

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 15 July 2013

Public Authority: Department for Communities and Local Government

Address: Eland House
Bressenden Place
London
SW1E 5DU

Decision (including any steps ordered)

1. The complainant requested information generated by the Secretary of State's consideration of a planning appeal.
2. The Commissioner's decision is that Department for Communities and Local Government correctly relied on regulation 12(4)(e) to withhold requested information from the complainant.

Request and response

3. The complainant states as follows –
 - That he sought planning permission to develop land from Brentwood Borough Council who refused the said permission. The complainant's appeal against the decision was subsequently considered by the Secretary of State who, on or about 3 October 2011, dismissed the said appeal in its entirety.
4. On 4 November 2011, the complainant requested the following information from the DCLG:

"All information, including all correspondences, notes, memoranda and documents that touch or concern the decision making process, and the decision itself, made by or passing between the Secretary of State and any Minister or civil servant, or any employee of the Planning

Inspectorate (to include any Inspector), produced on or after 5 May 2011, whether they exist in hard copy, manuscript, email or electronic/digital format.”

5. In a letter dated 16 November 2011 the complainant informed the DCLG that the relevant date was not “5 May 2011” but “6 May 2010”.
6. On 6 February 2012 the DCLG provided its substantive response. It provided some information within the scope of the request but refused to provide the remainder. It cited the following exceptions, in the Environmental Information Regulations 2004 (EIR), as its basis for doing so: regulations 12(4)(e) (internal communications), 12(5)(b) (legal professional privilege) and 13 (third party personal data).
7. The complainant requested an internal review on 10 February 2012. The DCLG sent him the outcome of its internal review on 12 March 2012. It upheld its original position.

Scope of the case

8. The complainant subsequently complained to the Commissioner (on 14 August 2012) that the DCLG has not dealt with his request for information in accordance with the EIR.
9. As part of his investigation the Commissioner wrote to the DCLG on 2 October 2012. The Commissioner sought a copy of the withheld information and invited the DCLG, if it so wished, to provide him with any submissions in support of its position. The withheld information was not supplied in response to the letter of 2 October 2012 and the Commissioner made a number of further attempts to obtain it. Ultimately, after the serving of an information notice¹ on 23 April 2013, the DCLG supplied the Commissioner with a copy of the withheld information on 21 May 2013.
10. The Commissioner has therefore been provided with, and viewed, a copy of the withheld information.

¹ <http://www.legislation.gov.uk/ukpga/2000/36/section/51>

Reasons for decision

11. Environmental Information Regulation 2(1) states:

“Environmental information” is any information in written, visual, aural, electronic or any other material form on –

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

12. The Commissioner has viewed the withheld information. It is information generated by the complainant’s application to change the use of land and the determination of that application. As such it concerns a measure (i.e. a planning application) affecting or likely to affect the elements and factors referred to in (a). It is therefore environmental information for the purposes of the regulations.

13. Regulation 5(1) of the EIR provides that “a public authority that holds environmental information shall make it available on request”. A public authority may only refuse to disclose information where an exception applies.

14. If an exception applies, the information is still to be disclosed unless “in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information” (regulation 12(2)). This is assessed by having regard to the overriding presumption in favour of disclosure. The result is that the threshold to justify non-disclosure is a high one.

15. The DCLG primarily relied on regulation 12(4)(e) to withhold requested information but for some of it, it additionally relied on regulations 12(5)(b) and 13.

Regulation 12(4)(e)

16. Regulation 12(4)(e) of the EIR states –

“For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that...

(e) the request involves the disclosure of internal communications.”

17. Regulation 12(4)(e) is a class based exception so it is not necessary to demonstrate prejudice or harm to any particular interest in order for its engagement.

18. The DCLG stated to the Commissioner that the information consists of communications within central government which will be “internal communications” for the purposes of regulation 12(4)(e), as defined by regulation 12(8) which has the effect of limiting the scope to within or between government departments. As compliance with the request would have involved the disclosure of these “internal communications” the exception at 12(4)(e) is engaged.

19. As stated above the Commissioner has viewed the withheld information and it is as described by the DCLG. That is, it is communications between individuals within the DCLG and therefore they are clearly internal communications for the purposes of regulation 12(4)(e).

20. As referred to earlier, regulation 12(4)(e) is subject to the public interest test.

Public interest arguments in favour of maintaining the exception

21. DCLG explained that the background matter was one of many planning cases which come to Ministers each year. The Secretary of State issued 64 decisions in 2011-12. This particular case was complex and required officials to consider and advise, and Ministers to reach a view, on a number of separate issues. Amongst other things, those issues (the DCLG explained) included: the general need for and provision of gypsy pitches in Brentwood; the particular needs of the site occupants for a pitch; the health and education needs of the site occupants; whether there was anywhere else suitable for the site occupants to move to if planning permission was refused; the scheme's impacts including its impact on the Green Belt and its impact on the character and appearance of the area.

22. DCLG further explained that officials and Ministers had to be able to consider the evidence and Ministers had to be able to consider officials' advice on each of these issues and form a view on each. The Commissioner and Tribunal have both recognised in case law decisions

that officials and Ministers must be afforded an appropriate degree of safe thinking space in which to do that. The judgement to be made by Ministers in this case was finely balanced, with difficult and sensitive choices having to be made on each issue.

23. DCLG acknowledged that, whilst of all these considerations are relevant to, and support the public interest served by protecting such thinking space, the timing of a request for information, and any response, may have a significant bearing on whether disclosure of information requested would or would not appropriately remove a previously necessary degree of private space.
24. The Commissioner appreciates that the background matter of the planning dispute is complex and involved a deep consideration of counter-veiling issues both at a local and national level. Such considerations generated a high degree of written discussion and thought within the public authority. These discussions, if they are to remain frank and open, benefit from them occurring in the belief that they might not soon be publically disseminated. The Commissioner believes that a fear of too soon a dissemination would likely inhibit people being frank with their views and considerations.
25. The Commissioner also notes that the request for information was made approximately four weeks after the Secretary of State's decision and whilst there were on-going legal proceedings. This is evidence that, to a large degree, matters were still "on-going" and certainly could not be described as finished.

Public interest arguments in favour of disclosing the information

26. The public interest arguments in favour of maintaining an exemption must relate specifically to that exemption, but this is not necessarily the case when considering the arguments in favour of disclosure. The Information Tribunal (Christopher Martin Hogan and Oxford City Council v Information Commissioner EA/2005/0026 and 0030 paragraph 60)² saying-

"While the public interest considerations against disclosure are narrowly conceived, the public interest considerations in favour of disclosure are

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(http://foiwiki.com/foiwiki/info_tribunal/DBFiles/Decision/i42/MrCMHoganandOxfordCityCouncilvInfoComm17Oct06.pdf)

broad-ranging and operate at different levels of abstraction from the subject matter of the exemption.”

27. There is a general public interest in promoting transparency, accountability, public understanding and involvement in the democratic process. EIR is a means of helping to meet that public interest, so it must always be given some weight in the public interest test.
28. Whilst openness and transparency will always be strong factors that favour the release of information the Commissioner notes that these have to some degree already be met by DCLG. This is because the Secretary of State's detailed decision letter and inspector's report were already publicly available at the time of the complainant's request for information.

Balance of the public interest

29. On balance, the Commissioner finds that the public interest factors favour the maintenance of the exception rather than the public dissemination of the withheld information. The more relevant factors are the nearness of the information request post the Secretary of State's decision, the need to avoid the fettering of the decision making process by fear of premature disclosure, the then public availability of his decision letter and the planning inspector's report, and the on-going legal challenges to the Secretary of State's decision.
30. Having found that regulation 12(4)(e) was correctly relied upon by the DCLG the Commissioner did not consider its alternative reliance on regulation 12(5)(b) or 13.

Right of appeal

31. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

32. 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.
33. 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

Alexander Ganotis
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