

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

Decision notice

Date: 2 August 2016

Public Authority: Hammersmith & Fulham Council
Address: Hammersmith Town Hall
King Street
Hammersmith
London
W6 9JU

Decision (including any steps ordered)

1. The complainant has requested the council to disclose the Pre-planning advice it gave to her neighbour in October 2014, any case notes that were taken by the planning officer during their visit to the property and photographs taken. The council released a redacted version of the Pre-planning advice it holds, citing regulation 12(5)(f) of the EIR for the sections it wished to withhold. It confirmed that it does not hold any case notes relating to the officer's visit but disclosed all photographs taken to the complainant.
2. The Commissioner's investigation focussed on the redacted version of the Pre-planning advice and although regulation 12(5)(f) of the EIR was applied by the council, the Commissioner considered the withheld information is third party personal data and regulation 13 of the EIR was more appropriate.
3. The Commissioner's decision is that the remaining withheld information is exempt from disclosure under regulation 13 of the EIR and therefore no further action is required in this case.
4. She has however recorded a breach of regulation 11 of the EIR, as the council failed to carry out an internal review in 40 working days.

Request and response

5. On 31 October 2015, the complainant wrote to the council and requested information in the following terms:

"I should like to see the Pre-Application advice the Local Planning Authority (LPA) offered the Owner of 39 Redan Street, W14 in October 2014; this Pre-Application advice led to Planning Application 2014/5343/FUL.

I should also like to see the Case Notes that the LPA Planning Officer who gave this Pre-Application advice made as a consequence of her visit, together with the associated photographs that were taken by the LPA on the day that the Pre-Application advice was given; I have been told by the LPA that these notes were made and that these photographs were taken."

6. The council responded on 30 November 2015 refusing to disclose the requested information citing regulation 12(5)(f) and 12(5)(e) of the EIR.
7. The complainant requested an internal review on 3 December 2015.
8. As the complainant received no response, she contacted the Commissioner on 8 February 2016 to request her assistance.
9. The Commissioner wrote to the council on 26 March 2016 to request that the internal review process is completed within 10 working days.
10. The council notified the complainant of the outcome of the internal review on 8 April 2016. In relation to the complainant's request to receive a copy of the Pre-Application advice, the council disclosed a redacted version to the complainant. For the sections of the report it had redacted, the council stated that it considered this information is exempt from disclosure under regulation 12(5)(f) of the EIR. It however wished to withdraw its previous reliance on regulation 12(5)(e) of the EIR. Regarding the complainant's request to see case notes, the council confirmed that it does not hold this information. In relation to the complainant's request to see the photographs taken, the council confirmed that it holds six and was willing to release two to the complainant. For the four that remained, the council advised that it wished to rely on regulation 13 of the EIR.

Scope of the case

11. The complainant contacted the Commissioner on 13 April 2016 to complain again about the way her request for information had been handled by the council. Specifically, she stated that she is unhappy that the council failed to respond to her request for an internal review in a timely manner and that it is still unwilling to disclose the outstanding information. The complainant believes it is in the public interest to release this information as it relates to proposals to develop a neighbouring property, which is in a conservation area. She also felt that she had good reason to believe that the proposals are not in keeping with national policies and local development plans.
12. During the Commissioner's investigation the council decided to disclose the remaining photographs to the complainant. As this information was disclosed and the complainant made no complaint about her request for case notes, the remainder of this notice will focus on the Pre-Application advice only and the council's decision to withhold this information under the EIR.
13. The Commissioner will also consider whether there has been any procedural breaches of the EIR.

Reasons for decision

14. Although the council has applied regulation 12(5)(f) of the EIR, the Commissioner considers regulation 13 to be more relevant here.
15. Regulation 13 of the EIR states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure would breach one of the data protection principles outlined in the Data Protection Act.
16. Personal data is defined as:

..."data which relate to a living individual who can be identified-

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

And includes any expression of opinion about that individual and any indication of the intentions of the data controller or any other person in respect of the individual..."

17. The Commissioner considers the first data protection principle is most relevant in this case. The first data protection principle states -

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”

18. The Commissioner must first consider whether the requested information is personal data. If she is satisfied that it is, she then needs to consider whether disclosure of this information would be unfair and unlawful. If she finds that disclosure would be unfair and unlawful the information should not be disclosed and the consideration of regulation 13 of the EIR ends here. However, if she decides that disclosure would be fair and lawful on the data subject concerned, the Commissioner then needs to go on to consider whether any of the conditions listed in schedule 2 and 3, (sensitive personal data) if appropriate, of the DPA are also met.

Is the requested information personal data?

19. The withheld information is a letter from the council to the complainant's neighbour responding to a request for Pre-planning advice. The letter is addressed to the neighbour at their home address and discusses features of their property, their proposals for redevelopment and whether, albeit informally, this would be acceptable in planning terms.
20. It is information from which the individual concerned can be identified either from their name and address or from the contents of the letter itself or from a combination of this information and other information that may otherwise be available to the public. The Commissioner is therefore satisfied that the withheld information constitutes the personal data of owner of the property.

Would disclosure be unfair?

21. The council confirmed that the individual concerned has not consented to disclosure and expects the withheld information to remain private and confidential. It explained the purpose of the Pre-planning advice service, how it is a paid service which provides those thinking of putting in a formal planning application with preliminary advice and how there is no legal requirement to make such information public.
22. As there is no statutory requirement to make such advice public the council considers those using the service hold an expectation of privacy

and confidentiality. The general public is aware that all planning applications are subject to public consultation and public scrutiny but they only expect such scrutiny at this stage and not before.

23. As the individual has not consented to disclosure, has the expectation that the information they supplied at this stage and the informal advice they received would remain private and confidential, the council decided that disclosure would be unfair.
24. The Commissioner notes that there is no statutory requirement to use the Pre-planning service or indeed to make any informal advice offered via this service public. She also acknowledges that users may not always proceed to a formal application which is subject to public consultation or may alter their proposals before doing so. The Commissioner is therefore of the opinion that users will have the expectation that any correspondence shared with the council during this pre-application process and any advice received will remain private and confidential. Users will only expect any formal application made and supporting documentation to be made publically available.
25. In this case, the council has also confirmed that the individual has specifically objected to the disclosure of this information. Although this does not automatically mean that information will not be disclosed (as a public authority must still consider whether this objection is reasonable), considered in conjunction with the individual's clear expectations of confidentiality, the Commissioner is of the view that disclosure would be unfair.
26. Disclosure under the FOIA is to the world at large not just to the applicant. The Commissioner considers disclosure of this information at the time of the request would cause distress and upset and constitute an unwarranted intrusion into the private life of the individual concerned.
27. The Commissioner accepts that there is a legitimate public interest in planning advice and ensuring that any advice offered is in accordance with local plans and statutory obligations. She also acknowledges that the complainant has specific concerns about planning in this conservation area and reasons to believe that planning has gone ahead in some cases when it is not in accordance with national and local guidelines.
28. However, the requested information here constitutes informal advice prior to the formal application stage and at a time when proposals are simply that. The proposals may or may not proceed to a formal application or may in fact change before a formal application is registered. The formal planning process provides openness and transparency, public consultation and an avenue for those objecting or

supporting a particular application to raise their views and the Commissioner considers the formal process meets any legitimate public interest in the disclosure of this information.

29. As any formal application made is subject to public scrutiny and it is this application upon which a decision to grant planning permission will be made, the Commissioner is not convinced that the disclosure of this information would be beneficial to the wider public. She is also of the view that any legitimate public interest in the requested information is outweighed by the distress and upset disclosure would cause the individual concerned and the intrusion that would have on their private life.
30. For the above reasons, the Commissioner is satisfied that disclosure would be unfair and in breach of the first data protection principle and therefore regulation 13 of the EIR applies.

Procedural breaches

31. Regulation 11 of the EIR stipulates that an internal review should be completed by the public authority within 40 working days of receipt. In this case it is noted that the complainant requested an internal review on 3 December 2016. However, this process was not completed until 8 April 2016 and required the involvement of the Commissioner. As the internal review was not completed within 40 working days, the Commissioner has found the council in breach of regulation 11 of the EIR in this case.

Right of appeal

32. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

33. 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.
34. 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

Samantha Coward
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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Wilmslow
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SK9 5AF