

Freedom of Information Act 2000 (the Act)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 27 July 2021

Public Authority: London Borough of Tower Hamlets
Address: Town Hall
Mulberry Place
5 Clove Crescent
London
E14 2BG

Decision (including any steps ordered)

1. The complainant has requested information regarding the fire safety measures of a specified housing development.
2. The Commissioner's decision is that the information is environmental and the appropriate legislation is the Environmental Information Regulations 2004 (EIR).
3. The Commissioner also finds that the London Borough of Tower Hamlets (the council) is not entitled to rely on regulations 12(5)(b), 12(5)(d) or 12(5)(f) to withhold the requested fire safety reports.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the PRP and Tri-Fire reports.
5. The public authority must take these steps 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

6. The complainant has raised concerns with the council about the safety of the building materials used in a specified housing development. The freehold of the buildings is owned by the council but the development is leased by a third party housing provider. The development comprises tower blocks in which the residents are a mix of flat owners, private tenants and social housing tenants.
7. The council confirmed that it would investigate these concerns and requested information from the housing provider. The council confirmed to the complainant that the housing provider had asked it to issue a formal notice under section 235 of the Housing Act 2004 to supply the council with the requested information.
8. The complainant was provided with a copy of this notice and the request follows the housing provider's response to the council.

Request and response

9. The complainant wrote to the council on 25 November 2020 and made a request for information in the following terms:

"Yesterday was the date by which [the housing provider] was required to comply with your section 235 Notice. Has there been a response? If so, please may I be provided with a copy together with copies of any documents which accompanied the response".

10. The council replied on the same day and confirmed that it had received a response. The council asked the complainant to contact its Freedom of Information team directly to obtain the requested documents.
11. On 8 December 2020, the complainant contacted the Freedom of Information team directly and, in relation to the specified housing development, re-made the request in the following terms:

"Please treat this email as a formal Request under the Freedom of Information Act 2000 for me to be supplied with copies of what CH¹ has provided to LBTH² in response to the section 235 Notice and any

¹ The housing provider, Clarion Housing.

² The council

correspondence passing between LBTH and CH referable thereto, namely:

- 1. The letter or letters or email of [sic] emails passing between LBTH and CH in October and/or November 2020 relating to the service on CH of a Notice under section 235 of the Housing Act 2004*
 - 2. The PRP Report*
 - 3. The Tri-Fire Report³*
 - 4. The Copy Official Lease"*
12. The council provided its response on 4 January 2021 and confirmed that the request was being handled under the EIR. The council confirmed that it held information falling within the scope of the request but was withholding this information as it is exempt under regulation 12(5)(b) as disclosure would, or would be likely to, prejudice 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.
 13. The council stated that the request was for the PRP report, Tri-Fire Report and Copy Official Lease. The council made no reference to the request for the associated correspondence. The council confirmed that the requested information was provided to it under a statutory notice permitted by section 235 of the Housing Act 2004.
 14. The council explained that the documents were provided in circumstances in which it was conducting an investigation regarding the health and safety of the residents in the named properties.
 15. The council acknowledged the public interest in releasing the requested documents, namely that disclosure would aid transparency and openness with the public on a matter of public interest.
 16. The council considered that weighed against this is the public interest in maintaining the exception as disclosure would have a likely impact on the council's ability to work collaboratively with the housing provider and inhibit the effectiveness and speed by which any required action is taken.

³ PRP and Tri-Fire are external organisations which provide fire safety evaluations.

17. The council considered that as its overriding objective was compliance with safety regulations, the requested information should be withheld under regulation 12(5)(b).
18. The council provided its assurances that it was communicating and working with the housing provider to achieve compliance but set out that this may take time and may result in formal proceedings.
19. The council also stated:

"Should we conclude on the outcome of investigation, or no further action is taken on the Housing Provider, LBTH will therefore be able to release the requested documents to you".
20. The complainant wrote to the council on 10 January 2021 and requested an internal review of the handling of their request.
21. They provided detailed arguments which included:
 - Regulation 12(5)(b) is not engaged and the public interest favours disclosure.
 - The council had applied the exception in a blanket fashion rather than considering the individual documents and their contents.
 - The council had misinterpreted the scope of the request as it had failed to include the request for the correspondence associated with the section 235 notice.
 - The EIR do not have the lower prejudice threshold of "would be likely to" and the council would therefore need to demonstrate that disclosure would have the adverse effect identified in regulation 12(5)(b). They disputed that the council had demonstrated this level of prejudice.
 - They disputed that disclosure would have the adverse effect identified in regulation 12(5)(b) as the housing provider is a large organisation which is aware of its statutory obligations and the benefits of co-operating with an investigation.
 - They disputed that the public interest lay in withholding the requested information as the council had not provided any information regarding what action may be taken or where in the proceedings the council was at the time of the request.
 - They disputed that the 'likely impact' of disclosure was sufficient to outweigh the public interest in releasing the requested information.

- The public interest in residents understanding the safety measures, or lack thereof, in their homes and being able to take steps to rectify unsafe measures tips the balance of the public interest in favour of disclosure. They considered that disclosure would allow action to prevent the cost of the remedial work being charged back to the residents and would give insight to residents in similar situations elsewhere to understand how these matters are dealt with by the housing provider.
 - They disputed that disclosure would inhibit the effectiveness and speed of any required action and considered that disclosure would instead place pressure on the housing provider to expedite meeting its obligations.
22. The council provided the outcome of its internal review on 5 February 2021 and maintained its position. It provided a short response stating only that it was upholding its original response.

Scope of the case

23. The complainant contacted the Commissioner on 7 February 2021 to complain about the way their request for information had been handled. Specifically, they disputed that the council was entitled to withhold the requested information and that the council had failed to include the request for the communications associated with the section 235 notice.
24. During the course of the Commissioner's investigation, the council confirmed that it was amending its position to the following:
- The requested information was not environmental and therefore the appropriate legislation is the Freedom of Information Act 2000 (the Act).
 - It confirmed that it had omitted the communications element of the request in error and disclosed this information to the complainant with the personal data redacted under section 40(2).
 - It confirmed that the "Copy Official Lease" was a copy of the land register for the specified development. The council confirmed that this is available by purchasing a copy from HM Land Registry and was therefore exempt under section 21⁴ of the Act.

⁴ Reasonably accessible to the applicant by other means.

- It confirmed that it was withholding the PRP report and Tri-Fire report under section 41(1) and section 31(1)(g) of the Act.
25. Following the council issuing a fresh response, the complainant confirmed to the Commissioner that he disputed the council's position that the requested information is not environmental and that the council is entitled to withhold the two fire safety reports.
 26. The complainant confirmed that he did not dispute the council's redaction of personal data and, having received an explanation of what the "Copy Official Lease" comprised, confirmed that they already held a copy and therefore did not wish to pursue this document.
 27. The scope of the investigation is therefore to determine whether the council is entitled to withhold the PRP report and the Tri-Fire report.
 28. The Commissioner will initially determine whether the requested information is environmental and so determine which legislation is the appropriate access regime to consider the request under.
 29. The Commissioner will then consider whether the council is entitled to rely on sections 41(1) or 31(1)(g) of the Act or – to the extent that the information is environmental - regulations 12(5)(f), 12(5)(b) or 12(5)(d).
 30. The Commissioner has taken this approach as the council has already issued a refusal notice and internal review under the EIR. Furthermore, in the circumstances of this particular case she considers that requiring the council to reconsider this request again under this same legislation – should she determine the information is environmental – would unduly disadvantage the complainant.
 31. In her investigation letter to the council, the Commissioner confirmed:

"On receipt of a complaint under the EIR, we will give a public authority one opportunity to justify its position, before issuing a decision notice".
 32. The council was also granted an extension during the Commissioner's investigation to provide its submissions. Following this extension, the Commissioner was required to contact the council to remind it that she had previously confirmed that, should it amend its position, it should provide a fresh response to the complainant explaining why the new exception or exemption applied. The council provided its submissions to the Commissioner on 27 May 2021 but did not provide the complainant with a fresh response until 7 June 2021. In light of this extension, the delay to informing the complainant of its new position, and the fact that the Commissioner's investigation was the council's third time considering the request and its position, the Commissioner is satisfied

that the council has had sufficient time and opportunities to provide its final position, and was aware that the Commissioner would proceed to decision notice following its submissions.

Reasons for decision

Regulation 2(1): Is the information environmental?

33. Regulation 2(1) of the EIR defines environmental information as:

"...any information in written, visual, aural, electronic or any other 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;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);"

34. The Commissioner recognises that it can sometimes be difficult to identify environmental information, and has produced guidance⁵ to assist public authorities and requesters. The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Directive 2003/4/C⁶, which the EIR enact.
35. In her consideration of this case, the Commissioner is assisted by the Court of Appeal's findings in *Department for Business, Energy and Industrial Strategy v Information Commissioner and Henney*⁷ ([2017] EWCA Civ 844). The Court of Appeal commented that the EIR must be construed purposively, in accordance with the Directive and the Aarhus Convention⁸:

"48. My starting point is the recitals to the Aarhus Convention and the Directive, in particular those set out at [15] above. They refer to the requirement that citizens have access to information to enable them to participate in environmental decision-making more effectively, and the contribution of access to a greater awareness of environmental matters, and eventually, to a better environment. They give an indication of how the very broad language of the text of the provisions may have to be assessed and provide a framework for determining the question of whether in a particular case information can properly be described as "on" a given measure".

36. The disputed information in *Henney* related to a Project Assessment Review (PAR) which concerned the communication and data component (CDC) of the Smart Meter Programme (SMP). The key issue for the Court of Appeal was whether information on a measure which did not in itself affect the state of the elements of the environment, or the factors referred to in regulation 2(1), could be information "on" another measure which did. The Court of Appeal found that information on the PAR was environmental information on this basis, even though it was not, in itself, a measure likely to affect the elements or factors of the

⁵ https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf

⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003L0004>

⁷ <https://www.bailii.org/ew/cases/EWCA/Civ/2017/844.html>

⁸ <https://ec.europa.eu/environment/aarhus/>

environment. Rather, information on the PAR was information on the SMP, which was such a measure.

37. The Commissioner understands that interpretation of the phrase "any information...on" will usually include information concerning, about, or relating to the measure, activity, factor, etc. in question. With specific regard to regulation 2(1)(c), the Court of Appeal in *Henney* commented that:

"It follows that identifying the measure that the disputed information is "on" may require consideration of the wider context, and is not strictly limited to the precise issue with which the information is concerned. It may be relevant to consider the purpose for which the information was produced, how it is to be used, and whether access to it would enable the public to be informed about, or to participate in, decision-making in a better way. None of these matters may be apparent on the face of the information itself".

38. The Commissioner notes that the withheld information comprises two reports conducted by third parties which review the fire safety measures of the development and provide recommendations to achieve adequate fire safety levels.
39. The council confirmed to the Commissioner that it did not consider that any of the requested information comprised environmental information. The council's arguments were as follows:

"Whilst it is clear from the above⁹ that information relating to built structures may be environmental information it does not follow that all information will be. There must be a relationship between the building and the natural environment. This is illustrated by the ICO's guidance on her website:

- Information on how a building has been affected by subsidence of the land it stands on is environmental information. This is because it is information on the state of a built structure inasmuch as it is affected by the state of the land, as an element of the environment.*
- Information on how a built structure has been affected by use of poor building materials is not environmental information under regulation 2(1)(f). This is because there is no information on how*

⁹ Regulation 2(1)

the building has been affected by the state of any element of the environment”.

40. The Commissioner considers that the council has interpreted the definition of environmental information too narrowly and has failed to take into account the potential effect of the building materials on the environment.
41. Clearly the aim of any fire safety measure is to manage the risk of fire. In the Commissioner’s opinion, this can be interpreted as a measure likely to affect the elements of the environment, most obviously air and atmosphere. It can also be interpreted as likely to affect factors such as emissions, discharges and other releases into the environment, likely to affect the elements. It follows that a measure that reduces the risk of fire will have an impact on the effects of fire such as smoke and fumes, which are themselves factors which affect the elements of air and atmosphere.
42. The Commissioner is also of the opinion that a measure designed to manage the risk of fire is also arguably designed to protect the state of the elements of the environment. The prevention of fire is the prevention of damage to both urban and natural landscapes, the prevention of harmful emissions and the protection of human life and ecosystems. The Commissioner considers that built structures fall within the definition of the urban landscape.
43. The Commissioner notes that regulation 2(1)(c) includes the wording “*as well as measures or activities designed to protect those elements*”.
44. The Commissioner considers that the requested information comprises information on a measure designed to protect the elements set out in regulation 2(1)(a). She therefore finds that the requested information is environmental in accordance with regulation 2(1)(c).
45. Regulation 2(1)(b) confirms that information on factors affecting or likely to affect the elements of the environment is environmental information.
46. The Commissioner’s guidance¹⁰ sets out that the word “*factor*” means something physical that has an impact or influence on the elements of the environment. Information about a factor is only environmental

¹⁰ <https://ico.org.uk/for-organisations/foi-guidance/regulation-2-1-what-is-environmental-information/#eir7>

information under this regulation if the factor is "*affecting*" or "*likely to affect*" the state of the elements of the environment indicated in regulation 2(1)(a).

47. "*Affecting*" means there has already been an impact on the state of the elements of the environment, or that the impact is current or ongoing. "*Likely to affect*" means there is a likelihood the factor will impact on the state of the elements of the environment. This does not have to be more probable than not, but it does have to be real and significant and substantially more than remote. The effect could be either detrimental or beneficial, and large or small scale.
48. As set out above, the Commissioner is of the opinion that fire safety activities, in particular physical fire prevention, affects the environment by reducing the risk of fire and damage to the environment. The Commissioner therefore considers that the requested information is also environmental under regulation 2(1)(b) of the EIR.
49. Regulation 2(1)(f) confirms environmental information as that on "*the state of human health and safety...conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)*".
50. "*Are affected by*" means that the effect has already occurred or is current or ongoing. "*May be affected by*" means that there has to be some possibility of an effect. This is a lower test than the "*likely to affect*" test under regulations 2(1)(b) and (c).
51. "*Human health and safety*" refers to a collective state of human health and safety. It includes such matters as diseases, medical conditions and risks to human safety.
52. "*Conditions of human life*" covers, for example, information on housing, poverty, employment, social welfare, heating, access to clean water, sanitation, and healthcare.
53. "*Built structures*" includes buildings and built structures, as well as built infrastructure, such as roads, railway lines, pylons, aerials, bridges, canals and tunnels.
54. As the Commissioner has already set out, she considers that fire safety activities have an ongoing effect on the environment by protecting it from fire, to a lesser or greater extent. In the specific circumstances of this case, the Commissioner considers that whilst the building materials may not be affected by the environment, the building materials do have an ongoing effect on human health and safety, conditions of human life and the built structures. The built structures in question are residential

buildings and the risk of fire due to the building materials used will clearly affect the health and safety and conditions of human life of the households within them. The Commissioner also notes that the purpose of the documents is to assess the buildings for fire safety rather than simply being information on what material was used.

55. The Commissioner therefore considers that the information is also environmental under regulation 2(1)(f).

Regulation 12(5)(f): Interests of the person who provided the information

56. As the Commissioner has determined that the requested information is environmental, she has considered whether, with regard to the council's position, the information can be withheld under the exceptions provided in the EIR.
57. The council confirmed that it was relying on section 41(1) of the Act to withhold the requested information. Regulation 12(5)(f) is designed to protect a similar interest and for this reason the Commissioner will consider this exception.
58. Regulation 12(5)(f) states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect:
- "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 to apart from these Regulations to disclose it; and*
 - (iii) has not consented to its disclosure"*
59. 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 to disclose the information 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.

60. The council provided arguments regarding its position that section 41(1) was engaged and that disclosure would result in an actionable breach of confidence.
61. However, as set out in the background section of this notice, the housing provider was asked to provide this information and the council issued a statutory notice under section 235 of the Housing Act 2004. The housing provider was therefore under a legal obligation to provide the information and the first criteria of the exception is not fulfilled. The Commissioner did not therefore require specific submissions from the council regarding this exception.
62. Regulation 12(5)(f) is not engaged in the specific circumstances of this request.

Regulation 12(5)(b): The course of justice

63. The council confirmed that it was also relying on section 31(1)(g) as disclosure "*would, or would be likely to, prejudice... the exercise by any public authority of its functions for any of the purposes specified in subsection (2)*" and that the specified purpose was "*ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise*" under section 31(2)(c).
64. As the requested information is environmental, the Commissioner has considered this request under the EIR. The Commissioner has considered regulation 12(5)(b) as, in addition to being applied by the council in its original response and internal review, this exception is designed to protect similar interests to section 31. As the council originally relied on this exception, the Commissioner has included the arguments set out in the refusal notice and the internal review.
65. Regulation 12(5)(b) states that a public authority may refuse to disclose information to the extent that its disclosure 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".
66. 'Adversely affect' means that there must be an identifiable harm to or negative impact on the interests identified in the exception. Furthermore, the threshold for establishing an adverse effect is a high one, since it is necessary to establish that disclosure **would** have an adverse effect. 'Would' means that it is more probable than not, ie a more than 50% chance that the adverse effect would occur if the information were disclosed. If there is a less than 50% chance of the adverse effect occurring, then the exception is not engaged.

The council's position

67. The council explained that sections 3 and 4 of the aforementioned Housing Act place it under a duty to review housing conditions with a view to taking action that may be required under that Act or other relevant Acts.
68. The council explained that where an authority identifies hazards it may be duty bound to act, under section 5 of the Housing Act, or have the power to act, depending on the nature of the hazard. The council confirmed that the reports were sought from the housing provider pursuant to its powers under the Housing Act and it is now for the council to decide what action, if any, to take.
69. The council explained that the decision of whether to take action is one entrusted to the council by Parliament and there are a number of possible options or combination of options.
70. The council explained that if work is required as a result of its enquiries, then it will need to consider what the best course of action is and that task is not best approached whilst the specific subject matter is being openly debated, potentially by persons who do not have the complete picture.
71. The council considers that disclosure would give rise to a real risk of greater pressure being placed upon the council to do or not to do something and will divert resources away from where they are needed in order to deal with queries, complaints and similar.
72. The council also considers that disclosure would hinder the work that the council is doing in relation to fire safety. It explained that housing providers are more likely to consider refusing to provide information voluntarily or may be more likely to withhold disclosure.
73. The council explained that whilst it does have powers to compel the production of documents or to enter premises, the use of those powers can be time-consuming and resource-intensive, and which ultimately has an effect on its ability to meet other service demands.
74. The council considers that if the information is disclosed, this would make it harder for other requests to be refused in future. The council explained that it is one of many authorities reviewing fire safety within the private housing sector, all of whom are dealing with housing providers and either seeking the voluntary disclosure of information or compelling such disclosure. The council considers that disclosure of the information risks not only the work being done by the council but also other public authorities.

Is the exception engaged?

75. The Commissioner's guidance on regulation 12(5)(b)¹¹ notes that this exception is broad in nature, explaining that it can, potentially, be widely applied to information held in relation to the administration of the course of justice. This may include legally privileged information; information gathered in relation to law enforcement, investigations and proceedings; and, as stated in the wording of the exception, information where disclosure would adversely affect the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
76. In this case, the information relates to potential enforcement action arising from non-compliance with fire safety requirements. The Commissioner is satisfied that the information falls within the class of information potentially covered by the exception.
77. The additional requirement necessary for the exception to be engaged was addressed in the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037¹²), where the Information Tribunal highlighted that there must be an "adverse effect" resulting from disclosure of the information, as indicated by the wording of the exception.
78. The Commissioner's guidance also notes that, in accordance with the Tribunal decision in *Hogan and Oxford City Council v Information Commissioner*¹³ (EA/2005/0026), the interpretation of the word "would" (in "would adversely affect") is "more probable than not".
79. The council's position is that disclosure would adversely affect its ability to decide whether enforcement is necessary and to carry out investigations in future.
80. To establish the background, and to consider whether there would be an adverse effect, the Commissioner has considered what was already known by the residents regarding the fire safety measures at the named housing development, at the time of the request.

¹¹ https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

¹² <https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i23/Archer.pdf>

¹³

<https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i42/MrCMHoganandOxfordCityCouncilvInfoComm17Oct06.pdf>

81. The complainant provided the Commissioner with copies of the correspondence they had entered into with the council prior to making the request. This included an email where they provided the council with a letter from the housing provider to the residents regarding fire safety and the building materials used.
82. This letter confirmed that following a change to the fire safety guidance on the suitability of certain types of cladding on low rise blocks, the housing provider had assessed the previously approved materials to determine whether they should be replaced.
83. The housing provider confirmed that some of the materials would need to be replaced or addressed. However, it could not provide a timeframe for this work as the financial liability for the required works was still to be determined.
84. The council confirmed, following detailed correspondence from the complainant, that it was undertaking enquiries into the safety of the development and provided the complainant with a copy of the section 235 statutory notice which was issued to the housing provider.
85. The Commissioner is aware that the progress of this investigation by the council remains an ongoing issue. However, her role in this case is to consider the position, and the information held, during the council's handling of the request up to it providing its internal review.
86. The Commissioner has considered whether disclosure would make public the council's private considerations of what action it might take and its assessment of its position.
87. Whilst it is not appropriate for her to disclose in detail the contents of the withheld information, in light of the information already known by the residents, the Commissioner is of the opinion that the contents of the withheld information would not disclose the council's private consideration of its position in relation to potential enforcement action.
88. The Commissioner also notes, from the correspondence provided by the complainant, that the council was initially hesitant to undertake any enquiries of the housing provider as it considered the development to be outside of its enforcement powers. It appears to be due to the persistence of the complainant that the council reversed this position and decided to require the housing provider to supply it with the requested information.
89. The Commissioner understands that the complainant's persistence was due to the housing provider's confirmation that work would be required to bring the buildings up to the required safety standards.

90. The Commissioner is not persuaded that disclosure would adversely affect the council's ability to conduct the investigation as it is clear that the residents of the development are already engaged with this issue and the Commissioner does not consider that withholding the two fire reports would reduce this engagement or support for action. Indeed, the Commissioner considers that withholding the two fire reports may increase the queries made to the council as the residents continue to raise concerns on the basis of the summary provided by the housing provider. Disclosure may allow the residents to focus their concerns and correspondence on issues that are helpful to the council's deliberations.
91. The Commissioner does not attach much weight to the council's argument that housing providers may refuse to supply information voluntarily. As the council acknowledged, it has the power to require housing providers to supply it with any required information or to enter premises. The Commissioner acknowledges that issuing formal notices requiring information would make the process of obtaining information from third parties more complicated. However, she considers that the council will not be prevented from conducting its investigations by housing providers refusing to voluntarily provide the information. She notes that in this case, the council requested the information from the housing provider informally but a section 235 notice was subsequently issued and an investigation is currently underway.
92. The Commissioner is also not persuaded by the council's argument that disclosure would make withholding information more difficult in future. The Commissioner does not consider that this argument is relevant to the specific circumstances of this case. Where information is subject to legal professional privilege, this argument may be relevant, however, having reviewed the withheld information, the Commissioner has no reason to believe that the information is subject to this privilege. Requests for information should be considered on their own merits and disclosure of information in relation to one request does not automatically mandate disclosure in future requests.
93. The Commissioner's decision is that the council has not demonstrated that the threshold of "*would adversely affect*" has been reached in the specific circumstances of this case. The Commissioner has therefore determined that the exception is not engaged in respect of the withheld information. Consequently the Commissioner is not required to consider the public interest test in respect of the exception.

Regulation 12(5)(d): Confidentiality of proceedings

94. The Commissioner has considered regulation 12(5)(d) in addition to regulation 12(5)(b) as this exception is also designed to protect similar interests to section 31. The Commissioner therefore considers that the

council's arguments in support of section 31 are relevant to this exception. As these have been set out in the regulation 12(5)(b) section of the notice, the Commissioner will not replicate them again.

95. Regulation 12(5)(d) 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 the proceedings of that or any other public authority, where such confidentiality is provided by law.
96. The engagement of the exception involves a three stage test:
 - What are the proceedings in question?
 - Is the confidentiality of those proceedings provided by law?
 - Would disclosing the information adversely affect that confidentiality?
97. It is important to recognise that the test for applying the exception is whether a disclosure to the world at large would undermine the confidentiality of the proceedings in question. Therefore, although some information may already be known to one or more parties involved in the proceedings, the Commissioner will consider the impact of disclosing the withheld information to the general public.
98. The first condition that has to be satisfied when applying regulation 12(5)(d) is whether the process has the sufficient formality to be considered 'proceedings'. The term 'proceedings' is not defined in the EIR but the Commissioner interprets it to include situations where an authority is exercising its statutory decision making powers. In this case, the council has confirmed that the aforementioned Housing Act places it under a duty to review housing conditions with a view to taking action that may be required under that Act or other relevant Acts.
99. The Commissioner accepts that the council is undertaking a formal process to determine whether the housing provider is required to undertake action to rectify potential fire risks. She is therefore satisfied that the process has the necessary formality to constitute a 'proceeding' for the purposes of this exception.
100. The second condition to consider is whether the confidentiality of the proceedings is provided for in law. The exception refers to the confidentiality of the *proceedings*, not the confidentiality of the *information* being withheld and that confidentiality must be "*provided by law*". The confidentiality may be provided in statute or derived from common law.

101. The Commissioner's guidance¹⁴ says that a common law duty of confidence would also apply to proceedings where they involve negotiations with another party, or information obtained from another party. The information thus obtained must have the quality of confidence; this means that it must not be in the public domain already and it must be of importance to the confider and not trivial. There must also be an expectation that it would not be disclosed.
102. The proceedings in question certainly involve the information provided by the housing provider and the Commissioner has therefore gone on to consider whether the information has the quality of confidence as outlined above. Whilst the housing provider has written to residents outlining the findings of the reports, she accepts that the reports themselves are not in the public domain. The council confirmed that the housing provider had been contacted and it considered that the information had been provided in confidence under the aforementioned Housing Act and it expected that it would not be disclosed.
103. The Commissioner accepts that this information has importance to the housing provider and is not trivial. The Commissioner is content that the withheld information has the necessary quality of confidence and furthermore that it was shared in circumstances that created an obligation of confidence. As the Commissioner is satisfied that the proceedings involve information obtained from another party, she accepts that the confidentiality of this information results in confidential proceedings provided by law.
104. The final criterion built into the exception is whether disclosure of the disputed information would adversely affect the confidentiality of the proceedings. The Commissioner considers that the term 'would adversely affect' means not only that there is an identifiable harm to the interest described by the exception, but also that disclosure *would* result in this harm. 'Would' in this sense means that the likelihood of the prejudice occurring is more probable than not.
105. Having considered all of the circumstances of this case, the Commissioner is not persuaded that the threshold of '*would adversely affect*' has been met.
106. In addition to the considerations already set out in the Commissioner's analysis of regulation 12(5)(b), the Commissioner notes that when the

¹⁴ https://ico.org.uk/media/for-organisations/documents/1626/eir_confidentiality_of_proceedings.pdf

council provided its late response to the request for communications between the council and the housing provider, it disclosed its communications with the housing provider until April 2021¹⁵. These communications included the steps the housing provider was taking in relation to the potential fire safety risks and the council's responses to the housing provider's updates.

107. These communications confirm that by the time the council had completed its internal review, the council had informed the housing provider that it intended to undertake a formal inspection of the buildings with a view to enforcement action for unsafe buildings.

108. The Commissioner considers that the council has already disclosed its position regarding the proceedings and the decisions and discussions being undertaken at the time of the request and several months beyond. She also notes that the housing provider wrote to the residents and provided a summary of the findings of the reports. Due to the information already disclosed, the Commissioner is not persuaded that disclosure of the fire safety reports would adversely affect the confidentiality of the proceedings.

109. The Commissioner considers that the threshold of "*would adversely affect*" has not been met and the exception is not engaged.

110. She requires the council to disclose the named fire reports.

Regulation 5(2): Statutory time for compliance

111. Regulation 5(1) states that:

"a public authority that holds environmental information shall make it available on request".

112. Regulation 5(2) states that:

"Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request".

113. The complainant originally requested the housing provider's response and the documents provided on 25 November 2020.

¹⁵ The scope of the request was for the period October-November 2020.

114. This request was valid and should therefore have been handled under the EIR and a response issued within 20 working days. The council instead required the complainant to resend the request to a specific team.

115. The Commissioner reminds the council of its duty to identify requests and ensure that it is not disadvantaging requesters by requiring requests are sent to specific teams or addresses.

Regulation 11 – Internal review

116. Regulation 11(3) of the EIR states:

"The public authority shall on receipt of the representations and free of charge—

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

117. The Commissioner has concerns regarding the internal review conducted by the council. The complainant put forward very specific and detailed concerns to the council as part of their request for internal review, in particular that the council had not included the request for correspondence in its response.

118. The council's internal review simply stated that it was upholding its original response.

119. The Commissioner considers that had the council performed an adequate internal review of its handling of the request and attempted to address the complainant's concerns, the omission of part of the request would have been rectified at internal review rather than several months later during the Commissioner's investigation.

120. The council has therefore breached regulation 11(3)(a).

121. The Commissioner expects the council to improve its internal reviews of future requests to prevent requesters being disadvantaged in a similar manner.

Right of appeal

122. 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

123. 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.

124. 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

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