

**London Borough of Hammersmith & Fulham**

Information Management Team, Digital Service

Hammersmith Town Hall

King Street, London, W6 9JU

Email: [InformationManagement@lbhf.gov.uk](mailto:InformationManagement@lbhf.gov.uk)

Web: [www.lbhf.gov.uk](http://www.lbhf.gov.uk)



**Mr Owen Sheppard**  
**request-642356-2f095f45@whatdotheyknow.com**

**7 October 2020**

Dear Mr Sheppard,

**Your request for Internal Review (IR) under the Freedom of Information Act (2002) and Environmental Information Regulations 2004 (EIR) - case number 1718978**

We've investigated your IR request which H&F received on 11 May 2020 and which was passed to H&F's Information Management Team (IMT) on the same day.

H&F Intouch responded on 7 April 2020 under the Freedom of Information Act (FOIA). We have reviewed both your first request question and IR application, as such, we will also be responding under the EIR because there is a presumption in favour of disclosure under this information rights regime.

In addition, we acknowledge the fact that it has taken us over 40 working days for us to respond to your internal review and we offer our apologies for any inconvenience caused by this.

**Internal Review outcome**

Your complaint is partially upheld:

- H&F failed to respond to your request within the statutory time limit, as such in breach of section 10 (1) of the FOIA and regulation 11(4) of the EIR
- The report is still in the course of completion, and for this reason the entire information is withheld under regulation 12 (4) (d) of the EIR
- The report contains some confidential information, as such, we will continue to withhold relevant parts of the report under section 41 FOIA and its equivalent, regulation 12(5)(d) of the EIR
- Some of the information in the report is commercially sensitive and exempt under section 43 of the FOIA
- We will also withhold parts of the report with individuals' personal data under section 40 of the FOIA and regulation 13 of the EIR

On the following pages we have set out:

- details of your IR request
- the actions we took to investigate this matter

Veronica Barella  
H&F Chief Digital Officer

- who you should contact if you are unhappy with our internal review response

Yours sincerely,

*Busola Awani*

Busola Awani  
Senior Information Management Officer

**NOTE: Please contact [H&FInTouch@lbhf.gov.uk](mailto:H&FInTouch@lbhf.gov.uk) with all new requests for information, including personal information, or data protection complaints.**

Veronica Barella  
H&F Chief Digital Officer

## Background to your IR request

- You sent a request for information (RFI) to H&F on 4 February 2020. The RFI requested:

*I have been told that in 2019 the council hired a company called Kroll Inc to investigate the council's sale of land that was included in the so-called Earl's Court West Kensington Opportunity Area.*

*I would like to receive copies of any documents the council possesses which hold information about the findings of Kroll Inc's investigation.*

*In addition, can you please tell me how much money the council paid to Kroll to undertake this investigation. And can you tell me when this investigation was commissioned, and when it was completed.*

- We responded on 7 April 2020 under FOIA:

*The cost for undertaken the investigation was not released into the public domain because we are yet to complete the investigation*

*The investigation was commissioned on 5th of March 2019 when the authorising decision became effective*

*The report was withheld under section 41 of the FOIA because the information contained in the report was given in confidence by other individuals*

- You submitted an IR request on 11 May 2020:

*You asked, 'the council to provide copies of the requested documents, simply by redacting any specific lines of text that could be used by a third party to identify those people who provided information in confidence.'*

## Our investigation

We contacted the Regeneration and Development team for their help in investigating your IR request, as they are responsible for the information in the borough and they would know where the requested information is held by the council.

We've set out extracts of the points you raised in your IR request in bold italics below, together with our response:

***(summary) You suggested to us to redact specific lines that could identify the individuals that provided the information before releasing the information.***

Veronica Barella  
H&F Chief Digital Officer

## H&F's IR response:

- **The report is in course of completion**

EIR - regulation 12 (4) (d)

Regulation 12(4)(d) provides an exception to the duty to make environmental information available when the request relates to material which is still in the course of completion, unfinished documents or incomplete data. We have engaged this exception because the report is still in the course of completion, and the need for public authorities to have a "thinking space" was recognised in the original proposal for the Directive on public access to environmental information, which the EIR implement.

The proposal explained the rationale for both this exception and the exception for internal communications:

*"It should also be acknowledged that public authorities should have the necessary space to think in private. To this end, public authorities will be entitled to refuse access if the request concerns material in the course of completion or internal communications. In each such case, the public interest served by the disclosure of such information should be taken into account."*  
( Access hyperlink - [Proposal for a Directive of the European Parliament and of the Council on public access to environmental information](#) ).

Additionally, there is an EIR decision notice **FER0322910** (Queen's College), the withheld information included a draft agreement to the sale of land for residential development. The contents of the agreement were still subject to negotiation and had not been finalised. The decision notice says at paragraph 52 that *"the Commissioner places great importance on public authorities being afforded safe space (thinking space) and drafting space when considering whether, and on what terms, a venture should be entered into"*. In this case the fact that the agreement had not been finalised added considerable weight to the argument that disclosure would prejudice this safe space.

This is a qualified exception under the EIR which means that consideration must also be given to whether in all the circumstances of the case the public interest favouring disclosure is greater than the public interest in maintaining the exception. The public interest means what is in the best interests of the public, not what is of interest to the public.

### **Factors in favour of disclosure:**

- Environmental information has a presumption in favour of disclosure
- Disclosure of information would help to ensure transparency and visibility of public bodies
- There is a general public interest in the outcome of the investigation

Veronica Barella  
H&F Chief Digital Officer

**Factors in favour of withholding:**

- The information requested is for an unfinished investigation, disclosing information would prejudice or undermine any decision to be made by the Investigation Outcome Panel (comprised of the Chief Executive and heads of legal and audit)
- Withholding the information provides some protection from having to spend time and resources explaining or justifying ideas that are not or may never be finalised

The issues of transparency and awareness are noted. However, on balance it is considered that the public interest in providing the information is outweighed by the potential impact release would have on the decision-making processes.

There is strong public interest in ensuring that public authorities are given space to make informed decisions, without concern that the public debate could be impacted by releasing aspects of the information or everything. Therefore, our arguments against disclosure outweigh the public interest in releasing the information.

- **Information provided in confidence**

- FOIA (section 41)

It is right to withhold some of the information under section 41 of the FOIA because this exemption applies if the information was obtained by the public authority from any other person (or company, local authority or any other legal entity); and, disclosure of the information to the public by the public authority holding it would constitute a breach of confidence actionable by that or any other person. The information was provided in confidence for internal use and disclosure of the information to the public by the public authority holding it, would constitute a breach of confidence.

This is an absolute exemption and is not subject to the public interest test.

- EIR (regulation 12(5)(d))

Some of the information in the report is exempt under regulation 12(5)(d), as this exception from disclosure applies if disclosing it would adversely affect the confidentiality of a public authority's proceedings where the confidentiality arises from statute or common law.

In assessing whether information can be withheld with reference to this exception, H&F is careful to consider several factors, as well as, carry out the public interest test.

- **What are the proceedings in question?**

The word 'proceedings' is not defined in EIR; however, it covers a range of activities and will rely on the explanation proffered by the Information Commissioner's guidance in engaging the provisions of this particular regulation.

Veronica Barella  
H&F Chief Digital Officer

The Commissioner considers that the word implies some formality, and H&F is mindful of the fact that it does not cover every action taken, decision or meeting.

The sale of land is statutory, and the internal deliberations includes correspondence with legal officers. This information is therefore highly sensitive. This approach is in line with the Information Tribunal's comments in the case of Benjamin Archer v the Information Commissioner and Salisbury District Council (EA/2006/0037, 9 May 2007), the Information Tribunal said at paragraph 68:

"The EIR contains no definition of "proceedings". We consider that "proceedings" would include legal proceedings. It would also include a formal meeting of the Council at which deliberations take place on matters within the Council's jurisdiction."

- **Disclosing the information would adversely affect that confidentiality?**

Releasing this information will affect the council's ability to defend their position in any potential legal proceedings and goes against the principle of the Council legal team being able to provide legal advice to clients which is privileged.

This is also a qualified exception under the EIR which means that consideration must also be given to whether in all the circumstances of the case the public interest favouring disclosure is greater than the public interest in maintaining the exception. The public interest means what is in the best interests of the public, not what is of interest to the public.

**Factors in favour of disclosure:**

- Environmental information has a presumption in favour of disclosure
- The public have a right to see that official investigations are conducted fairly and transparently

**Factors in favour of withholding:**

- Legal advice is some of the most sensitive information held by the Local Authority
- Legal advice is never obtained with the expectation that it will be disclosed to third parties
- Disclosure of legal advice may negatively impact the Local Authority's ability to defend their position in legal proceedings

Having considered the factors for and against disclosure as required by the regulations and based on the above, we are withholding the information requested. Disclosure of this information will risk the integrity of the decision-making process

- **Commercially sensitive information**

FOIA - section 43 (2)

Section 43 of the FOIA provides that information is exempt information if, its disclosure under the Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). If H&F were to release some of this information, it could put them at an unfair advantage during any future similar procurement of services.

Veronica Barella  
H&F Chief Digital Officer

This is a qualified exception under the FOIA which means that consideration must also be given to whether in all the circumstances of the case the public interest favouring disclosure is greater than the public interest in maintaining the exception. The public interest means what is in the best interests of the public, not what is of interest to the public.

**Factors in favour of disclosure:**

- There is a clear public interest in making appropriate information available to the public
- The release of such information promotes transparency and provides reassurance to the public as on public spend and this in turn, serves to support and maintain public finance confidence

**Factors in favour of withholding:**

- Release of this information could potentially impact on Capco commercially and financially should the information be utilised by a competitor.
- Disclosing the information will prejudice the position of Capco in the market due to the increase competition and competitive processes that are undertaken by different contracting public authorities

Having considered the factors for and against disclosure as required by FOIA and based on the above, we are withholding the information requested, to do otherwise means that individuals would be placed in a disadvantaged in the competitive market.

- **Personal data**

FOIA – section 40 (2)

A small quantity of the information is potentially exempt from disclosure under section 40 FOIA (personal information), where to release it would contravene the requirements of data protection laws i.e. Data Protection Act 2018 (DPA) and EU General Data Protection Regulation (GDPR). The disclosure of personal data under the FOIA must be fair and lawful under the GDPR to meet one of the conditions in Article 6 of the GDPR and the reasonable expectations of the individuals identified.

This is an absolute exemption and is not subject to the public interest test.

EIR – regulation 13

The GDPR provisions for withholding individuals' personal data under the EIR is the same as the above argument for FOIA section 40(2).

**Why did H&F's Information Management Team investigate your internal review request?**

Veronica Barella  
H&F Chief Digital Officer

H&F's Information Management Team (IMT) investigate complaints that are made to the council about how the council processes requests for information and complies with the Freedom of Information Act 2000 (FOIA) and Environmental Information Regulations 2004 (EIR).

This includes investigating complaints about:

- whether H&F holds the requested information
- whether H&F was correct to withhold the requested information

### **What can you do if you aren't happy with the council's response?**

You can appeal to the Information Commissioner if you aren't happy with how H&F has handled your internal review request. There is no charge for making an appeal.

You can do this by:

Writing to the Information Commissioner's Office (ICO), Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF

Emailing [casework@ico.org.uk](mailto:casework@ico.org.uk)

Visiting the ICO's website [www.ico.org.uk/concerns/](http://www.ico.org.uk/concerns/)

The ICO are the UK's independent authority set up to uphold information rights in the public interest.

More information about the ICO is available on their website or by calling their helpline: 0303 123 1113.

Veronica Barella  
H&F Chief Digital Officer