

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

Date: 12 December 2023

Public Authority: London Borough of Lambeth
Address: Lambeth Town Hall
Brixton
London
SW21 RW10

Decision (including any steps ordered)

1. The complainant has requested information generated by a pre-planning application.
2. The Commissioner's decision is that London Borough of Lambeth correctly relied on regulation 12(5)(d) (confidentiality of proceedings) to withhold the minority of the requested information.
3. However, it incorrectly relied on regulations 12(5)(d) and 12(5)(e) (confidentiality of commercial or industrial information) to withhold the majority of the requested information.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Aside from information submitted by the applicant (and any comments from the public authority thereon) in the pre-planning application, the public authority shall provide the complainant with the requested information. Namely, the background information and the policies applied to the application.
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 FOIA and may be dealt with as a contempt of court.

Background

6. Planning legislation allows local planning authorities to determine their own development proposals on land in which they have an interest. Such bodies can therefore dispose of land with the benefit of planning permission they have granted themselves.
7. The public authority made such a pre-application that is the subject matter of this notice.

Request and response

8. On 13 April 2023, the complainant wrote to London Borough of Lambeth ("the public authority") and requested information in the following terms:

"... . There is a small parcel of land by our property that appears to belong to the council. See attached highlighted in red. We have been speaking to the council about purchasing this garden since 2018, and directly with (name withheld) from the "valuations and strategic assets" team since August 2020.

I understand that the council is now applying for a planning pre-application for developing this bit of land before making it publicly available for sale. FOI: We would like to have sight of the pre-application information including drawings, since any proposal to this bit of land would affect us directly as the only property adjacent to this land is our house".

9. On 17 May 2023, the public authority refused to provide the requested information. It cited the following exceptions as its basis for doing so:
 - Regulation 12(5)(d) (confidentiality of proceedings),
 - Regulation 12(5)(e) (confidentiality of commercial or industrial information)and
 - Regulation 12(5)(f) of the EIR. (Interests of the information provider)

10. Following an internal review (after the Commissioner's intervention) the public authority wrote to the complainant on 13 September 2023. It stated that it upheld its position.

Scope of the case

11. The complainant originally contacted the Commissioner on 13 July 2023 to complain about the way his request for information had been handled.
12. The Commissioner considers he has to determine whether the public authority correctly relied on the exceptions it cited to withhold requested information from the complainant.

Reasons for decision

13. Pre-planning applications and advice are plans and activities defined under regulation 2(1)(c) of the EIR which will affect the elements of the environment outlined in regulation 2(1)(a) (the land, landscape, soil and so on), whether they proceed to full application or not. The requested information therefore falls within the definition of environmental information and the public authority was therefore correct to treat this request under the EIR.
14. The Commissioner has viewed a copy of the withheld information. Essentially it comprises of the pre-planning application, the public authority's comments thereon, background information and the policies applied to the application.

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

15. 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.
16. The engagement of the exception rests on three conditions being met.
17. Firstly, the confidentiality referred to by a public authority must specifically relate to the confidentiality of proceedings. In his guidance

'Confidentiality of proceedings'¹ (regulation 12(5)(d)), the Commissioner interprets 'proceedings' as possessing a certain level of formality. They will include but are 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.

18. The information withheld under this exception relates to a pre-planning application advice process offered by the public authority. The Commissioner has previously acknowledged in a range of decisions (e.g., FER069967692², IC-115533-Y4T64³, IC-206377-X4X4⁴) that such a process represents a 'proceeding' for the purposes of the exception.
19. The Commissioner is therefore satisfied that this condition for the applicability for regulation 12(5)(d) has been met, the information relates to the public authority's pre-application advice process.
20. Second, this confidentiality must be provided by law. The public authority has explained that it considers the information to meet the threshold for the common law of confidentiality. This is because the information is not trivial and was submitted to it voluntarily as part of the pre-application advice process.
21. Having considered the context in which the information has come to be held, the Commissioner is satisfied that the information submitted by the applicant (in the pre-planning process) is subject to the common law of confidentiality.
22. However as regards the withheld information that does not comprise information submitted by the applicant the exception is not engaged. This information is background information and the policies applied to the pre-planning application. It therefore lacks the qualities needed for confidentiality.

¹ [Regulation 12\(5\)\(d\) – confidentiality of proceedings \(Environmental Information Regulations\) | ICO](#)

² [fer0699769.pdf \(ico.org.uk\)](#)

³ [ic-115533-y4t6.pdf \(ico.org.uk\)](#)

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022697/ic-115533-y4t6.pdf>

23. Third, it must be demonstrated that disclosure would have an adverse effect on the confidentiality of the proceedings.
24. The public authority has explained that the party who submits information to it as part of the pre-application advice process will do so in the expectation that it is confidential. Publication of the information would therefore undermine this expectation.
25. On this basis, the Commissioner has decided that disclosure of the applicant submitted information would have an adverse effect on the confidentiality of proceedings by undermining that process. Regulation 12(5)(d) has therefore been found to be engaged as regards the information submitted by the applicant.
26. The Commissioner must next consider the balance of the public interest as regards the information that engages the exception. In doing so, he has taken into account the EIR's express presumption in favour of disclosure and the public interest in transparency and accountability.
27. The Commissioner recognises in this case that there is a public interest that public authorities are appropriately open and transparent about their decision-making processes. This is particularly so in respect of concerns about planning matters.
28. However, and as noted in the above cited decisions, the Commissioner also recognises that there is a strong public interest in ensuring that the public authority is able to provide a robust pre-application advice process to prospective planning applicants. The purpose of which is to improve the efficiency and effectiveness of the planning application system, and reduce wasted resources by helping to prevent planning applications being made that are unlikely to be approved. In the Commissioner's view disclosing the information that engages the exception would discourage full engagement with the pre-application process, both from this applicant and others, for fear of the public dissemination of such information.
29. The Commissioner has therefore decided that, in all the circumstances, the public interest in maintaining the application of regulation 12(5)(d) outweighs the public interest in disclosure.
30. The Commissioner next considers the status of the withheld information that could not be properly withheld by virtue of regulation 12(5)(d).
31. By way of a reminder this information comprises of information that is background information and the policies applied to the pre-application.

Regulation 12(5)(e)

32. Information can be withheld under regulation 12(5)(e) of the EIR if disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
33. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of regulation 12(5)(e) of the EIR, the authority must demonstrate that:
- the information is commercial or industrial in nature;
 - the information is subject to confidentiality provided by law;
 - the confidentiality provided is required to protect a legitimate economic interest; and
 - that the confidentiality would be adversely affected by disclosure.
34. The Commissioner is not satisfied that policies and background information applied to the planning application have the necessary qualities to engage the exemption. The policies referred to are in the public domain, so they lack the necessary quality of confidences, as does the information concerning the description of the location in question.
35. For the reasons above the Commissioner is not satisfied that the policy and background information engage the exception provided by regulation 12(5)(e).

Regulation 12(5)(f)

36. Regulation 12(5)(f) provides an exception from the duty to make information available if this would adversely affect the interests of someone who supplied the information, and that person:
- was not under, and could not be put under, any obligation to supply it;
 - supplied it expecting that it would not be disclosed to a third party;
- and
- has not agreed to the information being supplied.
37. The public authority applied this exception only to the information supplied by the applicant in the pre-planning application. The Commissioner having found that this information is not to be disclosed (by virtue of regulation 12(5)(d)) the public authority's reliance on regulation 12(5)(f) need not be determined.

Right of appeal

38. 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

39. 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.

40. 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
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Wilmslow
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SK9 5AF**