

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 23 July 2015

Public Authority: West Berkshire District Council

Address: Council Offices
Market Street
Newbury
Berkshire
RG14 5LD

Decision (including any steps ordered)

1. The complainant has requested information relating to a Planning Policy Task Group. West Berkshire District Council disclosed some information but withheld other information (meeting minutes) under the exception for internal communications (regulation 12(4)(e) of the EIR).
2. The Commissioner's decision is that the public authority has correctly applied regulation 12(4)(e) to withhold the meeting minutes requested in part 4 of the request.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 3 November 2014, the complainant wrote to West Berkshire District Council (the "council") and requested information in the following terms:

"1) The FOI is to request a named list of all elected Councillors past and present who have been members of/sat on the 'Planning Policy Task Group' tasked with producing/modifying and or consulting on West Berkshire Council's Housing Site Allocations Development Preferred options consultation Document (dated July 2014 and/or seen at <http://info.westberks.gov.uk/index.aspx?articleid=30382>)

2) Any associated document to be put forward as a recommendation following the public consultation (ended Sept 2014)

- 3) Any Draft Submission document currently being produced relating to points 1&2 above.*
- 4) The FOI is also to request the dates and times of all meetings and a copy of all minutes of the Planning Policy Task Group.*
- 5) This is to include details of when the Planning Policy Task Group was formed and details of how the group was selected, constituted and by whom.*
- 6) The request is also to include what terms of reference the Planning Policy Task Group were given including how those terms of reference were produced."*
5. The council responded on 2 December 2014. It disclosed the requested information but withheld the meeting minutes requested in part 4 of the request under the exception for internal communications (regulation 12(4)(e) of the EIR).
6. Following an internal review the council wrote to the complainant on 3 February 2015. It stated that it was maintaining its original position.

Scope of the case

7. On 12 March 2015 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. In its response to the complainant, the council stated that, in relation to part 4 of the request, it was withholding the relevant minutes for the period 2013-2014. The complainant did not query this timeframe at that time, however, they have subsequently agreed with the Commissioner that they are content for the timeframe of this element of their request to be restricted in this way. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly withheld the meeting minutes for 2013-2014 requested in part 4 of the request under regulation 12(4)(e) of the EIR.

Reasons for decision

Regulation 12(4)(e) – internal communications

9. 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.”

10. 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.
11. The council has withheld the minutes of meetings of the Planning Policy Task Group (the “Task Group”).
12. The council has explained that one of the roles of the Task Group is to assist in the development of the council’s Planning Frameworks. The Task Group receives information and puts forward recommendations which are then taken forward in public reports and documents. The council clarified that that the Task Group also acts as a forum for consultation and discussion on the implementation of new legislation or guidance.
13. The council has confirmed that the Task Group consists of members and officers of the council and that the minutes are only circulated internally.
14. Having considered the council’s explanations and referred to the withheld information the Commissioner is satisfied that the withheld information constitutes internal communications and that the exception at regulation 12(4)(e) is, therefore, engaged.
15. The Commissioner considers that the underlying rationale behind the exception is that public authorities should have the necessary space to think in private. The original European Commission proposal for the Directive (COM(2000)0402) explained the rationale as follows:

“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 [...] internal communications.”¹
16. Although a wide range of internal information might be caught by the exception, the Commissioner is of the opinion that, following the above European Commissioner proposal (which the EIR are intended to implement), public interest arguments should be focussed on the protection of internal deliberation and decision making processes.
17. The Commissioner considers that these factors must then be balanced against the public interest in disclosure. Regulation 12(2) specifically

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0402:FIN:EN:PDF>

provides that public authorities should apply a presumption in favour of disclosure. This means that a public authority may have to disclose some internal communications, even though disclosure will have some negative effect on internal deliberation and decision making processes.

Public interest in disclosure

18. The Commissioner acknowledges the presumption in favour of disclosure inherent in regulation 12(2) of the EIR. He also accepts that there is an inherent public interest in the openness and transparency of public authorities and their decision making process.
19. The complainant has argued that, as the Housing Site Allocations Development Preferred Options consultation document was published on 25 July 2014, and the public consultation ended on 12 September 2014, releasing the information would not have an impact on any deliberations or decision-making processes.
20. In relation to any potential 'chilling effect' resulting from disclosure² the complainant has argued that the prospect of information being made public would import greater rigour into future processes. The complainant maintains that that the prospect of disclosure would improve the quality of the decision making process and compel council officers to produce defensible decisions.
21. The complainant has also questioned the council's view that the Task Group has no decision making powers. The complainant has made reference to the minutes of various Parish Council meetings which state that any responses to the Housing Site Allocations Development Preferred Options document should go directly to the Task Group. The complainant considers that this indicates that the Task Group has some degree of decision making power, even if this power is only to consider and incorporate the views of Parish Councils and, at a later date, the views of those responding to the public consultation.

Public interest in maintaining the exception

22. The council has argued that members of the Task Group need a safe space to discuss and debate the various proposals before making recommendations. It has confirmed that the Task Group does not itself have any decision-making powers, its role being to make recommendations to inform the statutory process. Disclosure of the

² The future reluctance of officers to participate in deliberations because of the prospect of their contributions being disclosed.

information would, therefore, expose the full range of options considered by the Task Group, misrepresenting the actual recommendations being taken forward to the decision stage and damaging the integrity of the process of consideration.

23. In support of its position, the council has provided background information about work on the West Berkshire Core Strategy 2006-2026 which provides the overall framework for how development in West Berkshire should be managed. The council explained that this process began with a public consultation "Options for Delivering Homes" in 2007 and was subject to public examination in 2010, 2011 and 2012 before it was finally approved by the Planning Inspectorate. The council has clarified that this document did not include small site allocations and stated that "The Core Strategy will be followed by a Site Allocations and Delivery Development Plan Document (the "DPD). This will include details of any additional housing allocations, reviews of settlement and town centre boundaries, plus policies for development management."
24. The council has confirmed that, in July 2014, the scope and content of the DPD was consulted on and the results published alongside the DPD. It has explained that this consultation was an optional period of consultation not required by the legislation but the council considered it important that residents of the district had an opportunity to comment at an early stage of the planning process and for views to be taken into account before a final decision was made.
25. The council has clarified how its Planning Department will engage with the local community during the remainder of the decision making process and directed the Commissioner to its Statement of Community Involvement.³ The Commissioner notes that this document clearly sets out a commitment to and a schedule for making sufficient information available and facilitating local engagement in the plan making process.
26. The Commissioner has also had sight of the council's Local Development Scheme, which sets out the key stages for the Housing Site Allocations DPD⁴. The council has argued that the request was submitted at the very start of the process and that, whilst it carried out an informal (non-statutory) public consultation on the proposals in the draft DPD, a further formal consultation must be undertaken and is planned for Autumn 2015. It has advised that the Task Group is likely to be asked to revisit its findings in respect of the both the informal and formal consultation before the final document can be provided to the Planning

³ <http://info.westberks.gov.uk/CHttpHandler.ashx?id=38265&p=0>

⁴ <http://info.westberks.gov.uk/index.aspx?articleid=28845>

Inspector. The council has argued that changes in planning law and requirements between the initial discussions and the final presentation of all the documentation may also require changes to the proposals within the report. It has stated that the disclosure of the existing minutes may, therefore, present a misleading view of the final proposals to be considered by the Planning Inspector at the Examination in Public.

27. The council has confirmed that the withheld minutes will be released as part of the formal statutory process and disclosure prior to this could result in increased land speculation, mistrust and scare mongering, as well as an abandonment of the Plan-led approach to sustainable development favoured by the Government.
28. The council has directed the Commissioner to information which has already been placed in the public domain regarding this matter (in addition to that disclosed in response to this request). The Commissioner notes that a significant volume of relevant information has been published on the council's website. It has argued that the public interest in this matter has been served by these disclosures.
29. The council has also directed the Commissioner to a previous decision notice issued in relation to a request for similar information in which it was found that the public authority had correctly applied regulation 12(4)(e) to withhold the information⁵. It also directed the Commissioner to a decision of the First-Tier Tribunal (EA/2015/0029) which related to a request for comparable information and upheld the public authority's use of an exception to withhold this⁶.

Balance of the public interest

30. The Commissioner considers that there is no automatic public interest in withholding information just because it falls within this class-based exception. Neither should there be a blanket policy of non-disclosure for a particular type of internal document. Arguments should always relate

⁵ ICO reference: FS50498100; East Devon District Council, published on the ICO website here: https://ico.org.uk/media/action-weve-taken/decision-notices/2014/963758/fs_50498100.pdf

⁶

<http://www.informationtribunal.gov.uk/DBFiles/Decision/i1568/014%20220615%20Decision.pdf>

to the content and sensitivity of the particular information in question and the circumstances of the request.

31. In balancing the public interest arguments in this case the Commissioner has given due weight to the position public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction.. However, it is open to the Commissioner to consider the severity and extensiveness of any harm that disclosure might cause to such a safe space, or, in relation to the extent of any 'chilling effect' which the possibility of future disclosure might have on council staff's willingness to contribute uninhibited and robust advice.
32. The Commissioner considers that the need for a safe space will be strongest when an issue is still "live". Once a public authority has made a decision, a safe space for deliberation will no longer be required and the public interest is more likely to favour disclosure.
33. Whilst the complainant considers that the consultation process is complete, it seems clear to the Commissioner, having considered the council's submissions, that the process is ongoing, as is the broader process of decision making. He, therefore, considers that the public interest in not disclosing the minutes ahead of the appropriate stage in the statutory process carries significant weight.
34. The Commissioner accepts that there is a general public interest in public engagement in planning processes, particularly where they relate to far-ranging policies which impact on local housing plans. However, except in cases where there are specific concerns that a process is not being correctly followed, where sufficient information is not being made available or where there is evidence of malpractice, the Commissioner does not consider that this general interest justifies bypassing information disclosures made outside the statutory planning regime.
35. In reaching a decision on where the balance of the public interest lies in this case, the Commissioner has attached particular weight to the fact that no formal decision had been made at the time of the request, that there is a need to avoid any impact on the decision making process by premature disclosure of the requested information, and the lack of compelling public interest arguments in favour of disclosure.
36. Whilst the Commissioner accepts that disclosure of the information might well aid transparency he considers that this would be to the detriment of the ongoing deliberation process which the withheld information records. In short, there is a stronger public interest in the council being able consider the available options in this matter in order to inform a stronger decision making process. He also considers that

the disclosure already made by the council in relation to this matter and the existing planning statutory framework provide opportunities for public engagement.

37. For the reasons set out above the Commissioner considers that, in all the circumstances of the case, the public interest in maintaining the exception set out in regulation 12(4)(e) outweighs the public interest in disclosure and he therefore accepts that the minutes of the Task Group should be withheld.

Right of appeal

38. 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

39. 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.
40. 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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