information relating to the consideration of a planning application. The public authority withheld the information held within the scope of the requests relying on the exceptions at regulations 12(4)(d), 12(4)(e), 12(5)(b) and 12(5)(f) EIR.
2. The Commissioner's decision is that the public authority was entitled to rely on the exception at regulation 12(4)(e).
3. No steps required.

Request

4. The complainant initially submitted the following request to the public authority on 11 April 2019:

“Planning Application Ref. No: 2018/03982/FUL

Please could you disclose (under the FOI Act and the EIR Regulations), and records of internal deliberations as to how the Council has reached its conclusions on this matter? [sic]”

5. On 29 April 2019 the complainant submitted a further request to the public authority in the following terms:

“Planning Application Ref. No: 2018/03982/FUL, Proposed development at 34 Dewhurst Road, W14 0ES

Please treat this email as a request under the Freedom of Information Act 2000 (the Act) and the Environmental Information Regulations 2004 (the Regulations) for the Council to provide me with all correspondence, records of meetings or telephone attendance notes relating to the above application and between the applicant for the above planning application (and / or any agent acting on behalf of the applicant) and the Council. Such information does not need to include any information that is already available on the Council’s online- planning register for the above application.”

6. On 15 May 2019 the public authority responded to the request initially submitted by the complainant on 11 April 2019. It confirmed that it held the requested information which it considered exempt on the basis of the exceptions at regulations 12(4)(d) and 12(4)(e) EIR.
7. The Commissioner understands the complainant requested an internal review of this decision on 15 May 2019. As far as the Commissioner is aware, the public authority did not provide a substantive response by way of details of the outcome of the internal review if one was carried out.
8. On 31 May 2019 the public authority responded to the request submitted on 29 April 2019. It confirmed that it held the requested information which it considered exempt on the basis of the exceptions at regulations 12(4)(d), 12(4)(e) and 12(5)(f) EIR. The public authority also invited the complainant to request an internal review of its response in the event that she was dissatisfied with any part of it.

9. However, the complainant was less than clear to the Commissioner whether she requested an internal review of the response of 31 May 2019.

Scope of the case

10. The complainant initially contacted the Commissioner on 13 June 2019 in order to complain about the public authority's response to her requests for information. On 3 July 2019, the Commissioner advised the complainant that in order to give the public authority more time to respond, her case would be progressed to a full investigation if the public authority had not completed its internal review after 40 working days from 15 May 2019, the date it was submitted. The complaint was subsequently progressed to a full investigation on 12 July 2019.
11. During the course of the Commissioner's investigation, the public authority sought to additionally apply the exception at regulation 12(5)(b) EIR¹ to some of the withheld information. Therefore, the scope of the Commissioner's investigation was to determine whether the public authority was entitled to rely on the exceptions at regulations 12(4)(d), 12(4)(e), 12(5)(b) and 12(5)(f) EIR to withhold the information held within the scope of the requests of 11 and 29 April 2019.
12. The withheld information provided by the public authority to the Commissioner for the purposes of her investigation comprises of information falling within the scope of the narrow request of 11 April 2019 and the broader request of 29 April 2019.
13. During the course of the Commissioner's investigation, the public authority also released to the complainant, copies of correspondence between the public authority and the complainant or her representatives within the scope of her requests, outside of the EIR/FOIA. This information was released to the complainant's representatives on 10 February 2020. The public authority did not consider that there would be any harm to the interests it was trying to protect in releasing copies of correspondence already in the complainant's possession to her whilst

¹ A public authority may rely on this exception if it considers that disclosing the requested information would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.

maintaining its position that all of the information within the scope of her requests is exempt from disclosure under the EIR.

14. For the avoidance of doubt, disclosure under the EIR/FOIA is effectively disclosure to the world at large not just to the person making the request.

Reasons for decision

Applicable access legislation

15. The Commissioner understands that the request relates to a planning dispute. The dispute relates to a planning application by the complainant's neighbour which the complainant says would involve the "demolition of the roof of the side return and party wall" of her property. The Commissioner finds that the withheld information is environmental information within the meaning of regulations 2(1)(c) EIR². This is because it relates to modifications to a property by way of reconstruction, an activity likely to affect the elements.

Withheld information

16. The withheld information comprises of email correspondence between the Council's officers in relation to the complainant's objection to the planning application. The exchanges include emails from the complainant's representatives to officers, from the planning applicants to officers and from 2 Councillors to officers in relation to the objection to the planning application. These emails were forwarded as part of the exchanges between the Council's officers in relation to the planning application.

Application of Regulation 12(4)(e)

17. The Commissioner initially considered the application of Regulation 12(4)(e) which states:

"A public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications."³

² <http://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made>

³ <http://www.legislation.gov.uk/uksi/2004/3391/regulation/12/made>

18. The public authority's submission on the application of the exception is summarised below.
19. The request involves the disclosure of internal communications.
20. With respect to the balance of the public interest, disclosure would help promote transparency and accountability with stakeholders. It would increase public awareness and understanding around the public authority's planning areas internal processes and thinking. It would assist in providing a more effective public participation in environmental decision making which ultimately contributes to a better environment.
21. In favour of maintaining the exception, the emails were for internal circulation and use in order to assist officers with their work on the planning application. They were used for internal deliberation and to assist in internal discussions and decision-making processes in relation to the planning application. Disclosure would therefore inhibit the ability of officers to debate planning issues and prevent a free and frank exchange of views if the contributors felt that their input would be disclosed to a wider audience.
22. Disclosure may also prevent residents from feeling able to voice concerns freely in the public engagement forums on planning matters. Disclosure of the withheld information may hamper free and frank discussion of concerns and opinions relating to planning matters in future.
23. The planning officer's report provides the detailed justification of the decision made and lists the factors considered and the policies used to determine applications. Releasing internal communications may impact officers' ability to work together and discuss matters freely.
24. On balance, the public interest in maintaining the exception outweighs the public interest in disclosure. Officers would feel the need to be guarded if the withheld information was disclosed and the quality of advice and decision making would suffer as a result.
25. The complainant has submitted as follows: "Despite their duty to disclose under the FOI Act and the EIR Regulations, the Planning team at the London Borough of Hammersmith and Fulham has refused to disclose, and provide records of internal deliberations as to how the Council has reached its conclusions on a planning application that is cause of great concern to us. Despite the Council fully authorized the rear extension and the new side return for our property only last year, they want now to approve the application from a neighbor that involves

demolition of the roof of the side return and party wall of my property with no transparency on why they think it is appropriate to do so.”

The Commissioner's considerations

Is the exception engaged?

26. The Commissioner has considered whether the withheld information is caught by exception at regulation 12(4)(e).
27. The Commissioner considers that the term “internal communication” within the meaning of regulation 12(4)(e) refers to a communication that stays within one public authority. However, communications can still be internal even if they record discussions with third parties or contain information received from third parties. For example, a note of a meeting with a third party, created and circulated within a public authority for its own use, is still an internal communication. It is the form of the communication that is important, rather than its content. This means that the context and wording of a request can affect whether the exception is engaged. If a document only falls within the scope of a request because it was attached to an internal communication, the request “involves the disclosure of internal communications” and in these circumstances the exception will be engaged for both the internal communication and the attachment.
28. Having carefully considered the withheld information, the Commissioner finds that the information constitutes internal communications within the meaning of regulation 12(4)(e).

Balance of the public interest

29. The exceptions from the duty to disclose information under the EIR are subject to the public interest test set out in regulation 12(1)(b) EIR. Therefore, the Commissioner has gone on to consider whether in all the circumstances of the case the public interest in maintaining the exception at regulation 12(4)(e) outweighs the public interest in disclosing the withheld information.
30. Regulation 12(2) of the EIR⁴ requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. According to the Upper Tribunal, “If

⁴ <http://www.legislation.gov.uk/uksi/2004/3391/regulation/12/made>

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"⁵

31. There will always be a public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding of environmental matters and more effective participation in environmental decision making. More specifically, the withheld information would provide some insight into the complainant's objection to the planning application was handled.
32. The Commissioner considers that at the time of the request, there was a strong public interest in not inhibiting free and frank discussions in relation to the planning application. Planning permission was granted by the public authority on 4 July 2019, approximately two months after the complainant's initial request for information and approximately a month after she submitted her complaint to the Commissioner. The Commissioner accepts that disclosing the withheld information at the time of the request before the planning permission was granted could have inhibited free and frank discussions in relation to the complainant's objection to the application.
33. Furthermore, the Commissioner understands from the public authority that on 14 August 2019, the complainant sought a judicial review of the public authority's decision to grant the planning permission. According to the public authority, the Court's decision upholding the decision to grant the planning permission was issued on 15 January 2020. Although all of these events post-date the request, they give an indication of some of the factors that would have informed discussions pertaining to the planning application. Given the nature of some of the correspondence from solicitors acting on behalf of the complainant, the likelihood of legal proceedings commencing was not far-fetched. The Commissioner notes that the public authority has also relied on the exception at regulation 12(5)(b).
34. In light of those circumstances, the Commissioner has attached more weight to the view that the disclosing the withheld information could

⁵ Vesco v Information Commissioner (SGIA/44/2019) at paragraph 19.

have inhibited free and frank discussions in relation to the planning application. Given the detrimental impact that would have on the quality of decision-making, there was a stronger public interest in not disclosing the withheld information.

35. In this case, the Commissioner's view is that the balance of the public interests favours maintaining the exception, rather than being equally balanced. 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(4)(e) was applied correctly.

Procedural Matters

36. Under regulation 14(2) EIR a public authority refusing a request for environmental information is required to do so in writing as soon as possible and in any event no later than 20 working days following the date the request was received.
37. The Commissioner finds the public authority in breach of regulation 14(2) EIR for failing to respond to the complainant's requests of 11 April 2019 and 29 April 2019 within 20 working days.
38. Under regulation 11(4) EIR a public authority is required to carry out an internal review within 40 working days.
39. The Commissioner finds the public authority in breach of regulation 11(4) EIR for failing to respond to the complainant's correspondence of 15 May 2019 requesting an internal review of the public authority's response to her request of 11 April.

Right of appeal

67. 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

68. 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.
69. 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.....

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