

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 28 September 2015

Public Authority: Derbyshire Dales District Council

Address: Town Hall
Matlock
Derbyshire
DE4 3NN

Decision (including any steps ordered)

1. The complainant has requested recorded information relating to pre-planning advice given to a developer by Derbyshire Dales District Council. The Council has withheld the requested information in reliance on Regulation 12(5)(f) of the EIR.
2. The Commissioner's decision is that Derbyshire Dales District Council has correctly applied Regulation 12(5)(f).
3. The Commissioner requires the public authority to take no further action in this matter.

Request and response

4. On 6 March 2015 the complainant asked the Council for –

...all pre-application information held with reference to the former band hall site, Jackson Road, Matlock.

5. The Council made its formal response to the complainant's request on 15 May 2015. In its response the Council explained to the complainant that his request fell to be considered under the EIR. It also advised the complainant that the Council was refusing to disclose the information he seeks in reliance of Regulation 12(5)(f) – where disclosure would adversely affect the interests of the person who provided the information.

6. On 19 May, the complainant asked the Council to review its decision to withhold the information he seeks.
7. The Council carried out its internal review and on 17 June it advised the complainant of its final decision. The Council advised the complainant that –

"[it is] satisfied that the correspondence entered into prior to the planning application, was submitted on a voluntary basis and issued to the Council as a pre-planning advice request. Requests for pre-planning advice are provided voluntarily by a developer or agent in order to identify issues early enough to take these into account in any formal planning application. I am satisfied that the agent entered into correspondence with the expectation that the information would not be disclosed more widely by the Council.

Pre-planning advice requests are not planning applications and are not subject to the normal formal reporting as planning applications are."

8. The Council informed the complainant that it had sought the consent of the agent to disclose the requested information. The Council advised the complainant that the agent had not given consent and that he considered that the information was provided in confidence, is commercially sensitive and would affect his interests. The Council therefore determined to uphold its decision to apply Regulation 12(5)(f) to the withheld information.

Scope of the case

9. The complainant initially contacted the Commissioner on 12 May 2015 to complain about the way his request for information had been handled.
10. Having received the Council's internal review decision on 17 June, the complainant asked the Commissioner to determine whether the Council is correct to withhold the information he seeks.
11. The Commissioner's investigation was focussed on the Council's reliance on Regulation 12(5)(f) to withhold the requested information. This notice is the Commissioner's decision.

Reasons for decision

Regulation 12(5)(f)

12. Regulation 12(5) of the EIR states that information can be withheld where its disclosure would have an adverse affect upon:

(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.

13. The Council has provided the Commissioner with a number of assurances and arguments in support of its application of Regulation 12(5)(f).

14. The Council has explained that requests for advice prior to planning applications are made by developers to identify issues before the submission of a formal planning application.

15. In this case, the withheld information was supplied by the developer on an entirely voluntary basis: He was under no obligation to submit a request for pre-application advice.

16. The developer did not supply the withheld information in any circumstance where the public authority would be required to disclose it. The exception being a disclosure required by the EIR, where the public interest might favour disclosure.

17. The developer has a reasonable and legitimate expectation that his request for pre-application advice would be treated in confidence. Page 5 of the Council's Planning & Development Services Department's 'Development Control Customer Charter and Services Standards' state that confidentiality at the pre-application advice stage will be

respected¹. This provides a reasonable assurance to the developer that information will not be published or disclosed to third parties.

18. The Council consulted with the developer's agent about the complainant's request at the time of its internal review. The agent asserted that disclosure of the pre-application advice would adversely affect the interests of the developer who supplied the information and he confirmed that the developer has not consented to its disclosure.
19. The Council informed the Commissioner that the developer submitted his formal planning application on 24 March 2015, soon after the complainant had submitted his request for information, and the Council did not in fact send the developer the pre-application advice which he had requested.
20. The Council asserts that the timing of the complainant's information request prior to the submission of the formal planning application would have adversely affected the interests of the developer. It argues that premature publication of the pre-application information might have dissuaded the developer from submitting his formal application in respect of a contentious development in the local area.
21. The Council points out that the officer's advice is in draft form and it was never actually sent to the developer or his agent. It is understood that the draft advice was intended for future amendment and consequently the Council considers that it is subject to the exception to disclosure which is provided by Regulation 12(4)(d) of the EIR – where the information consists of material still in the course of completion, to unfinished documents or incomplete data.
22. The plans submitted by the developer for pre-application advice were bespoke to his development. He will have incurred expense in having the plans created for the purpose of his submissions to the Council. Disclosure at the pre-application stage would allow the developer's competitors to gain access to the developer's plans and thereby gain a commercial advantage.
23. In addition to the information provided to the Council by the developer, the Council also holds a draft letter which contains advice from one of its officers about the proposed development. The Council considers that the advice would significantly affect the possibility of the developer's application being successful.

¹ <http://www.derbyshiredales.gov.uk/images/documents/D/Development%20Control%20Charter.pdf>

Was the information supplied on a voluntary basis

24. The Commissioner has examined the withheld information and has considered the circumstances which brought in into the Council's possession. The withheld information consists of two sets of architect's plans which were received on 4 March 2015, together with a draft letter of advice from the Council's Development Manager which is dated 25 March 2015. The draft letter of advice was not sent to the developer because he had submitted his planning application before the advice letter had been finalised.
25. The Commissioner is satisfied that the information was submitted on a voluntary basis. It was provided to the council as part of a pre-planning advice request. The authority did not require the developer to provide the two copies of his architect's plans where there is no formal application.
26. The Commissioner considers that requests for pre planning advice are provided voluntarily so that issues may be identified early for them to be taken into account in during the formal planning application process.

Is the Council entitled to disclose the information other than under the Regulations?

27. As part of a pre-planning request for advice the Commissioner is satisfied that the developer would have submitted the request with the expectation that that information would not be disclosed more widely by the Council.
28. Pre-planning advice requests are not planning applications: They are not subject to the normal formal reporting procedures which govern formal planning applications.
29. The Commissioner is satisfied that the Council would not be entitled to disclose this information other than in response to a request under the EIR or the Freedom of Information Act.

Did the developer consent to the disclosure of the information?

30. It is quite clear that the developer did not consent to the information being disclosed. The Commissioner is therefore satisfied that this criterion has been met.
31. The Regulations make clear that consent is to be considered in respect of this exception and the Commissioner considers that the Council acted appropriately by seeking the consent of the developer.

Would a disclosure of the information have an adverse affect upon the interests of the developer?

32. Subsequent to the request being received by the Council, the developer submitted his planning application. The planning application resulted in 12 objections being made from interested parties.
33. The request was made by the complainant prior to the formal planning application being submitted. A disclosure of this information would therefore have acted against the interests of the developer.
34. In the Commissioner's opinion disclosure of the withheld information at the time of the complainant's request would have likely raised objections which were not necessarily based on the final application plans.
35. When a public authority gives pre-planning advice, it is always possible for a developer amend his plans or to determine that no formal application should be made. Disclosing the withheld information prematurely would have potentially raised tensions in the area which were not based on authoritative facts.
36. Disclosure of the preliminary plans and the Council's draft advice could have provided potential objectors with spurious information which would have been used to formulate objections against the developer's plans at a time when no formal planning application had been submitted.
37. The developer may then have faced significant objections to plans which he may have decided not to formally submit. This would clearly have had an adverse effect upon his interests. If, as in the case, the developer was continuing to consider his options as regards the proposed development, disclosure of the withheld information might have caused him to delay his formal application and he may have incurred costs as a result of the actions of interested parties who would seek to prevent his development occurring prior to the planning application process.
38. Once formal planning applications are submitted the public has the right to raise objections and have their arguments heard. At the pre-planning application stage the need for the public to have this type of input in the process considerably limited. It must be emphasised that no formal plans have been submitted.
39. In consideration of the above, the Commissioner is satisfied that a disclosure of the withheld information, prior to the formal submission of a planning application, is likely to have an adverse effect on the interests of the developer. The Commissioner is therefore satisfied that all of the criteria for Regulation 12(5)(f) have been met by the council.

40. Notwithstanding the Commissioner's decision that Regulation 12(5)(f) is engaged, the Council is required to carry out a public interest test to ascertain whether the information should be disclosed. This test is required by Regulation 12(1).
41. The test is required to determine whether the public interest in the exception being maintained outweighs the public interest in the information being disclosed. If it does not then the information should be disclosed in spite of the exception being engaged.
42. Regulation 12(2) also provides a specific presumption in favour of the information being disclosed.

Arguments in favour of disclosing the requested information

43. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in their understanding of how public authorities make their decisions and in turn fosters trust in public authorities. In many circumstances the disclosure of recorded information may allow greater public participation in the decision making process.
44. In this case, the Council accepts that disclosure of the withheld information would ensure transparency concerning its discussions with the developer and could help the public to understand some of the issues considered by the Council in respect the proposed development and in particular the type and quality of the advice given to the developer by the Council.
45. The Commissioner appreciates that the site of the proposed development is within a conservation area and could be perceived to have a significant impact on local residents.
46. Although the planning application had not been submitted at the time the request was made, it was likely that a planning application would be submitted and this was therefore a relevant consideration at the time of the request.

Arguments in favour of withholding the requested information

47. The Commissioner considers that it is important for potential developers to be able to seek advice on planning applications on a confidential basis in relation to future developments.
48. The pre-application advice given by the Council is not subject to the Council's publication scheme, whereas information concerning the formal planning applications is.

49. The right to object to a formal planning application is available to the public once the application has been submitted. Objections are considered when the planning application comes before the appropriate committee. The Council points 12 objections were received during the consultation period which followed the submission of the planning application.
50. The Commissioner considers that the ability for developers to submit confidential requests for pre-application advice will arguably save the Council and the developer's time, money and resources.
51. Issues can be identified and addressed before the submission of the final planning application. This diminishes the need for Council officers to consider unnecessary or problematic areas of the formal application.
52. The public's right to challenge a planning application is not affected by the non-disclosure of the requested information. That right can be properly exercised during the formal planning process.
53. Any objections or comments received in relation to pre-application advice may not be relevant and would require the Council's officers to consider and deal with potentially unwarranted objections. This would result in an unnecessary diversion at a time of scarce resources.
54. It is easy for the Commissioner to conceive that disclosure of the developer's pre-application plans may create an unfair commercial environment for the developer. Other possible developers and competitors may use the withheld information to gain an unfair advantage. Such an advantage would be contrary to the developer's interests in an open and competitive market.
55. Pre-application disclosure may dissuade developers from engaging with the Council at an early stage and thereby result in the submission of inadequate and unsatisfactory formal applications. Again, this would result in unnecessary time being spent on poor quality applications and also in unnecessary expense on the part of the Council.
56. Had the Council disclosed the pre-planning advice information before the submission of the formal application, the developer may have faced significant objections to his plans. This may have prejudiced the developer to the extent that he may have chosen not to submit his application.
57. Pre-application advice enables developers to make appropriate amendments to their plans. This in turn helps to reduce the costs to the Council and helps prevent unnecessary delay in the planning process.

Conclusions

58. At the time of the request no formal planning application had been submitted.
59. The Commissioner has seen no evidence to suggest that the developer's formative plans were inappropriate or that he was in any way acting unlawfully.
60. In this case, the Commissioner must acknowledge the opportunities afforded to objectors by the formal planning process. It is during this process that interested parties can make their objections based on substantive planning proposals. Here, the Commissioner considers that the ability of objectors to voice their concerns has not been significantly affected by the Council's withholding of the requested information.
61. The Commissioner's decision is that the Council is entitled to rely on Regulation 12(5)(f) to withhold the requested information on the grounds that the public interest arguments favouring the exception outweigh the public interest in the information being disclosed.
62. The Commissioner understands that the developer's application was approved by the Council's planning sub-committee on 15 July 2015.
63. The guidance published by the Local Government Association and created by the Planning Advisor Service, suggests that pre-planning advice provided by planning authorities should be recorded and published unless there is a reason for the information to remain confidential. This is in order to demonstrate probity in planning decisions, and particularly in councillor's involvement in pre planning discussions. The Commissioner notes that the advice letter held by the Council is in draft form and was never completed. The Commissioner makes no recommendation as to whether the Council should now consider disclosing the draft letter of advice.
64. The Commissioner's decision is restricted to his consideration of the circumstances of the case at the time that the request was received and when the review was carried out. At that time no formal planning application had been submitted to the Council.

Right of appeal

65. 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

66. 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.

67. 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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