

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 12 January 2015

Public Authority: Department for Communities and Local Government

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested information in relation to the Secretary of State's decision not to call in a planning application. The Department for Communities and Local Government (the DCLG) provided some of the information, redacted some information under regulation 13(3) of the EIR as personal data and refused the remaining under regulation 12(4)(e) of the EIR – internal communications.
2. The complainant disputed the DCLG's application of regulation 12(4)(e) of the EIR. That being advice provided to the Secretary of State.
3. The Commissioner's decision is that the DCLG has correctly withheld the information it has under regulation 12(4)(e) of the EIR.
4. The Commissioner does not require the DCLG to take any steps.

Request and response

5. On 6 July 2014, the complainant wrote to the DCLG and requested information in the following terms:

"Copies of the representations to the Secretary of State from the following members of parliament: Anne Milton MP, Mark Field MP, John Redwood MP, Steven Hammond MP, Keith Taylor MEP and Sir Paul Beresford regarding the Secretary of State's decision on the above application. Also, I request a copy of the un-redacted pages of the submission as supplied to Richard Buxton

Environmental & Public Law who was acting on your behalf on the 28 March 2013."

6. The DCLG responded on the 5 August 2014. It advised that the information requested was environmental information and so is responding under the EIR.
7. It confirmed that it holds the information requested and is able to provide some of it. The DCLG also advised that it is refusing the remaining information.
8. The DCLG provided copies of the letters sent from various members of parliament to the Secretary of State, redacting the details of the members of public under regulation 12(3) of the EIR as defined by regulation 13(1) and (2)(a) of the EIR as it considered this information to be third party personal data.
9. With regards to the submission document, the DCLG stated that this is a communication between officials and ministers in the DCLG and is being refused under regulation 12(4)(e) of the EIR – internal communications. In considering the public interest test, the DCLG found that it could not release the advice ministers received, but found that it was in the public interest to provide the factual information that was used to give the advice and so provided this part to the complainant.
10. The complainant requested an internal review on the 18 August 2014 as she considered the information withheld under regulation 12(4)(e) of the EIR should be provided.
11. The DCLG provided its internal review response on the 12 September 2014 and upheld its decision to withhold the information it has under regulation 12(4)(e) of the EIR.

Scope of the case

12. The complainant contacted the Commissioner on 23 September 2014 to complain about the way her request for information had been handled.
13. During the Commissioner's initial investigations, the complainant informed the Commissioner that the information that she is interested in obtaining from the DCLG is an un-redacted copy of the letter dated July 2012, addressed to the PS/ Secretary of State.
14. The Commissioner considers the scope of the case is to determine whether the DCLG is able to rely on 12(4)(e) of the EIR to redact the letter of 2 July 2012 addressed to the PS/ Secretary of State.

Background

15. In making a decision on this case, the Commissioner considers it relevant to highlight the background to this case, which has been explained to him by the DCLG.
16. A planning application was made to Mole Valley District Council (the council) on 29 October 2011 to use Cherkley Court and its existing associated outbuildings as a hotel comprising of guest accommodations, health spa and cookery school with provision of additional floor space to accommodate further guest rooms, an underground plant and leisure uses. Also a provision of an 18 hole golf course, practice facilities, club house and maintenance area.
17. The DCLG states that the council was minded to approve the application, however the site was located within the Green Belt and so referred to the Secretary of State via the National Planning Casework Unit (NPCU) on 11 May 2012 under The Town and Country Planning (Consultation) (England) Direction 2009.
18. The Secretary of State then had 21 days to consider whether to call-in the application for his own determination. However further time was required to decide whether to call in the application and so issued an Article 25 Direction, which was issued on 31 May 2012, preventing the council from determining the application without special authorisation.
19. The DCLG has told the Commissioner that this was a finely balanced case but it was concluded, on balance, not to call-in the application and the Secretary of State's decision on this was issued on the 18 July 2012. So the application went back to the local planning authority to decide the application which was subsequently granted by the council in September 2012.
20. The development was opposed by a local group and was successful in quashing the decision by way of a judicial review in August 2013. This was then appealed by the council and developers at the Court of Appeal and in June 2014 it set aside the High Court order squashing planning permission. The group opposed to the application were refused permission to appeal the Court of Appeal's ruling to the Supreme Court and work resumed on the development.
21. The DCLG has advised the Commissioner that the group applied to the High Court for a renewal of permission to apply for a judicial review on the council's decision to approve the Landscape and Ecology Management Plan on 14 March 2013, which was refused by The High Court.

22. The Commissioner has also been made aware by the complainant, that on the 27 November 2014, the Supreme Court refused permission for the group to appeal an order made by the Court of Appeal on the 7 May 2014. The court order was that permission to appeal be refused.

Reasons for decision

Regulation 12(4)(e) of the EIR

23. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.
24. The Commissioner has published guidance on regulation 12(4)(e)¹ which includes a description of the types of information that may be classified as 'internal communications'.
25. The Commissioner sees that the first factor that must be considered is whether the information in question can reasonably be described as a 'communication'. In his guidance, the Commissioner acknowledges that the concept of a 'communication' is broad and will encompass any information someone intends to communicate to others, or places on file so that others may read it.
26. The Commissioner is satisfied in this case that the withheld information is a 'communication' for the purposes of the regulation. The Commissioner must now consider whether the withheld information would fall into the category of 'internal' communications.
27. The EIR does not give a definition of what is meant by 'internal' and so, in absence of one, a judgement must be made by considering the relationship between the sender and the recipient, the circumstances of the particular case and the nature of the information in question. Usually though, and internal communication is one that stays within a public authority.

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_internal_communications.ashx

28. The Commissioner is satisfied that the communication is internal as it was sent from an official in the NPCU, which is part of DCLG, to the Secretary of State and copied only to officials in the department and the DCLG has confirmed this information is not in the public domain.
29. On this basis the Commissioner is satisfied that the withheld information constitutes an internal communication and the exception at 12(4)(e) is engaged.

The Public Interest Test

30. Although regulation 12(4)(e) has been found to be engaged in this case, the exception is subject to the public interest test as required by regulation 12(1) of the EIR.
31. The public interest test is to determine whether in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
32. What the Commissioner must take into account, when carrying out the public interest test, is a presumption towards disclosure of the information as required by regulation 12(2) of the EIR.

Public interest in favour of disclosure

33. The DCLG in its submissions to the Commissioner also noted the presumption in favour of disclosure at regulation 12(2) of the EIR, it also referred the Commissioner to its internal review that it carried out for this case which outlined its considerations in favour of disclosure.
34. The DCLG in its internal review acknowledged that disclosure of the information helps to promote transparency and accountability of the government and which, in turn, increases the public's trust and confidence in good governance.
35. The DCLG also recognises that, in considering the request, there is a strong argument that the planning decision and the process leading to that decision should be as open and transparent as possible.
36. The council has also stated that it accepts that once a decision has been taken, the need for such safe space may diminish and this more likely to be the case once the planning application process has been concluded.
37. The Commissioner is also of the opinion that safe space and chilling effect arguments do not automatically carry much weight in principle. The weight has to be considered on the specific circumstances of the individual case, including the timing of the request, whether the issue is

still live at the time of the request, and the content and sensitivity of the information in question.

38. The complainant has provided the Commissioner with a copy of the Supreme Court Order dated 27 November 2014 which she states concludes the judicial review litigation. She considers that as it has now concluded, the matter of this case is no longer live and therefore the withheld information can no longer be considered sensitive or withheld as private thinking space.
39. With this, the Commissioner can only consider the DCLG's reasons for applying the exception at the time the request was made. So he would not be able to consider the fact that the Supreme Court has issued its decision regarding the judicial review litigation in his determinations because the Supreme Court's decision came 4 months after the request was made.
40. The Commissioner acknowledges that there is an argument that the process leading to the planning decision should be as open and transparent as possible. If all parties are fully informed of the issues and the final decision is taken openly, and fully explained, the reasons for the decision will be known and fully understood by the public.
41. The Commissioner also sees that the better informed the public are then the more inclined, or better able they may be to actively participate in the decision.

Public interest in maintaining the exception

42. The public interest considerations with regulation 12(4)(e) mainly relate to the protection of thinking space and the ability to have full and frank discussions without fear that the information will be disclosed.
43. Although the Secretary of State made his decision not to call in the planning application, the DCLG's arguments focus on the fact that the matter is still live and on-going as it has been and was, at the time of the request, subject to appeal.
44. In the DCLG's internal review, it stated that it has considered the arguments that planning decision's and the process leading to those decisions should as open and transparent as possible. With this in mind, it has provided the complainant with the factual detail of the evidence that was presented to the Secretary of State.
45. The Commissioner considers that this goes some way to informing the public on how decisions are being made.

46. The council has also considered that, as it is the Secretary of State that is accountable rather than officials, it is vital that there is an appropriate degree of safe space around advice provided by officials which informs the Secretary of State's considerations and decisions.
47. The Commissioner is of the opinion that although the advice the Secretary of State receives could influence his decision, it is ultimately his decision and so the greater weight is on disclosure of his decision rather than advice he has received in making that decision.
48. The Commissioner notes that the requested information does not directly relate to the issue of whether the development should be built or not.
49. The Secretary of State's decision relates to whether the planning application should be 'called in' and decided at central government level. The ultimate decision of the Secretary of State was that the planning application decision should be decided at local level. In effect it was a decision that there was no requirement for the department to become involved in local matters. This is in line with the government's localism policies, and to an extent, may strengthen the ability of the local community to be more involved in the decision process.
50. The Commissioner has to take into consideration that an appeal was actively being pursued at the time of the request, and disclosure of the information could reduce the DCLG's thinking space and the ability to have full and frank discussions without fear that the information will be disclosed. This could detrimentally affect the decision making process in the future and/ or potentially lead to less full and frank advice being provided in the future.
51. There are avenues of appeal for those opposed to planning decisions made, which have been taken in this case, and this adds weight to maintaining the exception for the withheld information as the appeal process is a legitimate route for disputing decisions made.
52. In consideration of this and the specific circumstances of the case, the Commissioner considers that there is sufficient weight in the argument of safe space and that there is still a credible argument to the chilling affect to find that the public interest in maintaining the exception outweighs that for disclosure.
53. Therefore the Commissioner's decision is that the DCLG was correct to withhold the advice that was given to the Secretary of State in the July 2012 letter.

Right of appeal

54. 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

55. 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.
56. 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

Andrew White
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