

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

Date: 4 November 2022

Public Authority: London Borough of Hackney
Address: Town Hall
Mare Street
London
E8 1EA

Decision (including any steps ordered)

1. The complainant submitted a request to the London Borough of Hackney (the Council) seeking information about pre-planning application exchanges between it and the prospective developers of the 55 Morning Lane (Tesco) site. The Council withheld this information on the basis of regulations 12(5)(d) (confidentiality of proceedings), 12(5)(e) (confidentiality of commercial information) and 12(5)(f) (interests of the person who provided the information) of the EIR.
2. The Commissioner's decision is that the requested information is exempt from disclosure on the basis regulation 12(5)(d) and that in all the circumstances of the request the public interest favours maintaining the exception. However, the Commissioner has concluded that the Council has breached regulations 5(2) and 11(4) by failing to respond to the request and complete the internal review within the time limits required by the legislation.
3. No steps are required.

Request and response

4. The complainant submitted a request to the Council on 12 August 2020 seeking the following information:

 'Pre-application exchanges (January 2017-present) between Hackney Planning Department and the prospective developers of the 55 Morning Lane (Tesco) site.'
5. The Council responded on 22 April 2021 and confirmed that it held the information but considered it to be exempt from disclosure on the basis of section 43(2) (commercial interests) of FOIA.
6. The complainant contacted the Council on 20 May 2021 and asked it to conduct an internal review into its handling of this request.
7. The Council informed him of the outcome of the review on 12 November 2021. The review concluded that the request should have been handled under the EIR rather than FOIA. However, the Council concluded that the information was exempt from disclosure under the EIR on the basis of regulations 12(5)(d) (confidentiality of proceedings), 12(5)(e) (confidentiality of commercial information) and 12(5)(f) (interests of the person who provided the information).

Scope of the case

8. The complainant initially contacted the Commissioner on 11 August 2021 about the Council's failure to complete the internal review in relation to the request. He was also dissatisfied with the length of time it had taken the Council to initially respond to the request. Following the completion of the internal review the complainant confirmed to the Commissioner that he disputed the Council's decision to withhold the information falling within the scope of the request.
9. It is important for the Commissioner to note, particularly given the delays in this case, that in assessing the application of exceptions his role is limited to considering the circumstances as they existed at the time of the request.

Reasons for decision

Regulation 12(5)(d) - confidentiality of proceedings

10. Regulation 12(5)(d) provides 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 public authority, or any other public authority, where such confidentiality is provided by law.

11. Determining whether this exception is engaged requires consideration of the following:

- Are the 'proceedings' in question ones that the exception is intended to protect?
- Is the confidentiality of those proceedings provided by law?
- Would disclosing the information adversely affect that confidentiality?

The Council's position

12. The Council explained that in its view the chargeable procedures for dealing with planning pre-application enquiries provided a formal process for dealing with such applications and therefore fell within the definition of regulation 12(5)(d). The Council noted that the pre-application advice service is not a service that the Council is required to provide by law. Rather the service is offered voluntarily, if applicants wish to obtain specific advice in relation to their proposals, to save them time, effort, and money prior to making a planning application which may be refused if it does not reference the relevant plans and policies required. If an applicant chooses to make a formal pre-planning application, they are required to pay a fee ranging from £125 to-£10,000 depending on the type of enquiry.

13. In deciding if the exception is engaged, the Council explained that it considered whether the confidentiality of the proceedings is provided for in statute or derived from common law. The Council argued that the information provided within the planning pre-application enquiry is subject to the common law duty of confidence. In the Council's view the information is not otherwise accessible, is not trivial in nature, was communicated in circumstances importing an obligation of confidence and has the necessary quality of confidence to support the application of the exception.

14. The Council noted that the developer in this instance is under no obligation to supply the information contained in the planning pre-application enquiry, nor is the Council obliged to offer advice or opinions in response. The Council explained that the exchange between the parties is based solely on the confidential nature of the proceedings with which they are engaged. The Council explained that there is a clear expectation is that it remains confidential and, although it may be placed in the public domain should the developer proceed to a formal application, there is no obligation for this to be the case.

15. In the circumstances of this particular case the Council also emphasised that this is a large strategically important site which planning policies expect to achieve a number of objectives which will have to be carefully balanced. In this context the Council anticipated that the pre-application

process would be considerably protracted with potential developers putting forward a number of options and subsequent revisions, including attempts to address earlier comments from the planning service. The Council noted that the withheld information showed this to be the case. In light of this the Council has determined that as the developer (at the time of the request) had not made an application for planning permission, they may opt to seek further pre-planning advice or even decide not to submit a planning application.

16. Taking the above into account, the Council argued that disclosing the information prior to the submission of a formal application by the developer would pose a threat that confidential exchanges are made public prematurely. This would negatively impact confidence in the planning pre-application enquiry process as the breach of confidentiality would lead to potential developers no longer engaging with the Council. The Council argued that the entire pre-planning process, including the relationship of trust between confident and confidant, would be undermined if such information was routinely disclosed to the public.

The complainant's position

17. The complainant challenged the Council's rationale for relying on regulation 12(5)(d). He suggested that on the one hand the Council explained that pre-application exchanges between it and the prospective developers are a formal process. However, the complainant noted that the Council makes it clear that this process is offered voluntarily for developers to obtain specific advice in relation to their proposals. The complainant argued that rather than these being proceedings, this process is closer to an informal consultation between the Council and the developers. Therefore, the complainant argued that if this was the case then regulation 12(5)(d) could not apply.
18. Similarly, the complainant noted that the Council had asserted that a developer providing information under the pre-application process would expect that the information provided would not be disclosed. The complainant challenged this position on the basis that developers will be aware of the disclosure requirements of FOIA and EIR.
19. The complainant also argued that it was relevant to take into account the fact that the requested information concerns land owned by the Council. The complainant noted that the Council bought the Hackney Central site in 2017 to ensure it had more control over what could be built in a key town centre location, after Tesco announced its intention to find a buyer for the land.¹ The complainant emphasised that a

¹ <https://news.hackney.gov.uk/council-to-explore-new-options-for-morning-lane-tesco-site/>

substantial amount of public funds, £60 million in total, were expended in purchasing this plot of land.² As a result the complainant argued that the developers would have been aware that there would be strong public interest in the public having access to information concerning any proposed development and that the public would likely wish to engage in scrutinising the Council's decision making process.

20. The complainant also disputed the Council's position that the disclosure of the pre-planning advice would result in developers not engaging in this process in the future. In support of this point the complainant cited the findings of the Tribunal in case *Royal Borough of Greenwich v Information Commissioner* in which it rejected the argument of the local authority that 'developers might be reluctant to exchange anything above the bare minimum of information in negotiations with the council if the present so called "open book" appraisals were also publicly available.' The complainant also noted the Tribunal found that:

'Just as Councils might face a choice between development or no development, and so have an incentive to consider variations, developers are likely to have an incentive to make the most persuasive case available to them if they felt that existing commitments had to be varied. It is difficult to conceive how developers could make a convincing viability argument without using such quantified information, and we accordingly take a doubtful view of arguments that the information would have to be dragged point by point out of those proposing a variation'³

21. The complainant acknowledged that while that case concerned a variation proposal, he argued that the same principles apply to pre-application exchanges. In the complainant's view if the developer wishes to maximise their chances of having their planning proposal accepted, then, despite knowing that the information provided may be disclosed to the public, it is in their interest to nonetheless engage fully in the pre-application process. This is because the developer, in the words of the Tribunal case above, is 'likely to have an incentive to make the most persuasive case available to them'. Accordingly, the complainant argued that the Council's reasoning to rely on regulation 12(5)(d) to his request could not be sustained.

² <https://www.hackneygazette.co.uk/news/wall-of-silence-from-hackney-council-on-secretive-tesco-land-6529396>

³ *Royal Borough of Greenwich v Information Commissioner*, EA/2014/0122

[https://informationrights.decisions.tribunals.gov.uk/dbfiles/decision/i1478/royal%20borough%20of%20greenwich%20ea.2014.0122%20\(30.01.15\).pdf](https://informationrights.decisions.tribunals.gov.uk/dbfiles/decision/i1478/royal%20borough%20of%20greenwich%20ea.2014.0122%20(30.01.15).pdf)

The Commissioner's position

22. In considering the first of the three conditions set out above at paragraph 11 the Commissioner notes that the term 'proceedings' is not defined in the EIR. However, the Commissioner's guidance⁴ explains that he considers that:

'... the word implies some formality, i.e. it does not cover an authority's every action, decision or meeting. It will include, but is not limited to:

- formal meetings to consider matters that are within the authority's jurisdiction;
- situations where an authority is exercising its statutory decision making powers; and
- legal proceedings.

In each of these cases the proceedings are a means to formally consider an issue and reach a decision. 'Proceedings' could include, for example, the consideration of a planning application by a planning authority, or an internal disciplinary hearing in a public authority; both of these have a degree of formality.'

23. In the Commissioner's view the term 'proceedings' should be taken to mean a formal means to consider an issue and reach a decision. Proceedings should be governed by formal rules.

24. The Commissioner accepts that pre-application enquiries and associated advice have the necessary formality to constitute proceedings for the purposes of regulation 12(5)(d). This position is consistent with previous decision notices that the Commissioner has issued which also sought copies of information concerning pre-application enquiries.

25. With regard to the second condition, i.e. that the confidentiality of the proceedings in question has to be protected by law, such confidentiality must be provided for in statute or derived from common law. As noted above, in this case the Council's position is that the information is subject to the common law duty of confidence.

26. In the Commissioner's view, the common law of confidence will apply where the following two elements are satisfied. First, the information

4

https://ico.org.uk/media/fororganisations/documents/1626/eir_confidentiality_of_proceedings.pdf

has the necessary quality of confidence. This means that the information must not otherwise be accessible and be of importance to the confider and not trivial. Secondly, the information was communicated in circumstances importing an obligation of confidence. An obligation of confidence can be expressed explicitly or implicitly.

27. The Commissioner considers that the first element is satisfied; the issue to which the information relates, i.e. pre-application enquiries, is certainly not a trivial one. The Commissioner has also viewed the withheld information and is satisfied that its contents are not trivial. With regard to the second element, the Commissioner acknowledges that the complainant's point that developers seeking such advice should be aware of the Council's obligations under the EIR. However, the Commissioner does not consider that this undermines such third parties' expectations that the information would be treated confidentially given the custom and practice of such information not being disclosed, even in response to EIR requests, given the exceptions available to public authorities to withhold such information.
28. Therefore, the Commissioner accepts that the withheld information has the quality of confidence as it is clearly not of a trivial nature, is not in the public domain, and was communicated in circumstances importing an obligation of confidence.
29. The third condition requires the determination as to whether disclosure would have an adverse effect. The exception is only engaged where disclosing the information would adversely affect that confidentiality. It is not enough that the confidentiality is provided by law, there must also be an adverse effect on that confidentiality.
30. The Commissioner's aforementioned guidance on regulation 12(5)(d) states:

'Adversely affect' means there must be an identifiable harm to or negative impact on the interest identified in the exception. Furthermore, the threshold for establishing 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'.
31. The interest that is protected by regulation 12(5)(d) is the confidentiality of proceedings, where that confidentiality is provided by law.
32. While the Commissioner is mindful that pre-application enquiries and the related advice may be provided within a confidential context, since the introduction of the EIR, authorities should be aware that no information can be subject to a blanket restriction on disclosure. It is the duty of

public authorities to show in each specific instance that information is being withheld for the reasons identified in the exception being applied.

33. In this case, the Commissioner considers that disclosure would have an adverse effect on the confidentiality of the pre-application process as it would damage the general principle of confidentiality itself and result in harm to the interest the exception is designed to protect. In the Commissioner's view disclosing the specific information requested in this case would discourage full engagement with the pre-application process, both from this developer and others, for fear of the public dissemination of such information. The Commissioner considers that this argument attracts particular weight in this case given that the developer had, at the time of the request, yet to submit a formal planning application and there remained the possibility that further pre-application submissions would be made given the complex nature of the site and proposed development.
34. In reaching this decision, the Commissioner appreciates that the complainant has drawn upon the Tribunal's decision in *Royal Borough of Greenwich v Information Commissioner* to argue that developers will have an incentive to continue to engage in open and frank exchanges with the Council even if previous pre-application information was disclosed. The Commissioner is not persuaded that the findings of the Tribunal in that case can be read across to the scenario of pre-planning applications. The Tribunal was considering a case where a developer wanted to be released from obligations in respect of planning application previously decided so that that they could reduce the amount of affordable housing. In the Commissioner's view there is a material difference between that scenario and one where a developer is only at the stage of engaging with the pre-planning process. Whilst the Commissioner acknowledges the point that to get the most of out of the process, developers do have a reason to be open with planning authorities, he does not accept that this can be equated to the clear financial incentives for developers in the circumstances considered by in the Tribunal case cited.
35. The Commissioner is therefore satisfied that the exception contained regulation 12(5)(d) is engaged.
36. Whilst the Commissioner recognises that each request needs to be considered on its own merits, he would note that his decision that the pre-planning application information in this case attracts regulation

12(5)(d), is line with a number of other decision notices regarding pre-planning information.⁵

The public interest test

37. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(d) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information.
38. 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).

Public interest arguments in favour of disclosing the information

39. The complainant argued that the public interest favoured disclosure of the information. In support of this position he made the following points:
40. The complainant argued that the Council placed too great an emphasis on the interests of the developers than the interests of the public in knowing how public property will be utilised. On that point, the complainant argued that the Council had failed to apply the presumption in favour of disclosure and rather sought to only justify non-disclosure. The complainant noted the internal review contained no discussion of the fact that the questions of how publicly-owned land should be used and of how much social housing should be built are overwhelmingly important issues for the public. The issues that the developers may have been raising in the pre-application exchanges, for instance, about the viability of building a certain percentage of social housing, continue to be relevant in relation to any developer proposing to develop this publicly-owned land.
41. The complainant noted that the developer had not submitted a planning application and it was likely (at the point of his complaint to the Commissioner) that the Options Agreement between Council and the developer would lapse at the end of March 2022 without such an application being approved. In any event the complainant noted that the

⁵ For example FER0900414, <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2618026/fer0900414.pdf>

Council was already exploring new options for the site⁶ and the issues discussed between it and the developer are likely to be relevant to any developer seeking to develop the site owned by the Council. The complainant argued that without this information, it would be difficult for the public to properly engage in the decision making and scrutinise the Council's handling of the site.

42. Furthermore, the complainant argued that public has an interest in understanding why the developer has not, at this stage the request made, submitted a planning application. He argued that this raised serious questions such as is it being argued that less social housing should be developed? And, will the developer not submitting an application place pressure on the Council to grant concessions as to the obligations the developer is required to comply with? The complainant suggested that disclosure of the pre-application exchanges could answer these questions and there is overriding public interest to do so given the context and circumstances of this case, including the amount of funds the Council had expended in purchasing the site.
43. During the course of the Commissioner's investigation of this matter, the complainant also noted that option agreement between Hackney Council and Hackney Walk Limited came to the end of its five years on 31 March 2022 without Hackney Walk Limited submitting a planning application for 55 Morning Lane. As result, the complainant suggested that the Council will now have to find a new developer with which to work or take on the role of developer for the site. In his view this increased the public interest case for the disclosure of information regarding the previous negotiations so that there can be appropriate and informed public scrutiny of any future deals.

Public interest arguments in favour of maintaining the exception

44. The Council argued that the confidential pre-planning application process is a service that saves public money by enabling it to advise on how to eliminate any planning problems before the formal application stage commences. The Council argued that this ensured a cost effective and efficient planning process, if pre-application advice is routinely disclosed, developers are more likely to submit inappropriate plans. These would need resubmission, increasing the time, effort and expenditure required to deal with planning applications to the detriment of both developers, the Council and the wider public. The Council noted that pre-application engagement is encouraged in the National Planning Policy Framework as having the potential to improve the efficiency and

⁶ <https://news.hackney.gov.uk/council-to-explore-new-options-for-morning-lane-tesco-site/>

effectiveness of the planning application system for all parties. Therefore, the Council argued that there is a strong public interest in encouraging developers to engage in confidential, full and frank discussions and whilst there is no legal obligation to obtain pre-planning advice, and the Council could mandate developers to engage with them before submitting a planning application, they should encourage the take-up of any pre-application services offered.

45. The Council therefore determined that, the public interest in disclosure is outweighed by the need for the Council to deal with pre-application enquiries confidentially as land or property developers are seeking such informal advice in confidence and to assist in their decisions; they need to know that any information supplied is not made public prior to any decision to proceed with a particular development scheme.

Balance of the public interest arguments

46. As set out in his guidance on regulation 12(5)(d), the Commissioner accepts that there will always be a general public interest in protecting confidential information. Breaching an obligation of confidence undermines the relationship of trust between confider and confidant. For this reason, the grounds on which confidences can be breached are normally limited. Therefore, where the exception is engaged, the Commissioner accepts that there will always be some inherent public interest in maintaining it.
47. Furthermore, the Commissioner agrees with the Council that there is a considerable public interest in ensuring that the effectiveness of the pre-planning application process is not undermined. In the particular circumstances of this case the Commissioner notes it was possible, at the time of the request, that the developer could have continued to engage in further pre-planning discussions subsequent to this request being submitted. In the Commissioner's view it would be firmly against the public interest if the free and frank nature of such submissions were to be undermined. More broadly and for the reasons outlined above, the Commissioner also considers that it would be counter to the public interest if other developers were less open with the Council as a result of the disclosure of information in this case. These risks have a widespread and deleterious impact on the wider planning process and impact on the Council's ability to run such a process effectively. Taking the above into account, the Commissioner considers that the public interest in maintaining the exception attracts significant weight.
48. With regard to the public interest arguments in disclosure, the Commissioner recognises the significance of the site in question, both in terms of its location in the borough and the amount of money the Council has invested in purchasing it. The Commissioner also appreciates that the public have legitimate questions as to why up to the

date of the request, the developer has yet to submit a planning application in respect of the site. Disclosure of the withheld information could provide the public with some insight into this and answer some, albeit not all, of the questions advanced by the complainant. In the Commissioner's view the public interest arguments therefore also attract notable weight.

49. However, the Commissioner is conscious that the pre-planning process is not one which is designed to have a role or opportunity for interested parties, including the public, to comment on proposals by developers. In contrast, once a planning application has been submitted the planning process provides precisely such a role and opportunity. In the Commissioner's view such transparency, and more specifically this route of engagement in the planning process for interested third parties at a later stage in the process, but still prior to a local authority's decision on a particular application, arguably reduces the public interest in disclosure of information about pre-planning.
50. In conclusion, in the Commissioner's view the public interest arguments in favour of disclosing the information are, by a relatively narrow margin, outweighed by the public interest in maintaining the exception. The Commissioner has reached this finding given the potential, at the time of the request, for further pre-application discussions between the developer and Council in respect of this site, the broader risks to the confidentiality of the Council's pre-planning process and the inherent public interest in maintaining confidences.
51. In light of these findings, the Commissioner has not considered the Council's reliance on regulations 12(5)(e) and 12(5)(f).

Delays in processing the request

52. Regulation 5(2) states that when it receives a request a public authority has to provide a response to as soon as possible and in any event within 20 working days.
53. In this case, the complainant submitted his request on 12 August 2020 but the Council did not issue its response (albeit under FOIA rather than the EIR) until 22 April 2021. This represents a breach of regulation 5(2) of the EIR.
54. Regulation 11(4) requires a public authority to complete its consideration of an internal review as soon as possible and in any event within 40 working days.
55. In this case, the complainant submitted his request for an internal review on 20 May 2021 but the Council did not issue its response until 12 November 2021. This represents a breach of regulation 11(4) of the EIR.

Right of appeal

56. 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

57. 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.

58. 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

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