

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 13 September 2023

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested information from London Borough of Hackney (the Council) relating to the development scheme of the Stamford Hill Morrisons Site, located at 47-49 Stamford Hill, London.
2. The Council originally refused the request under section 12 (cost limit) of FOIA, subsequently revising their position at internal review and correctly providing a response to the request under the Environmental Information Regulations 2004 (EIR). The Council provided the complainant with some information held within scope of the request but stated that most information requested was not held and therefore regulation 12(5)(a) applied to those parts of the information requested.
3. The Council withheld the planning pre-application information requested under regulation 12(4)(d)(material still in the course of completion) but during the Commissioner's investigation withdrew reliance on this exception and instead applied regulations 12(5)(d)(confidentiality of proceedings) and 12(5)(f)(interests of the person who provided the information) to the same.
4. The Commissioner's decision is that, on the balance of probabilities, the Council do not hold most of the information requested. With regard to the planning pre-application information, the Commissioner's decision is that this information is exempt from disclosure under regulation

12(5)(d) and that in all the circumstances of the request the public interest favours maintaining the exception. However, the Commissioner has found that the Council breached regulation 11(4) by failing to complete the internal review within the time limit required by the legislation.

5. No steps are required.

## **Request and response**

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6. On 19 November 2021, the complainant wrote to Hackney Council (the Council) and requested information in the following terms:

*'We request the following information:*

- a. *All instructions (whether in email or correspondence form) given to Jan Kattein Architects (JKA) by officers of the Council's planning team (including its planning policy team) in relation to the preparation of JKA of a development scheme for the site known as Stamford Hill Morrisons Site located at 47-49 Stamford Hill, London, N16 5TB ("the Site"), including the scope of the brief given to JKA;*
- b. *All email correspondence between planning officers of the Council (including its planning policy officers) and JKA in relation to development options for the Site and its future site allocation in the draft Stamford Hill Area Action Plan ("SHAAP"), including all email correspondence between JKA and the Council's planning officers (including its planning policy officers) in relation to the JKA Scheme and/or other scheme designs for this Site.*
- c. *Any other reports or advice prepared for the Council (whether internally or externally) in relation to the design of any other schemes for the Site, whether in draft or final form.*
- d. *Any Financial Viability Appraisal ("FVA") of the JKA Scheme prepared for the Council by external viability consultants, whether submitted to the Council in draft form or otherwise.*
- e. *Any emails between the Council's planning officers (including its planning policy officers) and any valuer or financial viability consultant regarding the financial viability of the JKA Scheme.*
- f. *Any emails between the Council's planning officers (including its planning policy officers) and any valuer or financial viability consultant regarding financial viability issues in relation to the future development of this Site and its potential allocation in the SHAAP.*

- g. Any other technical reports commissioned by the Council (whether prepared internally or by external consultants) in relation to the JKA Scheme, including any draft reports.*
- h. Any other technical reports commissioned by the Council (whether prepared internally or by external consultants) in relation to any other potential development schemes for this Site, including any draft reports'.*
7. The Council responded to the request on 9 December 2021. They advised that from their '*preliminary assessment*' they estimated that to comply with the request would exceed the costs limit under section 12 of the Freedom of Information Act 2000 (FOIA). The Council stated that, '*we have decided to refuse the request because we would need to manually examine individual records dated from February 2020. These records are not held in an easily retrievable format*'. Consequently, the Council confirmed that they were refusing the request under section 12 of FOIA.
8. The Council advised the complainant that the draft Stamford Hill Area Action Plan (SHAAP) and supporting information was available at [hackney.gov.uk/Stamford-hill-aap](http://hackney.gov.uk/Stamford-hill-aap) and that if the complainant would like to meet to discuss any of the information, he was invited to get in touch.
9. The complainant requested an internal review of the decision on 5 January 2022. He contended that the Council's refusal to disclose the information requested in reliance on section 12 FOIA was '*plainly unreasonable*' for at least the following reasons:
- a) *First, the requests were primarily for emails and written reports and advice. Those requests were targeted and specific. The Council has already identified that the relevant date to search from is February 2020, so the date range of the search on its own analysis is limited and very recent*'.
- b) *Second, to suggest that the emails and reports sought are not in 'an easily retrievable format' is plainly not tenable as these will all be contained in electronic form in emails from the relevant officers and/or from JKA, which can be readily searched by identifying the relevant email recipients at JKA and searching the relevant officers email accounts against those email addresses. Such a limited and targeted search exercise cannot possibly take 18 hours*'.
- c) *Third, the correspondence with JKA and the reports requested relate to a site that is currently the subject of a draft consultation for the Stamford Hill Area Action Plan ("SHAAP") so the relevant officers at the Council who are responsible for the SHAAP will plainly have to hand the relevant information in any event. To suggest that those*

*reports are not 'readily retrievable' is plainly not tenable. It is concerning that such a contention has been made, given these documents form the basis of decisions recently taken by the Council in its capacity as local planning authority'.*

- d) *Finally, and critically, the Council has plainly failed to consider each request separately and consider how long each request would take to consider, and has unlawfully aggregated the requests. Pursuant to the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, the only basis on which the total costs of multiple requests should be taken into account is where they relate to 'the same, or similar information', for the purposes of Regulation 5(2). The information sought in the various requests do not relate to the same or similar information – they relate clearly to separate categories of information (for instance, some relate to Financial Viability Appraisals, and some relate to design), and some relate to emails whereas others relate to reports. The Council should therefore have considered each request separately and on disaggregated basis and if they had done so the costs of complying with each of those requests cannot possibly have exceeded 18 hours worth of work to search for this information'.*
10. The complainant contended that the Council should, *'at the very least'*, immediately provide the information requested in parts (c), (d), (g) and (h) of the request. He stated that the Council *'plainly can readily identify whether or not an FVA and the technical reports referred to in those requests exist, by asking the relevant officers responsible for the SHAAP who will be familiar with this material to provide them'*. The complainant therefore contended that there was no need for the Council to *'manually examine all the individual records'* to comply with those specific parts of the request.
11. The Council provided the complainant with their internal review on 22 April 2022, more than three months after he had requested the same.
12. In their internal review, the Council correctly revised their response, recognising that as the planning information requested constituted environmental information, the correct legislative framework for processing the request was not FOIA but rather the Environmental Information Regulations 2004 (EIR).
13. The Council advised the complainant that they recognised the regulation 12(2) presumption in favour of disclosure of environmental information and they also recognised *'the public interest in transparency and accountability in relation to its actions as well as the public interest in maintaining confidence regarding the way it conducts business on behalf of the public'*. The Council advised that as part of their review, they had reconsidered their previous response to the request in its entirety and

that they were *'now in a position to provide the following information in response to your request'*. The Council provided the complainant with a table containing the individual parts of the request and their revised response to each.

14. With regard to the information requested in part (a) of the request the Council advised that:

*'The officers who appointed JKA have now left the Council. The preparation of the development scheme was discussed at project meetings and follow up documents were curated for feedback on all sites across the borough; the development scheme was then prepared by JKA architects. The following 'Morrisons Feedback to JKA' documents include the relevant information for the Morrisons Site which the Council is able to share'.*

15. With regard to the information requested in part (b) of the request the Council informed the complainant that, *'the service has advised that it cannot locate any emails discussing the development options for the Morrisons sites'*.

16. In respect of part (c) of the request the Council disclosed to the complainant the Morrisons Stamford Hill Site brief produced by the Conservation and Urban Design (CUDS) Team. The Council informed the complainant that *'the pre-application notes associated with the pre-application on the site cannot be shared as it is an evolving process which is incomplete'*. The Council stated that the design brief was the CUDS team's most up-to-date position. The Council informed the complainant that the pre-application notes were being withheld under regulation 12(4)(d)(material still in the course of completion) but failed to apply the public interest test in respect to the exception.

17. With regard to the information requested in part (d) of the request the Council advised the complainant that the Stamford Hill Viability Assessment had been uploaded to the Stamford Hill Area Action Plan Assessment web page and they provided him with the relevant link.

18. With regard to the information requested in part (e) of the request the Council advised the complainant that there were no specific emails regarding the financial viability of the JKA scheme with any valuer or financial viability consultant.

19. With regard to the information requested in part (f) of the request the Council similarly stated that there were no specific emails regarding the financial viability issues in relation to the future development of the Morrisons site and its potential allocation in the SHAAP.

20. In respect of the information requested in part (g) of the request the Council advised the complainant that *'the service is not aware of other*

*technical reports that have been commissioned internally or externally in relation to JKA commission*'. The Council noted that the complainant might wish to visit the Stamford Hill Area Action Plan Assessment web page where evidence-based documents associated with the draft AAP could be located, viewed and downloaded.

21. Finally, with regard to the information requested in part (h) of the request, the Council advised the complainant that *'the service is not aware that any technical reports (including draft reports) have been commissioned internally or externally in relation to any other potential development schemes for this Site'*.
22. The internal review concluded with the Council confirming that the complainant's appeal had been upheld *'to the extent that we are able to disclose the information included above'* and that in upholding the appeal, they acknowledged their oversight in originally considering the request under FOIA rather than the EIR.

### **Scope of the case**

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23. The complainant contacted the Commissioner on 30 June 2022 to complain about the way his request for information had been handled. Specifically, the complainant complained about the Council's response to parts (a), (b), (e) and (f) of the request.
24. In submissions to the Commissioner, the complainant noted that in changing their initial refusal to provide information on the grounds of cost, the Council's revised position indicated *'that there is information that actually exists, which is entirely inconsistent with its position'* in respect to some parts of the request where the Council *'appears to assert that it cannot locate the information in question'*.
25. The complainant contended that the response from the Council was *'wholly inadequate'* and indicated that they had not properly carried out their searches or complied with their obligations under the EIR and/or FOIA. The complainant provided the Commissioner with detail as to which parts of the Council's response they considered to be inadequate.
26. In respect of part (a), the complainant stated that in advising that they had provided the relevant information from the Morrisons Site which they were *'able to share'*, the Council had given an entirely inadequate response. They had not explained whether the information requested exists but was being withheld on the grounds of a particular EIR exception, or why they felt that they were not *'able'* to share other information.

27. The complainant advised the Commissioner that *'it is inconceivable that such information does not exist as it was the Council that instructed the architects (JKA) in question'*. He noted that the only document disclosed does not relate to the request *'but appears to be some feedback given to the architects JKA (it is not entirely clear from whom), but that document does not amount to any sort of instructions to JKA'*.
28. In respect of part (b) of the request the complainant contended that the Council's response was *'entirely inadequate'*. He noted that whilst the Council had stated that the service had advised that it could not locate any emails, *'it is entirely unclear the extent of such searches and who carried them out'*. The complainant advised the Commissioner that *'it is simply inconceivable that such emails do not exist. JKA are architects commissioned by the Council to produce a development scheme for this site which is now part of the Council's proposed local plan document'*.
29. With regard to parts (e) and (f) of the request, the complainant advised that the Council's statement that there are no *'specific'* emails regarding the financial viability of the JKA scheme with any valuer or financial viability consultant was *'entirely unsatisfactory'* as *'it implies that there are other emails regarding the financial viability of the JKA Scheme but they have not been disclosed'*. The complainant contended that, *'it is plainly implausible that there are no emails regarding this, given the fact that the Council instructed BNPP to carry out a financial viability appraisal of the Stamford Hill Area Action Plan, which included this Site'*.
30. During the course of the Commissioner's investigation, and in submissions to the Commissioner, the Council disclosed further information to the complainant, which they advised *'may be of relevant (sic) to the complainant's request'*. This further information comprised documents relating to procurement for the following projects within Hackney:
- London Borough of Hackney: Invitation to Tender for the Provision of Specialist Services – Consultants Brief Stamford Hill Housing Capacity study – August 2019;
  - Stamford Hill Housing Capacity Study Tender – 23/09/2019 – JKA Associates;
  - London Borough of Hackney: Invitation to Tender for the Provision of Specialist Services – Consultants Brief – Key Corridors Housing Design and Density study: Dalston, Clapton and Homerton – December 2019.
31. The Council also advised the Commissioner that they held emails between planning officers and the financial viability consultant relating to the viability study for the Area Action Plan as a whole, and whilst noting that *'these emails may not be directly relevant to the request'*,

the Council disclosed them to the complainant. For reasons which are explained later in this notice, these emails were outside the scope of the complainant's request.

32. During the course of the Commissioner's investigation the Council withdrew their reliance on regulation 12(4)(d) to withhold the pre-application notes, and instead withheld this information under regulations 12(5)(d)(the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law) and 12(5)(f)(the interests of the person who provided the information). The Council provided the Commissioner with copies of the pre-application information withheld under regulation 12(5)(d).
33. The scope of the Commissioner's investigation has been to ascertain the extent of relevant information within the scope of the request held by the Council and the Council's application of the above exceptions to the pre-application notes.

## **Reasons for decision**

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### **Regulation 12(4)(a) – information not held at the time of the request**

34. Regulation 12(4)(a) of the EIR provides an exception from the duty to make information available if the public authority does not hold the requested information at the time of the request.
35. The Commissioner notes that whilst the Council did not explicitly rely on regulation 12(4)(a) in submissions to the Commissioner, their position that they do not hold most of the information requested by the complainant equates to reliance on this exception.
36. In scenarios such as in this case, where there is a dispute between the information located by a public authority and the information which the complainant believes should be held, the Commissioner, following the lead of a number of First-Tier Tribunal (Information Rights) decisions, applies the civil standard of proof – i.e. on the balance of probabilities. That is to say, the Commissioner will determine whether, on the balance of probabilities, the Council hold recorded information falling within scope of the request.
37. In reaching this determination, the Commissioner will consider any arguments and evidence from the complainant, and the nature and extent of the checks and searches carried out by the public authority, along with any information or explanation provided by the public authority as to why the information requested was not held by them at the time of the request.

*Part A of the request – instructions to architects*

38. The Commissioner appreciates and agrees with the complainant that terminology such as '*are able to share*' by a public authority in response to an information request is not appropriate or helpful, since it tends to imply or suggest that the public authority may hold other relevant information which they are not (for whatever reason) able or willing to disclose. It is imperative that a public authority is clear about whether they hold information requested and the extent of such information.
39. In the course of his investigation the Commissioner advised the Council that there would be a reasonable presumption that the Council would hold the instructions provided to JKA (assuming that such instructions were not entirely verbal in nature) and that if it were the Council's position that they do not hold these instructions, then they would need to provide the Commissioner with an explanation as to why not (e.g. they were previously held but were deleted prior to the complainant's request for the same).
40. In submissions to the Commissioner the Council simply stated that, '*the Morrisons document was provided **as it relates to the instructions that were given to JKA** (Commissioner's emboldening). It was our understanding that this was the information that the complainant was seeking to obtain as part of the internal review*'.
41. However, the Commissioner would note that part (a) of the complainant's request was very clearly worded as to encompass all instructions given to JKA by the Council in relation to the Stamford Hill Morrisons Site. That is to say, the request was for the instructions *themselves*, and not information relating to such instructions. As the complainant noted in submissions to the Commissioner, the document disclosed to them by the Council (the Morrisons feedback document) '*does not amount to any sort of instructions to JKA*'. The Council also advised that the officers who appointed JKA have since left the Council.
42. The Commissioner acknowledges that the officers who appointed JKA have since left the Council but he considers that there would be a reasonable presumption that any instructions given to JKA (provided these were in recorded form) would be retained by the Council for future use and reference, regardless of any such staff changes or departures. The Commissioner addresses this issue more generally later in this notice.
43. In light of the response provided by the Council, and the checks and searches carried out, the Commissioner is satisfied, on the balance of probabilities, that the Council do not hold the instructions which were provided to JKA in respect of the Stamford Hill Morrisons Site. However, the Commissioner considers that the Council not holding this information

is most unsatisfactory and clearly not in accordance with their Records Management Policy (as detailed later in this notice).

*Part B of the request – email correspondence*

44. The Commissioner would agree with the complainant that it is not satisfactory for the Council to simply state that *'the service has advised'* that it cannot locate any relevant emails without identifying the service and providing information as to what checks and searches were carried out to locate and identify relevant information.
45. The Commissioner considers that it is likely that at least some email correspondence would have taken place concerning this matter. As the complainant has noted, JKA are architects commissioned by the Council to produce a development scheme for the relevant site which is now part of the Council's proposed local plan document. Such a process would likely involve at least some email communications between the Council's planning officers and the commissioned architects. Indeed, the emails disclosed to the complainant by the Council during the Commissioner's investigation shows this to be the case.
46. In seeking submissions from the Council the Commissioner reminded the Council that under the EIR (and FOIA) information held by a public authority as a whole, and not just a particular department or service area, is potentially within scope of a request. Consequently, the Commissioner asked the Council to carry out appropriately careful and thorough checks and searches for the email correspondence in question.
47. In submissions to the Commissioner the Council advised that they had manually examined electronic files associated with the project. The Council further advised that, *'searches have also been conducted on the archived mailbox of the officer who was responsible for project managing the work which forms the basis of this request'*.
48. The Council advised the Commissioner that:  
  
*'It is most likely that a full chain of the emails requested by the complainant will have been sent from the project manager for this work, who has since left the Council. The Council's ICT team has, on two occasions, undertaken an exercise to retrieve and search the information that was archived and backed up from the officer's mailbox'* (the Council confirmed that the most recent search was conducted following receipt of the Commissioner's investigation letter in May 2023).
49. The Council also advised that further searches were conducted by the Council's Head of Planning, who undertook a search of their mailbox. The Council confirmed that *'these are the most likely places where the*

*information would be held. The searches have concluded that there are no emails that fall within the scope of this request'.*

50. As the Council's submissions to the Commissioner were silent as to whether the departed project manager's role was filled by a successor, the Commissioner sought clarity on this point from the Council. In supplemental submissions to the Commissioner dated 13 July 2023, the Council confirmed that the project manager referred to in their main submissions left the Council in May 2021 and that a new project manager has since been appointed to lead on the preparation of the SHAAP. The Council confirmed that the email inbox of the appointed individual had been checked but no relevant further information had been found.
51. The Commissioner would agree that any email correspondence between the Council and JKA relating to development options for the site and its future allocation in the draft SHAAP, would most likely have been sent from, received by, or copied to, the project manager(s) for the work in question and/or the Head of Planning. Consequently, the Commissioner considers that the Council have carried out appropriate and reasonable checks and searches for any relevant information held.
52. The Council advised the Commissioner that the requested information relates to the preparation of evidence reports to support the SHAAP that have now been published and supplied to the complainant. The Council explained that:  
  
*'It is these reports and the robustness of the assumptions within them that will be scrutinised through a statutory examination process, by an independent inspector appointed by the Government from the Planning Inspectorate. It is highly unlikely that the Council would need to retain additional information that is not referred to in the report itself. Now the reports are published and available in the public domain, there would be limited value in retaining any such information'.*
53. Given the above position, whilst the Commissioner appreciates the complainant's contention that such email correspondence would have taken place, and the Commissioner considers that it would be a reasonable presumption that at least some email correspondence would have taken place, he is satisfied, on the balance of probabilities, that this information was not held by the Council at the time of the request.

#### *Part D of the request*

54. With regard to the information requested in part (d) of the request the Council advised the complainant in the internal review that the Stamford Hill Viability Assessment had been uploaded to the Stamford Hill Area Action Plan Assessment web page and they provided him with the relevant link.

55. The Commissioner would note that under Regulation 5(1) of the EIR, a public authority has a duty to '*make available*' (as opposed to provide under FOIA) environmental information on request. The Commissioner accessed the link to the Council's website which the Council provided to the complainant. One of the documents accessible via that link is the Stamford Hill viability assessment. The Council confirmed to the Commissioner that this document is the Financial Viability Report prepared BNPP for the Stamford Hill Area Action Plan. The document is dated March 2021 and has the BNPP logo at the top of the cover page.
56. The Commissioner is consequently satisfied that the Council complied with Regulation 5(1) of the EIR in respect of part (d) of the request in that they made available to the complainant (and indeed the world at large) the Stamford Hill Area Action Plan – Viability Assessment, as provided to the Council by BNPP.
57. For the avoidance of doubt, the Council confirmed to the Commissioner that, '*no further financial viability reports have been provided to the Council by BNPP in relation to Stamford Hill*'.

*Parts E and F of the request – emails regarding financial viability of the JKA Scheme*

58. The Commissioner would agree with the complainant that the Council's statement in the internal review that there are no '*specific*' emails regarding the financial viability of the JKA scheme with any valuer or financial viability consultant is not satisfactory or helpful since it tends to imply or suggest that other relevant but less specific emails may be held which are within scope of the request.
59. In submissions to the Commissioner the Council advised that they wished to '*qualify*' their response that they held no specific emails within the scope of parts (e) and (f) of the request '*with reference to the fact that the viability work undertaken to support the Stamford Hill Area Action Plan AAP is for the Stamford Hill area as a whole. The limitations of this work are acknowledged in paragraph 2.4 of the published Stamford Hill Area Action Plan Viability Study:*  
  
*'As an area wide study this assessment makes overall judgements as to viability of development within Stamford Hill and does not account for detailed site circumstances which can only be established when work on detailed planning applications is undertaken. The assessment should not be relied upon for individual site applications'*.
60. The Council advised the Commissioner that they held emails between planning officers and the financial viability consultant relating to the viability study for the Area Action Plan as a whole. The Council stated that these emails may not be directly relevant to the request but disclosed copies of the same to the complainant.

61. Following receipt of these emails from the Council, the complainant advised the Commissioner that the emails seemed only to fall within part (e) of their information request, and only provided a partial response to the same. The complainant contended that it was '*inconceivable*' that further email correspondence with BNPP does not exist.
62. The complainant further stated that '*the provision of this information is plainly inconsistent with LBH's initial denial that there are no specific emails regarding the viability of this scheme*' and invited the Commissioner to take this into account when assessing the credibility of the response provided by the Council.
63. During the course of his investigation the Commissioner was provided with copies of the emails which the Council had disclosed (on 3 July 2023) to the complainant. These emails comprise around 10 pages.
64. The emails comprise communications between the Council and BNPP in respect to the 'Stamford Hill Viability Assessment' and the 'Morrisons Site, Stamford Hill'. The Commissioner acknowledges the Council's advice that these emails are not solely restricted to Stamford Hill and also refer to other areas of the Area Action Plan as a whole, such as Hackney Central and Dalston. However, they would not be outside the scope of the request on that basis as they clearly concern, at least partially, the development scheme for the Stamford Hill Morrisons site.
65. However, the Commissioner notes that the disclosed emails date from between July and December 2022. They are therefore outside the scope of the complainant's request of 19 November 2021 for the simple reason that they obviously did not exist at that earlier point in time. The Council were therefore under no obligation to disclose these emails (as they did during the Commissioner's investigation) to the complainant. Given their obvious interest to the complainant though, it was helpful and good practice of the Council to do so.
66. One of the disclosed emails was sent from the Council to BNPP on 18 July 2022, in which the Council asked, '*As discussed, it would be useful if you could review this and provide **a written response** (Commissioner's emboldening) to the points raised, particularly around assumptions/any further points for us to consider*'. The complainant advised the Commissioner that they had not seen this 'written response' and that it fell within the scope of parts (f) and (h) of their request.
67. The Commissioner would agree that the 'written response' would fall within the scope of the complainant's request, providing that it was held by the Council prior to the date of the request on 19 November 2021. Consequently, the Commissioner made enquiries of the Council to see whether they held any such written response.

68. The Council advised the Commissioner that no such written response was provided to them by BNPP. When asked by the Commissioner why no written response had been provided, given that the Council had clearly asked BNPP to provide one, the Council stated that they did not follow up their request for the written response as the information, *'was not time critical when it was requested, in that it was not required at that stage of the plan making process'*. The Commissioner is therefore satisfied that this information (written response) is not held by the Council as BNPP never provided the same to them.
69. In confirming the position to the Commissioner, the Council advised that, *'any additional information that is subsequently supplied to the Council by BNPP and is relevant to the examination of the Stamford Hill AAP will be made available in accordance with planning regulations'*.
70. The Commissioner sought details from the Council of the exact checks and searches which they had carried out to try and locate any other emails which were within scope of parts (e) and (f) of the request.
71. The Council confirmed that they had manually examined electronic files associated with the project. The Council advised that, *'searches have also been conducted on the archived mailbox of the officer who was responsible for project managing the work which forms the basis of this request'*. The Council further advised that their ICT team had, *'on two occasions, undertaken an exercise to retrieve and search the information that was archived and backed up from the officer's mailbox'* (the Council confirmed that the most recent search was conducted following receipt of the Commissioner's investigation letter in May 2023).
72. The Council advised that further searches were conducted by the Council's Head of Planning, who undertook a search of their mailbox. The Council confirmed that *'these are the most likely places where the information would be held. The searches have concluded that there are no emails that fall within the scope of this request'*.
73. The Commissioner would agree that any further email correspondence between the Council and any valuer or financial liability consultant(s) regarding the financial viability of the JKA scheme or any financial viability issues in relation to the future development of the site and its potential allocation in the SHAAP, would most likely have been sent from, received by, or copied to, the project manager for the work in question and/or the Head of Planning.
74. In submissions to the Commissioner the Council advised that there is no requirement under Planning legislation or otherwise to retain the information requested within scope of parts (e) and (f) of the request. They advised that the statutory provisions regarding the retention of

planning documents are contained in Regulation 35 of The Town and Country Planning (Local Planning) (England) Regulations 2012.

75. In responding to the Commissioner's enquiries, the Council advised that consultation had taken place with the Council's Head of Planning and Strategic Planning Manager and they stated that *'these officers perform their roles in line with their statutory obligations relating to planning legislation'*.
76. Consequently, the Commissioner considers that the Council have carried out appropriate and reasonable checks and searches for any relevant information held. The Commissioner is satisfied, on the balance of probabilities, that this information was not held by the Council at the time of the request, because the searches did not locate the requested information.
77. Although regulation 12(4)(a) is a qualified exception, in keeping with all the EIR exceptions, the Commissioner's position is that it is not necessary to carry out a public interest test in respect of this exception. This is because clearly the public interest cannot favour disclosure of information which is not held. With respect to parts (a), (b), (e) and (f) of the request, the Commissioner is therefore satisfied that the Council has complied with the requirements of regulation 12(4)(a) of the EIR.
78. However, the Commissioner does have concerns about the amount of relevant information retained by the Council in this case.
79. In their submissions to the Commissioner, the Council advised that they take their obligations regarding access to information seriously and they are committed to transparency and accountability. Unfortunately, the Commissioner considers that the Council's records management and retention handling in this particular case does not support this statement.
80. The Commissioner notes that the Council's own Records Management Policy (as provided to the Commissioner by the Council) provides support for this view. The Records Management Policy (The Policy) states (under the section covering 'movers and leavers') that *'Managers must ensure that records are not lost when a colleague leaves their post, for example by ensuring it is saved in a Shared Drive, or that ownership of documents in the leaver's My Drive is transferred to another colleague'*.
81. More generally, the Policy states that, *'accurate and reliable records are valuable to the council because they'* (amongst other things), *'provide legal evidence, enabling the council to hold others to account, and vice versa'* and *'enable services to answer statutory requests for information efficiently'*. It recognises that *'our records are a key asset'* and that managing them well supports (amongst other things) *'accountability'*

and '*protection of the rights and best interests of both the council and the citizens it serves*'. Conversely, the Policy also recognises that managing records badly can lead to (amongst other things) '*financial detriment and legal penalty*' and '*comprised decision-making*'.

82. Much of the information requested by the complainant in this case, particularly any instructions which were issued to JKA and associated email correspondence, is information which the Council, were they following their Policy, would be expected to retain. The departure from the Council of a project manager should not mean the loss of any project related information which that individual was responsible for creating or handling. In this case it would appear that relevant records were neither saved in a Shared Drive, or transferred to another colleague, prior to the departure of the project manager, as is required by the Council's Policy.
83. Clearly, the failure to take appropriate steps to retain such information or have an audit trail of communications regarding such processes, does not support accountability or provide transparency. The paucity of information held by the Council within scope of the complainant's request suggests that those involved in creating or handling the information did not process this information in accordance with the Council's Policy.
84. The Commissioner would impress upon the Council the importance of ensuring that all their staff are aware of the need to follow and adhere to the Policy in all matters of records management and retention.

*Part C of the request – pre-application notes*

85. As noted, the Council originally withheld this information under regulation 12(4)(d) (material still in the course of completion) but in subsequent submissions to the Commissioner they withdrew this exception and instead confirmed that they were withholding this information under regulations 12(5)(d)(the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law) and 12(5)(f)(the interests of the person who provided the information) instead.
86. In submissions to the Commissioner, in support of their position, the Council referenced two previous decisions whereby the Commissioner had found that pre-application planning information was exempt from disclosure under regulation 12(5)(d). The most recent of these decisions, IC-115533-Y4T6 (November 2022) concerned a request to the Council for pre-application exchanges between the Council and the prospective developers of the 55 Morning Lane (Tesco) site.
87. In the above case the Council had contended that information provided within the planning pre-application enquiry is subject to the common law

duty of confidence. In their view, the information is not otherwise accessible, 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

88. The Council advised that the developer is under no obligation to supply information contained in planning pre-application enquiries, and 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 advised that there is a clear expectation that such proceedings remain confidential and although such information 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.
89. In IC-115533-Y4T6, the Commissioner accepted that pre-application enquiries and associated advice have the necessary formality to constitute proceedings for the purposes of regulation 12(5)(d). That position is consistent with previous decision notices that the Commissioner has issued which also sought copies of information concerning pre-application enquiries.
90. Whilst the Commissioner was mindful that pre-application enquiries and the related advice may be provided within a confidential context, since the introduction of the EIR, public 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.
91. In the above case the Commissioner considered 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 requested information would have discouraged full engagement with the pre-application process, both from the developer and others, for fear of the public dissemination of such information.
92. In finding that regulation 12(5)(d) was engaged to the information in IC-115533-Y4T6, and recognising that each request needs to be considered on its own merits, the Commissioner noted that his decision that the pre-planning application information attracted regulation 12(5)(d) was in line with a number of other decision notices regarding pre-planning information.
93. In the present case the Council relied on the aforementioned reasoning which they had previously given for reliance on regulation 12(5)(d) in

the above case. Whilst the Commissioner considers that the Council could have provided more information specific reasoning for their application of the exception in the present case, he considers that the Council's previous submissions in IC-115533-Y4T6 have sufficient relevance and bearing on the pre-application notes in the present case so as to engage regulation 12(5)(d).

### **The public interest test**

94. 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.
95. As stated in the Upper Tribunal decision of *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*

96. In his complaint to the Commissioner the complainant did not specifically complain about the Council's original decision to withhold the pre-application notes under regulation 12(4)(d)(material still in the course of completion). Consequently, the complainant did not provide the Commissioner with any public interest arguments as to why the pre-application notes should be disclosed (which would also have been applicable to regulation 12(5)(d)).
97. However, the Commissioner recognises that there is always a public interest, for transparency and accountability purposes, in the disclosure of environmental information, particularly where that information relates to the development of a particular area or site which has the potential to impact the local community. The Commissioner is also mindful that regulation 12(2) of the EIR imposes a presumption in favour of disclosure when considering any of the EIR exceptions.

#### *Public interest arguments in favour of maintaining the exception*

98. In submissions to the Commissioner the Council advised 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. This ensures a cost effective and efficient planning process. If pre-application advice were to be routinely disclosed, the Council contended that developers would be 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'.*

99. The Council explained that:

*'Pre-application engagement is encouraged in the National Planning Policy Framework as having the potential to improve the efficiency and effectiveness of the planning application system for all parties. Therefore, there is a strong public interest in encouraging developers to engage in confidential, full and frank discussions. Whilst there is no legal obligation to obtain pre-planning advice and the Council cannot mandate developers to engage before submitting a planning application, the confidential nature of the service encourages take up'.*

100. The Council contended that the public interest in disclosure of pre-application advice 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 decision; 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*

101. As the Commissioner previously stated in IC-115533-Y4T6, he 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. The Commissioner 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 the pre-application material 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.

102. 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.

103. In conclusion, the Commissioner is satisfied that the public interest arguments in favour of disclosing the pre-application notes in this case, are outweighed by the public interest in maintaining the exception.
104. In light of these findings on regulation 12(5)(d), the Commissioner has not considered the Council's additional reliance on regulation 12(5)(f).

### **Procedural matters**

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105. Regulation 11(4) of the EIR requires a public authority to complete its consideration of an internal review as soon as possible and in any event within 40 working days.
106. In this case the complainant submitted his request for an internal review on 5 January 2022 but the Council did not provide the same until 22 April 2022. This represents a significant breach of regulation 11(4) of the EIR.

### **Other matters**

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107. Guidance for public authorities on good records management is provided by the section 46 Code of Practice<sup>1</sup>. The Code provides guidance to public authorities on keeping, managing and destroying records. Failure to comply with the Code is not in itself a breach of FOIA or the EIR. However, following the Code will help a public authority to comply with the legislation.
108. Part 1 of the Code sets out good records management practice for public authorities subject to FOIA and the EIR. Good records management should be seen as a benefit, not a burden. Failure to follow the Code may mean that a public authority also fails to comply with other legislation concerning the creation, management, disposal, use and re-use of records and information, for example the Public Records Act 1958.
109. The Code advises a public authority to have its records management policy endorsed at senior management level. The policy could form part of a wider information or knowledge management policy, but the essential point is that it is supported at all levels in the organisation. As the Commissioner's guidance on the Code makes clear, a public authority will only achieve good records management if its staff

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<sup>1</sup> [section-46-code-of-practice-records-management-foia-and-eir.pdf \(ico.org.uk\)](https://ico.org.uk/section-46-code-of-practice-records-management-foia-and-eir.pdf)

understand the importance of proper record keeping. A public authority should arrange training for all staff involved in the creation or management of records.

110. In light of the records management issues demonstrated in this case, the Commissioner would strongly advise the Council to ensure that all their staff are aware and appreciative of the need to follow the Code of Practice and the Council's own Records Management Policy.

## **Right of appeal**

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111. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

112. 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.

113. 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 .....**

**Gerrard Tracey  
Principal Adviser  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**