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6 November 2018

INTERNAL REVIEW – REFERENCE 18-049

Dear Sirs.

We refer to your email of 11 September 2018 where you requested an appeal under the Environmental Information Regulations 2004 (EIR) with regard to the response you received from the London Legacy Development Corporation (Legacy Corporation) in relation to your information request referenced as above.

The internal review has been completed and the findings and recommendations of the internal review are as follows:

1. Background

The Request was received on 8 August 2018 and sought: "*a copy of any record or notes of:*

1. *pre-application discussions or correspondence between any MSG [Madison Square Garden] group company (or its agents) and LLDC in relation to the development of the Site [the land north west of Angel Lane]; and*
2. *discussions about the need for, content or scope of the environmental statement which will accompany the planning application".*

The response was sent on 5 September 2018. The response included copies of all the pre-application meeting notes, with information withheld under the following EIR regulations:

- Reg. 12(5)(a) – adversely affect international relations, defence, national security or public safety
- Reg. 12(5)(e) – adversely affect commercial confidentiality
- Reg. 13 – personal data

The appeal (Appeal Letter) was received on 11 September 2018, and sited that there had been a failure to provide copies of all records relating to the requested information and a failure to explain the application of the exemption in Regulation 12(5)(e).

The application of regulations 12(5)(a) – adversely affect international relations, defence, national security or public safety and 13 – personal data were not challenged and have not been reviewed by the Panel.

A copy of the original request is attached in **Annex A**, the response is attached in **Annex B** and a copy of the Appeal Letter is attached in **Annex C**.

On 13 September 2018, a new information request was received from the requestor. This requested additional information, in much greater detail, relating to the same topic. This request, reference 18-061, has been responded to and the request and response are attached in **Annex D** and **Annex E** for reference.

2. Review findings:

Request scope

The Legacy Corporation considered the information requested to be the formal record of the meetings that had taken place in relation to the pre-application discussions with MSG or its agents.

The Panel have reviewed this and consider that, in retrospect, the Legacy Corporation interpretation of the request could have been broader, however, the Panel believe it is unlikely that a broader interpretation of the original request would have identified all of the information identified in the Appeal Letter, as this information was identified using the information provided in the 18-049 response, however, if the scope had considered to be broader then the Legacy Corporation would have needed to consider the impact on resources that would be required to provide this amount of information. There would also be considerations in relation to confidentiality.

The Appeal Letter references the sentence in the response letter that stated that “*email correspondence has not identified in relation to this request at this as the official record in relation to your request have been provided.*” The Panel agree that this sentence does not make sense and understand that this sentence was a typographic error. As stated above, the Legacy Corporation understood the request to be for the formal records and as such did not undertake a search of all email correspondence. The Panel understand that this sentence should have read that “*email correspondence has not been identified in relation to this request as the official record in relation to your request has been provided.*”

Regulation 12(5)(e)

*12(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—
(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;*

The original response withheld the information as detailed below:

“Under regulation 12(5)(e) a public authority may refuse to provide information in response to a request where the disclosure of the information would adversely affect the commercial interests of the third party that provided the information.

To maintain this exception, the public authority needs to consider the commercial nature of the information and if there is an obligation of confidentiality in relation to the information provided in addition to the consideration of the public interest and the balance weighed in favour of release.

The information withheld under this exception was provided during the pre-application discussions which comes with an expectation of confidentiality for information provided that could harm the 3^d party if released. If all information received during the pre-app process was considered public, this would harm the effectiveness of these discussions as it would place restrictions on the information exchange and reduce their usefulness. However, this is always balanced by an understanding that the public authority has EIR obligations where the emphasis is on release. It is therefore important for both the pre-app process and EIR that consideration is given to releasing as much as possible but balanced against protecting the commercial interests of the applicant which would be harmed if certain confidential information was released.

The information withheld under this exception, if released, would harm the commercial interests of the 3^d party that provided the information. It is the consideration of the Legacy Corporation that the public interest in maintaining the exception outweighs the public interest in disclosing the information”

The Appeal Letter stated that the Legacy Corporation had failed to explain:

- how the withheld information is commercial or industrial in nature;
- how the confidentiality is protecting a legitimate economic interest; or
- how the disclosure would cause harm.

The Panel have reviewed the original response. Upon consideration of the information provided by the third party and withheld under this exception, the Panel believes that this exception was applied incorrectly. The Panel thinks that it would have been more appropriate to withhold the information under EIR regulation 12(5)(f) – adversely affect interests of provider.

The below should be applied to the information previously withheld under regulation 12(5)(e). A revised schedule of redactions is attached in **Annex F**.

EIR regulation 12(5)(f) – adversely affect interests of provider.

For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(f) the interests of the person who provided the information where that person—

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure;

Please note: the word ‘person’ in the regulation is not restricted to an individual and also includes legal persons such as companies.

Under EIR, Regulation 12(5)(f) is a qualified exception and requires the Legacy Corporation to conduct a test of public interest in terms of disclosure as set out in Regulation 12(1)(b).

There is, of course, the Legacy Corporation's commitment to openness and transparency, as well as the inherent presumption in favour of disclosure of information requested under the EIR, however, the following factors have been considered in favour of maintaining the exception:

The Legacy Corporation have a duty of confidence in relation to information provided to them during the pre-application process. There is not a legal requirement to provide information to the Legacy Corporation and the decision of the third party to provide information is entirely voluntary. The quality of any information provided benefits the pre-application process, however, it is provided with the understanding that it will be treated in confidence.

The information currently withheld was provided as part the pre-application process and, while it was included in the records of the pre-app process, the Legacy Corporation can confirm that this information was provided voluntarily, with the expectation that it would be treated in confidence and with no expectation of disclosure. In addition, MSG or its agents have not given consent for its disclosure.

Making volunteered information available to the public could inhibit open and constructive discussions between the Legacy Corporation and third parties and adversely affect this pre-application process, and any future pre-application processes, where the provision of information by the third party is restricted as commercially sensitive and confidential information could not be guaranteed to be held in confidence by the Legacy Corporation.

The Legacy Corporation can confirm that they have been advised that releasing the information at this time will adversely affect the interests of the third party who provided the information. In addition, due to the concern in relation to the adverse impact of the possible release of the information requested under the EIR, the third party now strictly controls how the Legacy Corporation can access the information relevant to the pre-application process, which in turn is adversely affecting the quality of the service.

The public interest in releasing this information at this time is small, especially with consideration that once the pre-application process has concluded and a planning application has been submitted, the details of the planning application and supporting documents will be made available on our planning database website.

The Legacy Corporation can confirm that, in this instance, it believes that the factors in favour of withholding the information requested outweigh those in favour of disclosure.

3. Panel Recommendations:

The 18-049 schedule of redactions should be revised to demonstrate the amended exception.

A lessons learned review will be undertaken and processes will be updated.

4. Annexes:

- Annex A: 18-049 request letter dated 7 August 2018
- Annex B: 18-049 LLDC response dated 5 September 2018
- Annex C: 18-049 appeal request dated 11 September 2018
- Annex D: 18-061 request letter dated 13 September 2018
- Annex E: 18-061 LLDC response dated 11 October 2018
- Annex F: Revised 18-049 Schedule of redactions

If you are not content with the outcome of the internal review, you may appeal directly to the Information Commissioner at the address given below. You should do this within two months of our final decision. There is no charge for making an appeal.

Further information on the Freedom of Information Act 2000 is available from the Information Commissioner's Office:

Wycliffe House
Water Lane
Wilmslow
SK9 5AF

Telephone 08456 30 60 60 or 01625 54 57 45

Website www.ico.gov.uk

Yours sincerely

Deputy Chief Executive
London Legacy Development Corporation