

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 24 June 2020

Public Authority: Manchester City Council
Address: PO Box 532
Town Hall
Manchester
M60 2LA

Decision (including any steps ordered)

1. The complainant requested from Manchester City Council ("the Council") information relating to land between Millbank Street and Store Street. The Council disclosed some information to the complainant and withheld other information under regulation 12(5)(f) (interests of the information provider) of the EIR.
2. The Commissioner finds that the Council breached regulation 11(4) of the EIR by failing to reconsider the complainant's representations within 40 working days.
3. The Commissioner's decision is that the Council correctly applied regulation 12(5)(f) of the EIR to the withheld information. Therefore, the Commissioner does not require the Council to take any steps as a result of this decision.

Background information

4. The Council provided the Commissioner with an explanation regarding the request. It stated that a planning application for the development of land had been submitted by a developer on 27 November 2015, for consideration by the Council's Planning and Highways Committee. On 3 March 2016, planning permission for the development was approved.

5. The Council further explained: *"Separate to the planning application, the developer approached the Council with a view to having discussions about it acquiring the development land and appropriating it under powers contained within section 237 of the Town and Country Planning Act 1990. During those discussions, the Council requested further information to determine whether the discussions should take place and whether reliance could be placed upon the Council's statutory powers. The Rights of Light Report was submitted to the Council on 9 February 2016 on the understanding that the document was private and confidential. The decision to acquire and appropriate the land was taken on 21 July 2016."*
6. The Commissioner understands from the Council's description that: *"Section 237 of the Town & Country Planning Act provides the Local Authority with the right to undertake building works on land that has been acquired or appropriated by the Local Authority for Planning purposes, and so long as the building work is done in accordance with a Planning Permission, notwithstanding the fact that the building work would interfere with other people's legal rights (such as a right of light)."*
7. The information the complainant is seeking is about the execution of s237 TCPA 1990 relating to land between Millbank Street and Store Street.

Request and response

8. On 8 March 2019 the complainant wrote to the Council and requested information in the following terms:

"I would like to receive full details of the information the town hall had in deciding to proceed with a Section 237 purchase and leaseback on the land between Millbank Street and Store Street and bordering on to Great Ancoats. The Section 237 was completed in 2016."
9. The Council responded on 11 April 2019 and stated that it required an extension in line with regulation 7 of the EIR.
10. On 18 April 2019 the Council provided its response to the request and confirmed that it held the information requested. The Council reported that some of the information was held in the public domain, and it disclosed details of this information within its correspondence together with links to the websites. The remaining information falling within the scope of the request, the Council withheld under regulation 12(5)(f) (interests of the information provider) of the EIR.

11. On 20 April 2019 the complainant wrote to the Council and expressed his dissatisfaction with its response to his request.
12. On 12 July 2019 following his contact with the ICO, the complainant specifically asked the Council for an internal review.
13. Following some further correspondence between the complainant and the Council (between 23 July 2019 and 13 August 2019) relating to clarification of the internal review request, on 2 October 2019 the Council provided its internal review response. The Council noted to the complainant that *"a majority of the information held within the scope of your original request was provided by reference to information readily available via the Council's website."* However, there was a further document related to the complainant's request, which the Council considered exempt under regulation 12(5)(f) of the EIR. Therefore, the Council confirmed to the complainant that it was withholding this information – *"the Rights of Light report"* and it upheld its original decision to refuse to disclose this document to the complainant.

Scope of the case

14. The complainant contacted the Commissioner on 12 November 2019 to complain about the way his request for information had been handled. Specifically, he disputed the Council's reasons for withholding the information requested which is the "Rights of Light" report. The complainant did not dispute that the remainder of the information requested was available online.
15. The following analysis focuses on whether the Council correctly withheld the "Rights of Light" report (the report) under regulation 12(5)(f) of the EIR, and whether any procedural breaches occurred in the handling of the case.

Reasons for decision

Regulation 2(1) – environmental information

16. Regulation 2(1) of the EIR defines what "environmental information" consists of. The relevant parts of the definition are found in 2(1)(a) to (c) which state that it is information in any material form on:

"(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements..."

17. The Commissioner considers that the phrase "any information...on" should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc in question.
18. Information about a plan, or a measure, or an activity, that affects or is likely to affect the elements of the environment, is environmental information. The information in this case relates to purchase and leasing of land with the purpose of facilitating a development on that land. This is an activity which is likely to affect many of the elements and factors referred to in regulations 2(1)(a) and (b) of the EIR.
19. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be on a measure affecting or likely to affect environmental elements and factors listed in regulations 2(1)(a) and (b).
20. The Commissioner finds that the information is environmental information, and so the Council was correct to consider it under the EIR.

Regulation 12(5)(f) – Interests of the information provider

21. Regulation 12(5)(f) provides an exception in relation to information provided to a public authority from another person and where several conditions are satisfied.
22. The Commissioner's published guidance¹ on this exception explains that its purpose 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 it would adversely affect the interests of the information provider. The wording of the exception makes it 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.
23. After establishing that the information was supplied to the public authority by another person, consideration of regulation 12(5)(f) involves a five stage test:
 - Would disclosure adversely affect the interests of the person who provided the information to the public authority?
 - 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?
24. Where the first four stages of the test are satisfied, the exception will be engaged. The public interest test will then determine whether or not the information should be disclosed.

Was the information provided to the Council by another person?

25. The Commissioner has viewed the withheld information and is satisfied that it was provided to the Council by another person: a property developer (the developer). The Commissioner accepts that this part of the test is therefore satisfied.

¹ https://ico.org.uk/media/for-organisations/documents/1638/eir_voluntary_supply_of_information_regulation.pdf

Is it more likely than not that disclosure of that information would adversely affect the interests of the person who provided it?

26. 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.
27. 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 more probable than not to occur as a result of disclosure of the information in question, and to explain why disclosure would, on the balance of probabilities, directly cause the harm.
28. There is no requirement for the extent of 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, if the exception is found to be engaged. 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.
29. 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 the wording of the exception requires that for it to be engaged it must be the case that an adverse effect *would* occur through disclosure of the information in question. It also means that it is not sufficient for a public authority to speculate on possible harm to a third party's interests.
30. The Council considers that disclosure of the withheld information "*would*" have an adverse affect. It stated (at the time of this decision notice) that the developer is in active negotiations with the owners of interests or rights affected by the development that the report relates to, with a view to negotiating settlement of their claims for compensation. The Council said that the disclosure would undermine the developer's position in relation to the negotiations on compensation, which should be paid to property owners over the development. Therefore, the Council believes that disclosure would adversely affect the interests of the developer who provided the information to the Council.

31. The Council explained how it considered there to be a clear link between disclosure of the information in question and the adverse effect. It said; *"The operation of Section 237 of the Town and Country Planning Act 1990 converts any injunctive relief held by owners of an interest or right affected by a development to a right for compensation for the diminution of their property interest. The developer in commissioning the Right of Light Report did so to both identify properties which may have an interest or right which may be affected and to quantify the amount(s) of compensation the developer may be required to pay as a result. The rights of light report is materially linked to the settlement of claims for compensation."*
32. The Council considers that disclosure of the information would prejudice the developer in those negotiations. It explained that the report *"which identifies those rights, provides a technical analysis of each claim and provides an opinion on quantum for each claim."*
33. The Council said that it had consulted with the developer, and they considered that disclosure of the information would prejudice them in negotiations on the settlement of claims. The Council explained that there are ongoing claims concerning the development. It stated that the information included professional advice, negotiation and mitigation strategies and therefore the Council believes that disclosing this information would undermine the developer's position by putting a claimant in a beneficial position regarding those claims.
34. Having reviewed the content of the withheld information and considered the reasoning advanced by the Council, the Commissioner accepts that an adverse effect is more likely than not to occur. She considers that the disclosure of the information would weaken the developer's position with regards to the settlement of claims for compensation. It would also prejudice the developer in negotiations concerning these claims.

Was the developer under, or could they have been put under, any legal obligation to supply the information to the public authority?

35. The Council stated that the developer who provided the information was not under, or could have been put under, any legal obligation to supply the information to the Council. The developer voluntarily provided the information to the Council for the purpose of discussions relating to the properties in question and the settlement of claims for compensation.
36. The Commissioner is not aware of any legal obligation that the developer was or could have put under to supply the information to the Council. She accepts that the information was provided voluntarily by the developer, in order to discuss the settlement of compensation claims for the properties in question.

Did the developer 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?

37. The Council stated that it was not entitled to disclose the information in question as it was provided to it in confidence.

38. When considering this condition to the application of 12(5)(f), in a previous case – FER0798596² - the Commissioner stated the following:

"In considering the third stage of the tests, UKRI argues that the information was provided to it in confidence and therefore it was supplied in such circumstances that UKRI is not entitled to disclose it.

In common law, following the case of Coco v Clark [1969] RPC 41, when determining if disclosure would constitute a breach of confidence, the Commissioner considers that an authority will usually need to consider:

- whether the information has the quality of confidence;*
- whether it was imparted in circumstances importing an obligation of confidence; and*
- whether disclosure would be an unauthorised use of the information to the detriment of the confider."*

39. The Commissioner considers the arguments surrounding the provision of information is the same in both of these cases.

40. 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.

41. As outlined above, the Council's position is that the information was provided to it voluntarily and there are no circumstances, other than under the EIR, where the Council would be entitled to disclose the report.

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2615235/fer0798596.pdf>

Does the information have the necessary quality of confidence?

42. Information will have the necessary quality of confidence if it is more than trivial and if it is not otherwise accessible.
43. The Commissioner is satisfied that the withheld information has the necessary quality of confidence. The information is more than trivial because it is associated with the execution of s237 TCPA 1990 relating to land between two specific streets.
44. The Council agreed with the developer that the information would not be shared further. The Commissioner is therefore satisfied that the information the Council continues to withhold is not otherwise accessible to the wider public.

Was the information imparted in circumstances importing an obligation of confidence?

45. The Commissioner's guidance says that there are essentially two circumstances in which an obligation of confidence may apply:
 - The confider has attached explicit conditions to any subsequent use or disclosure of the information (for example the wording of a letter); or
 - The restrictions on use are obvious or implicit from the circumstances, for example information exchanged between a client in therapy and their counsellor.
46. Of the two circumstances above the Commissioner considers the first applies. The reason is that the developer clearly stated to the Council that the report remained confidential and was provided to the Council in confidence. The developer said that it was not expected that the report would be disclosed to a third party when it was provided to the Council. The Commissioner is therefore satisfied that there were explicit conditions that created an obligation of confidence.

Would disclosure be an unauthorised use of the information to the detriment of the confider?

47. The Commissioner's published guidance on regulation 12(5)(f) establishes that case law now suggests that "*any invasion of privacy resulting from a disclosure of private and personal information can be viewed as a form of detriment in its own right*".

48. It has been established that the disputed information was provided voluntarily with the expectation that it would be treated confidentially. Therefore, the Commissioner's view is that disclosure would be an unauthorised use of the information that would result in detriment to the developer due to invasion of privacy.
49. As disclosure would constitute a breach of confidence, the Commissioner is satisfied that the Council was not entitled to disclose the information in question apart from under the EIR.

Has the person supplying the information consented to its disclosure?

50. The Council provided the Commissioner with a copy of the letter from the developer dated 12 April 2019. The developer stated that it did not consent to the report being provided to a third party. The Council said that the position was reviewed during the internal review and that the developer confirmed that their position remained unchanged.
51. On the basis of the evidence of the 12 April 2019 letter, the Commissioner accepts that the developer has not consented to disclosure of the report.
52. Having considered the withheld information, and the arguments provided by the Council, the Commissioner is satisfied that the disclosure of the information would adversely affect the interests of the developer, and that the other tests for 12(5)(f) to be engaged are met. Therefore, she has concluded that regulation 12(5)(f) is engaged.

Public interest test

53. Where regulation 12(5)(f) is engaged, it is subject to the public interest test required by regulation 12(1)(b). This is to ascertain whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
54. When carrying out her assessment of the public interest test, the Commissioner must take into account a presumption towards the disclosure of the information, as required by regulation 12(2).

Public interest in favour of disclosing the information

55. Some weight must always be attached to the general principles of accountability and transparency. These in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.

56. The Council accepts that disclosing the information will promote accountability and transparency in public spending and in decision-making by the Council. It considers that it will assist the public to understand why a decision was made. It will further the understanding of and participation in the debate surrounding the relevant issues. Also, it will assist individuals in challenging decisions. The Council stated that the information will be published in the future, but at a still unset date.
57. The Council's actions have affected the interests of property owners, in that it has facilitated the development and removed the injunctive rights of individuals who would be affected by these actions. There is a public interest in creating greater transparency over an issue where the Council's actions have effectively removed or affected the rights of individuals, and potentially affected the value, the worth, and their enjoyment of their properties.
58. The complainant provided the Commissioner with additional arguments as an explanation for his reasons why he considers that disclosure is in the public interest, and that it is not just in his interests.
59. The complainant argued that disclosure of the information is essential *"for the protection of the public interest."* He further argued that there is a public interest in transparency *"when you consider the large sums involved and the concessions granted through Strategic Development and Planning departments, at the considerable cost to residents of Piccadilly Village"*. Also to be considered according to the complainant are *"the citizens of Manchester denied safe junctions and denied 70 affordable homes."*
60. The complainant believes that there is a public interest in knowing whether or not the Council have been misled. He explained that disclosure of the withheld information would allow him to *"say to the Council what facts are correct and what facts are incorrect, according to my knowledge of the interactions with all the immediate affected residents."* The complainant considers that *"if the Council have failed"* the residents should know this.
61. The complainant also considers that the information should be disclosed in order to show the public that the Council have carried out all the correct checks and balances regarding this development. He strongly believes that the Council have ignored government guidelines and broken the law and, therefore, he is of the view that the Council should be held to account for its actions and be seen to be held to account.

Public interest in favour of maintaining the exception

62. The Council argued that a disclosure of this information may hinder the full and frank sharing of information and/or the receipt of detailed advice from third parties in the future. The Commissioner, however, places little weight on this latter argument under the circumstances of this case. The developer needed the Council to take action in order to facilitate its wish to develop the property. It would be unlikely that it would hold back relevant information in the future, which would ultimately undermine its request for assistance in regards to its own plans.
63. The Council considers that the disclosure of the information may cause damage and distress to others and would result in unfairness to others. It may reveal limitations within Council processes which could be exploited. The disclosure would inhibit the effective delivery of services and/or undermine the Council's ability to fulfil its role. The Council further argued that the disclosure may jeopardise its bargaining position, and it reiterated that the information volunteered by the developer may jeopardise future participation.

Balance of the public interest arguments

64. The Commissioner has considered the competing arguments and the context of the request. She accepts that there is a public interest in disclosure in order to promote greater transparency and accountability around decisions made by public authorities. The Commissioner acknowledges that there is a public interest in allowing the public to better understand the process to which the withheld information relates.
65. There is a public interest in information relating to planning processes being open and transparent, and a public interest in creating transparency and creating greater understanding about the spending of public money. There is also a public interest in creating accountability over steps the Council takes, which affect the legal rights of individuals.
66. Having reviewed the withheld information, the Commissioner considers that most of the content comprises of a technical analysis with regards to the development. The Commissioner is of the view that this would not benefit the public interest and the technical details would not assist the public in understanding how these decisions are reached. As some of the content of the withheld information relates to negotiations concerning the development, and that are ongoing, it would not be in the public interest to disclose the requested information at this time.

67. The Commissioner understands the complainant's strongly argued views regarding the public interest and the situation he has highlighted. He believes that the Council may have acted on incorrect information from the developer and that there were inconsistencies with information surrounding the project. The Commissioner is not however, in a position to make any sort of judgement on such a claim. The complainant also made it known to the Commissioner that he suspects improper conduct of this matter. Again, it is not the Commissioner's role to make a judgment on such an argument. The complainant has the right to make a complaint to the Local Government Ombudsman if he believes that there had been any maladministration by the Council in its actions. He is also able to obtain legal advice with a view to taking the matter to court, if he believes his legal rights have been affected by the Council either negligently or based upon incorrect information. As the Commissioner has no remit or powers to investigate and make a judgement on such matters, she is not in a position to take these allegations into account in her deliberations over this matter.
68. Bearing this in mind, on the counter side, the Commissioner recognises that the developer's interests would be affected by the disclosure of this information. It would affect and undermine its ongoing negotiations with property owners regarding levels of compensation payments.
69. The information within the report was provided voluntarily, however, the result of the Council's action was a decision which may have affected the legal rights of individuals. The decision to purchase the property was ultimately taken by the Council, and therefore, there is a fairly strong argument towards the disclosure of the information in order that the public has confidence in the actions of the Council, and greater transparency is achieved as to why it took those actions.
70. Nevertheless, with the negotiations ongoing, and with the complainant's rights to make complaints to either the Ombudsman, or to take advice with a view to taking legal action against the Council, the Commissioner considers that, overall, the balance of the public interest currently rests with the exception being maintained. Specifically, given the stage at which the project, and the negotiations in question are currently at.
71. The Commissioner, having considered the arguments from both the complainant and the Council, is satisfied that the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Conclusion

72. 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).
73. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of 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 regulation 12(5)(f) was applied correctly. Therefore, the Council was not obliged to disclose the requested information.

Regulation 11 – representations and reconsideration (internal review)

74. Regulation 11 of the EIR states that:

(1) Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

(2) Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.

(3) The public authority shall on receipt of the representations and free of charge—

(a) consider them and any supporting evidence produced by the applicant; and

(b) decide if it has complied with the requirement.

(4) A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations.

(5) Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of—

(a) the failure to comply;

(b) the action the authority has decided to take to comply with the requirement; and

(c) the period within which that action is to be taken.

75. In this case, the complainant made representations to the Council on 20 April 2019, which demonstrated that he was unhappy with the response received to his request.
76. Within the Commissioner's guidance on internal reviews under the EIR, it states that it is not necessary for the requester to specifically request an internal review in their letter. The EIR Code of Practice states; *"that any correspondence in which the requester has expressed dissatisfaction over the handling of their request should be addressed through the internal review procedure."* The Council in this case, should have at least asked the complainant if he wanted an internal review into the Council's response to his request.
77. Following the Commissioner's intervention, the complainant returned to the Council and asked for an internal review. The Council acknowledged this request on 13 August 2019. However, the Council did not provide its internal review response until 2 October 2019, which is beyond the statutory timeframe. Therefore, the Commissioner concludes that the Council breached the requirements of regulation 11(4) of the EIR.

Right of appeal

78. 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: 0116 249 4253

Email: grc@justice.gov.uk.

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

79. 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.

80. 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

Ben Tomes
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