

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 12 January 2015

Public Authority: Hungerford Town Council
Address: The Library
Church Street
Hungerford
Berkshire
RG17 0JG

Decision (including any steps ordered)

1. The complainant has requested a copy of a report which was provided to Hungerford Town Council ("the Council") by Ashburn Planning. The Council refused to disclose the report in reliance of the exception to disclosure provided by Regulation 12(5)(d) of the Environmental Information Regulations 2004.
2. The Commissioner's decision is that the Council has properly applied Regulation 12(5)(d) to the report and is therefore entitled to withhold it from the complainant.
3. The Commissioner requires no further action to be taken by the public authority.

Request and response

4. On 13 August 2014, the complainant wrote to Hungerford Town Council and requested the following information:
 - "1. Minutes of the LDF sub-committee.
 2. Minutes of any other record held of the meeting held earlier this year with District Councillor Hilary Cole and West Berkshire Council officers regarding the LDP.
 3. The Council's response to the consultation on the preferred sites for development (pre public consultation) and the date of the meeting where this was approved by the Council.

4. Any reports provided by Ashburn Planning.
5. Total payments to Ashburn Planning.”
5. The Council responded to the complainant’s request on 15 August. In respect of item four of the request the Council stated; ‘Reports by Ashburn Planning are draft and confidential’.
6. On 15 August the complainant wrote to the Council again in connection to its refusal to supply the Ashburn Planning report. The complainant stated that she was taking the Council’s refusal to having been made under the Environmental Information Regulations and she pointed out that the Council’s refusal would be dependent on a consideration of the public interest test. The complainant asserted that the report should be disclosed unless there is a legal confidentiality clause in the agreement between the Council and Ashburn Planning which prohibits disclosure.
7. The Council sent the complainant a further response on 24 September. The Council apologised for not issuing a refusal notice in respect of item 4 of the request and made clear that its refusal was reliant on section 22 of the FOIA – where the information is intended for future publication. The Council advised the complainant that the report is now published on its website.
8. On 20 October the complainant wrote to the Council again. This time the complainant advised the Council that the link it had provided was not to the Ashburn Planning Report. The complainant therefore asked the Council to review its handling of her request for information.
9. The Council completed its internal review and wrote to the complainant on 4 November. The Council apologised for the confusion it had caused in directing the complainant to its website and made clear that it was refusing her request for the Ashburn Planning report in reliance of section 22 of the FOIA.
10. On 4 November the complainant wrote to the Council again to challenge the Council’s reliance on the provisions of the Freedom of Information Act and to assert her belief that the requested information fell to be considered under the EIR.

Scope of the case

11. The complainant contacted the Commissioner on 4 November 2014 to complain about the way her request for information had been handled.
12. The complainant has asked the Commissioner to consider only item four of her request. This notice is the Commissioner’s decision in this matter.

Reasons for decision

Is the requested information 'environmental information'?

13. The Council's refusal notice referred to provisions of the Freedom of Information Act 2000. In its response to the Commissioner's enquiries the Council has amended its position and has advised him that it is refusing the complainant's request in reliance of Regulation 12(5)(d) of the Environmental Information Regulations ("the EIR").
14. Information is 'environmental information' if it meets the definition set out in regulation 2 of the EIR. If the information satisfies the definition in regulation 2 it must be considered for disclosure under the terms of the EIR rather than the FOIA.
15. Under regulation 2(1)(c) of the EIR, any information on activities affecting or likely to affect the elements or factors of the environment listed in regulation 2 will be environmental information. One of the elements listed is land.
16. The Commissioner has examined the withheld information in this case – "Hungerford Town Council – Housing Growth Review. He is satisfied that the information is environmental information as it concerns the identification of development sites within Hungerford to assist West Berkshire Council – the planning authority – to ensure that appropriate levels and locations of housing are identified for Hungerford. The Commissioner therefore considers that the request should be dealt with under the EIR.

Regulation 12(5)(d) – confidentiality of proceedings

17. Regulation 12(5)(d) allows a public authority to withhold environmental information in circumstances where its disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority, where the confidentiality is provided by law.
18. There is no definition of 'proceedings' provided by the EIR. The Commissioner's guidance on regulation 12(5)(d) sets out that proceedings can cover a wide range of activities which public authorities are obliged to undertake in compliance with their statutory duties.
19. In this case the proceedings identified by the Council concern the formal planning process associated with the Local Development Framework. The Council is a statutory consultee with regards to that process.

20. The Commissioner accepts that the withheld report relates to the proceedings of the Council. He finds that the Council contracted with Ashburn Planning to prepare a review of housing growth for Hungerford in the context of the Town Plan Refresh. The report is made to the Council's elected members prior the Council making its representations to West Berkshire Council – the planning authority – as part of its Local Development Framework planning production process.
21. The report will eventually be used to support the Council's case at the Examination in Progress ("the EIP") – part of the consultation process, where decisions will be made on the location and extent of development in Hungerford and the surrounding area.
22. The Council asserts that the report does not represent the Council's final position. Rather, the Council has commissioned the report ahead of the EIP in order to be prepared for that process. At the time of the Commissioner's enquiry no date has been set for the EIP.
23. Regulation 12(5)(d) can only apply to proceedings where confidentiality is provided by law. This can be by virtue of common law or by virtue of a specific statutory provision.
24. In this case the Council has asserted that confidentiality is provided by the common law duty of confidence.
25. In the Commissioner's opinion the common law of confidence will apply where the information has a necessary quality of confidence and where the information was imparted in circumstances which import an obligation of confidence.
26. Having examined the withheld report, it is clear to the Commissioner that the report was commissioned by the Council in order to obtain advice about its future presentation to the EIP and that the information can be described as 'more than trivial' and characterised as being confidential in nature.
27. The information was provided to the Council in preparation for making its presentation to the planning authority, at a time very early in the planning process.
28. Given that the Council's final presentation will be made public and that there is potential for both planning laws and planning requirements to change between the production of the report and the final presentation, the Commissioner is minded to accept that the information was imparted by Ashburn Planning in circumstances where confidentiality is generally acknowledged to be important, particularly where it is necessary for the Council to give detailed consideration to the report frankly and freely.

29. The Commissioner asked the Council to identify the adverse affects which would follow publication of the report.
30. The Council advised the Commissioner that disclosure would be detrimental to the planning process. It points out that the EIP is the appropriate mechanism for planning development, and, given the current stage of this process, and that the fact that the report is subject to change – in effect containing information in draft – it would be misleading of the Council's final position. The Council stressed that the final report will be published in the future.
31. Additionally, the report contains information which relates to future planning provisions. That information could be used by developers to gain an unfair commercial advantage on the grounds that the report identifies the locations of potential development sites and the Council's current preferences. Developers could use the information lobby the Council and members of the public about the sustainability of the sites or may make planning applications on the recommendations prior to their agreement. The information if made public at this stage could artificially inflate the value of the land of the sites identified in the report and could prejudice the interests of the Council and residents of Hungerford.
32. The Council asserts that disclosure of this information would have a detrimental impact on the residents of Hungerford in that it could result in unnecessary speculation and scaremongering and it could jeopardise the Council's final position in respect of the EIP which is yet to commence.
33. The Council has assured the Commissioner that the confidentiality of the report has been maintained within the Council: Only officers of the Council, its elected members and members of one of its committees have had access to it.
34. During the course of the Commissioner's investigation the complainant made further representations in support of her complaint. These representations have been considered by the Commissioner prior to making his decision.

The public interest

35. 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. Disclosure of information can assist the public in understanding how public authorities make their decisions. This in turn fosters trust in

public authorities and may allow greater public participation in the decision making process.

36. It is clear that disclosure of the requested information would help the public to understand the issues to be considered by the Council in respect of what might be its representations to the planning authority in due course.
37. In this case however the Commissioner believes that greater weight must be given to those arguments which favour maintaining the exception: He must give weight to the Council's assertion that the information contained in the report is essentially in draft form and is subject to change. The information is relevant to a planning process – the EIP – which has yet to commence, and it is information which will ultimately be placed into the public domain at the appropriate juncture.
38. The report identifies the Council's preferred options for development as they stand at the time of its writing. These options are subject to potential change. If these sites were made public at this time, the Council's assertions that the public and developers could be misled and that the Council could receive unwarranted planning applications based on incorrect information are likely to occur. The Commissioner accepts there is a real likelihood that the land price of those sites identified in the report could be artificially inflated and therefore would jeopardise the Council's economic interest and therefore those of its residents.
39. Having considered information provided by the complainant and by the Council, and having weighed the public interest identified in this case, the Commissioner has concluded that Hungerford Town Council is entitled to withhold the Ashburn Planning Report in reliance of the exception to disclosure provided by Regulation 12(5)(d).

Right of appeal

40. 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

41. 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.
42. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF