

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 3 June 2015

Public Authority: Dartford Borough Council
Address: Civic Centre
Home Gardens
Dartford
Kent
DA1 1DR

Decision (including any steps ordered)

1. The complainant has requested a copy of a draft planning recommendation report and emails relating to a specified planning application from Dartford Borough Council (the council). The council initially refused the request under section 36 of the FOIA. However, following the Commissioner's intervention it then considered the request under the EIR and determined that the information was excepted from disclosure under regulations 12(4)(d) and 12(4)(e) as it was unfinished material and consisted of internal communications.
2. The Commissioner's decision is that the council has correctly withheld the requested information. He does not require the council to take any steps.

Request and response

3. On 19 December 2014, the complainant wrote to the council and requested information in the following terms:

"On the 20th of October 2014 my company received a letter with regard to planning application DA/14/00489/FUL, which we act as agents for. It stated that the recommendation was for approval of permission for a temporary period. The next day the recommendation was altered. We would request a copy of the report that recommended approval. Furthermore, I would like to receive copies of all

correspondence relating to this application from or to the following officers:

- Alec Lauder
- Tania Smith
- Robin Bennett"

4. The council responded on 20 January 2015. It stated that section 36(2)(b)(i) of the FOIA may apply as it was the qualified person's reasonable opinion that disclosure would or would be likely to inhibit the free and frank provision of advice. It advised that it therefore needed additional time to consider the public interest test. It did however provide copies of some emails between the specified individuals as it considered that these were not subject to the exemption.
5. The council responded further on 30 January 2015 advising that it considered that the public interest in disclosure was not outweighed by the public interest in withholding the information.
6. The council wrote to the complainant on 18 February 2015 to provide the outcome of its internal review. It upheld its position.
7. Following the Commissioner's involvement, the council carried out a further review of the request, but this time under the EIR. On 16 April 2015 it wrote to the complainant again and informed him that the council now considered that the information was excepted from disclosure under regulations 12(4)(d) and 12(4)(e) as it was unfinished material and also consisted of internal communications.

Scope of the case

8. The complainant contacted the Commissioner on 5 March 2015 to complain about the way his request for information had been handled. He was concerned that the information had been withheld.
9. The Commissioner considers the scope of this investigation to be to determine whether the council was correct to withhold the draft report and associated email correspondence.

Reasons for decision

Regulation 12(4)(d) – material in the course of completion

10. The council has withheld a draft officer report recommending approval of temporary permission for the specified planning application under this exception. The report is referred to as the draft report.
11. 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. By nature of being an unfinished document (by definition), draft documents will similarly engage the exception. A draft version of a document will still be considered an unfinished document even if the final version of the document has been published.
12. If the information in question falls into one of the categories above then the exception is engaged. It is not necessary to show that disclosure would have any particular adverse effect in order to engage the exception, however, any adverse effects of disclosure may be relevant to the public interest.
13. The council has provided some background to the request which it considers is helpful in explaining the unfinished nature of the draft report. On 20 October 2014, the complainant was notified by the planning officer for his application that the recommendation was for temporary permission. On 22 October 2014, he further informed the complainant that the application would be reported to the Development Control Board on 30 October 2014, and that the report would recommend refusal of permission.
14. The Development Control Board considered the application on 18 December 2014. Permission was refused and the final report to this effect was published. The request in this case was received by the council on 19 December 2014.
15. The council considers that it is clear that the draft report falls within the definition of the exception. It stated that the information was created as part of the process of formulating recommendations to the Development Control Board. It has also stated that in line with previous First Tier Tribunal (Information Rights) cases and the Commissioner's guidance, it

considers the draft version of the document to be unfinished even after the final version is published¹.

16. The council has explained that its planning officer reports are draft reports produced by case officers to articulate the reasons why planning applications should be granted or refused permission. It has said that the work is undertaken over a period of months and involves a full review of the comments, available data, and planning issues. This involves working on a draft report which is subject to further evidence gathering as the process develops. It states that draft reports are necessarily part of an evolving process which is subject to change. It is often the case that some of the content in earlier drafts will not make it to the final version. The draft reports are submitted to the Head of Regeneration or the Development Control Manager for approval and sign off.
17. In this case, the council has explained that the email of 20 October 2014 which notified the complainant that the recommendation was for approval of temporary permission was sent prematurely. The draft report had not been signed off and both the Head of Regeneration and the Development Control Manager considered it to be flawed.
18. The complainant has informed the Commissioner that he does not consider the information he requested to have been a draft recommendation. He explained that he is aware that the council has said that when the letter of 20 October 2014 was sent, the report had not been signed off by the Development Control Manager. However, he maintains that an email he received on 29 August 2014 suggests to him that the Development Control Manager had received the report before 20 September 2014. The email in question is from the planning officer to the complainant and states "*I have to give the draft report to the DC Manager by 17.09.14 for finalising shortly after that.*" He also argues that the notification letter he received from the planning officer on 20 October 2014 did not give the impression that the recommendation was a draft in any way. He specifically points to the fact that the letter appears to be signed off by the Development Control Manager.

¹ EA/2008/0052 – Secretary of State for Transport v The Information Commissioner, https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf

19. The council has explained to the complainant that the signature is inserted electronically above the sign off "*On behalf of Dartford Borough Council*" and the Development Control Manager does not see all the letters sent out. In addition, contact information on the letter gives the planning officer's details.
20. The council explained that the draft report was last edited by the Development Control Manager on 22 October 2014. The Commissioner has seen from the additional requested information of correspondence about the application between named individuals that the report was being discussed and changes being made. It is clear that the requested draft report was very much an unfinished document. Indeed an email from the planning officer to the complainant on 22 October 2014 states "*The application has been subject to significant internal discussion and the report has only been finalised today.*"
21. On the basis of the council's explanation of the way the reports are created and given that a final report was published on 18 December 2014, some two months after the planning officer had notified the complainant on 22 October 2014 that his recommendation was for approval of temporary permission, the Commissioner finds that the draft report is material in the course of completion. He has therefore concluded that the information engages the exception at regulation 12(4)(d) and has gone on to consider the public interest in disclosing the information.

Regulation 12(4)(e) – Internal Communications

22. In respect of this exception, the council has withheld emails between the named individuals in which the draft report is discussed and amendments suggested.
23. Regulation 12(4)(e) states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. The exception is a class based one; that is to say if information falls within the scope of the exception then it is engaged – there is no need for a public authority to demonstrate some level of prejudice.
24. The Commissioner is satisfied that the withheld information clearly falls within the scope of this exception given that it constitutes emails exchanged between the named individuals, all of whom are council employees.
25. Regulation 12(4)(e), like all of the exceptions contained within the EIR, is a qualified exception and therefore, the Commissioner must consider

whether the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Public interest in disclosure

26. The council has put forward the same arguments for the public interest in respect of both the information that has been withheld under regulation 12(4)(d) and regulation 12(4)(e). As the Commissioner agrees that both exceptions are engaged, he has recorded the public interest arguments here for both exceptions. He will explain his conclusion in relation to each.
27. In considering the public interest in this case, the Commissioner is mindful that regulation 12(2) of the EIR instructs authorities to apply a presumption in favour of disclosure. The council has acknowledged this and has stated that information held by a public authority is of value in itself because it promotes better government through transparency, accountability, public debate, better understanding of decisions and informed participation and understanding of democratic processes.

Public interest in maintaining the exception

28. The council has explained that at the time of the request, the matter to which the requested information relates was live, and continues to be live as there is a planning appeal in process. It acknowledges that the Development Control Board has resolved to refuse permission, but notes that the planning appeal process is ongoing. The complainant has informed the Commissioner that it is due to be heard in July 2015.
29. It argues that the 'safe space' argument be given significant and notable weight in this case. It has stated that the safe space is vital and necessary in order to allow the council to review, consider and make effective planning decisions and debate issues away from external scrutiny.
30. The council also considers that disclosure of the information at this time is likely to have a chilling effect on the free and frank exchange of views in respect of the planning appeal. It considers that it is plausible that the frankness of ongoing discussions would be adversely affected and that the candour of submissions relating to the outstanding aspects of the planning application could be lost.
31. It has also stated that disclosure could plausibly risk undermining the candour of similar internal discussions on other similar planning applications in the future.
32. In addition it argues that publishing unfinished documents, particularly when the matter at hand is still live, would distract public debate away

from substantive and relevant arguments. It suggests that disclosure could result in the focus on issues and matters which were included in an earlier draft report, but which are no longer relevant and/or were discounted in the final report.

Balance of the public interest

33. In reaching a determination as to where the balance of the public interest lies the Commissioner has noted that whilst a decision in relation to the planning application had been made by the Development Control Board, the decision has been appealed and an appeal decision has not been reached.
34. The Commissioner acknowledges that, in some situations, the disclosure of information ahead of a decision being reached at planning appeal could have a damaging impact on the process of deliberation. However, in any given case, he considers that it is for the public authority to identify what form the impact might take and to explain how disclosure of the specific information would result in the effects identified.
35. In this instance the council has explained that disclosure of the information could plausibly risk a loss of candour and frankness in the submissions put forward by council officers in respect of this planning appeal. It has stated that it considers that the safe space in this case is vital and necessary to allow officers to fully explore issues relating to the planning application free from undue external pressures, including the pressure of the prospect of disclosure.
36. It has also argued that there is a plausible risk of undermining the candour of internal discussions regarding other similar planning applications in the future. Finally, it states that publishing unfinished documents such as the draft report would distract public debate from the substantive arguments which could shift the focus to issues and matters which are no longer considered relevant.
37. The Commissioner notes from the information supplied in this case that the individuals to whom the planning application relate have submitted applications on the same land for similar changes in the past. The planning application in question is a result of changes made following previous planning application refusals. It is therefore conceivable that even after the planning appeal is heard, the matter could still be considered live as another similar planning application could be made.
38. The council states that the Development Control Manager remains concerned that the process of reaching a conclusion in the appeal hearing could be unduly influenced by knowledge of previously

unpublished information leading to a less robust decision which could be open to challenge.

Conclusion – Regulation 12(4)(d) material in the course of completion

39. The Commissioner has weighed the presumption in favour of disclosure provided by regulation 12(2) in this case against the public interest arguments the council has highlighted for withholding the draft report. The council has stated that disclosure of the draft report would undermine the safe space that is needed by public authorities to enable them to think in private about important matters. In this specific case, it is clear to the Commissioner that the matter to which the draft report relates is still live as the planning appeal has not been concluded. Therefore it is a valid argument that a safe space is required in this case.
40. The Council has also argued that there would be a plausible chilling effect on future planning deliberations and draft reports. The Commissioner finds that this argument is relevant here in view of the fact that the planning application to which this relates is the latest in a series of applications by the same family about the same land. Following this pattern, depending on the outcome of the ongoing planning appeal, it is conceivable that there will be further planning applications of a related nature on the same land. The Commissioner therefore accepts that disclosure of the draft report in this case may chill planning officers in their approach to future similar applications.
41. As the planning appeal is still live, the Commissioner finds that the public interest with regard to the draft report lies in maintaining the exception.

Conclusion – Regulation 12(4)(e) internal communications

42. The Commissioner has weighed the presumption in favour of disclosure provided by regulation 12(2) in this case against the public interest arguments the council has highlighted for withholding the information. The council has stated that disclosure of the internal emails would undermine the safe space that is needed by public authorities to enable its staff to discuss important matters in a free and frank manner, without undue outside influence. In this case, it is clear that internal discussions about draft planning reports will need a safe space whilst planning matters are live. The Commissioner recognises that officers must have the means and opportunity to discuss what can be finely balanced decisions away from external pressure, particularly from interested parties. This is demonstrated by the fact that the planning

decision in this case went from one of temporary approval to refusal of permission.

43. With regard to the council's argument that there would be a plausible chilling effect on officer communications discussing future similar planning issues, the Commissioner is again mindful that in this particular case, there is a likelihood that future similar applications may be submitted based on the outcome of the pending appeal.
44. Therefore, again, as the planning appeal is still live, the Commissioner finds that the public interest with regard to the internal emails lies in maintaining the exception.

Right of appeal

45. 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

46. 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.
47. 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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