

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 11 March 2019

Public Authority: Pembrokeshire County Council

Address: foi@pembrokeshire.gov.uk

Decision (including any steps ordered)

1. The complainant has requested minutes in respect of a notification that a specified company had applied to vary some of the conditions in the planning permission of a specified site meeting. Pembrokeshire County Council cited regulation 12(5)(b) to refuse to supply the requested information. The Commissioner's decision is that Pembrokeshire County Council was entitled to rely on regulation 12(5)(b) in respect of the withheld information. The Commissioner does not require the public authority to take any steps.

Request and response

2. On 20 April 2018, the complainant wrote to Pembrokeshire County Council ('the Council') and requested the following information in respect of Planning Application 17/1300/PA:

"Was a formal "pre-application submission" received by your Authority as required. As no supporting information has been presented with this application form I shall need to examine the minutes of the site meeting. Can I therefore please receive the following information under the Freedom of Information Act 2000.

- *Copy of minutes of site meeting 15 March 2018, or contemporaneous notes prepared by you as a record of the meeting."*
3. The Council responded on 2 May 2018. It stated that it was refusing to disclose the requested information on the basis that it was part of an on-going investigation and that it was exempt from disclosure under

regulation 12(5)(b) which provides an exception on the basis that disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public to conduct an inquiry of a criminal or disciplinary nature.

4. Following an internal review the Council wrote to the complainant on 31 May 2018. It stated that the decision of the internal review panel was to uphold its original decision to refuse the request on the basis of regulation 12(5)(b).

Scope of the case

5. The complainant contacted the Commissioner on 31 May 2018 to complain about the way his request for information had been handled. He stated that he remained of the view that disclosure of the information is in the wider public interest to enable informed comment to be made on a planning application currently being processed. He further stated that there is no evidence to suggest that the Council were currently undertaking a criminal investigation, adding that only a planning application has been placed in the public domain, making it impossible for the public to make informed comment on the proposal. The Complainant further stated that he was not convinced that real harm would result from placing the minutes of a meeting between a planning officer and developer/contractor in the public domain.
6. The Commissioner considers that the scope of her investigation is to consider whether the Council was entitled to rely on regulation 12(5)(b) in respect of the withheld information.

Reasons for decision

Regulation 12(5)(b) – the course of justice...

7. Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –
 - the course of justice, ability of a person to receive a fair trial or
 - the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.

8. The Commissioner's guidance on regulation 12(5)(b) sets out that there is no definitive list which covers circumstances when a public authority may wish to consider applying the exception. In *Rudd v The Information Commissioner & the Verderers of the New Forest (EA/2008/0020, 29 September 2008)*, the Information Tribunal commented that 'the course of justice' does not refer to a specific course of action but is "a more generic concept somewhat akin to the 'smooth running of the wheels of justice'".
9. The successful application of the exception is dependent on a public authority being able to demonstrate that the following three conditions are met:
 - the withheld information relates to one or more of the factors described in the exception,
 - disclosure would have an adverse effect on one or more of the factors cited, and
 - the public interest in maintaining the exception outweighs the public interest in disclosure.
10. The Council has stated that the information requested is part of an on-going enforcement investigation regarding a potential breach of condition 2 of the consent conditions attached to reference 16/0992/PA, which concerns the building of houses. It has further confirmed that there is a possibility that it will progress to court action and considers disclosure would affect the investigation.
11. The Council has further informed the Commissioner that the enforcement investigation was opened in early 2018 and that it was ongoing at the time of the request and the Council's internal review, therefore the course of potential further enforcement was not known but any non-compliance with an enforcement notice could lead to further judicial action such as court and a prosecution.
12. The Commissioner accepts that 'an inquiry of a criminal or disciplinary nature' is likely to include information into potential breaches of legislation such as planning law or environmental law.
13. Having considered the Council's arguments, and reviewed the withheld information, the Commissioner recognises that the information represents evidence that, at the time of the request, related to a live and ongoing inquiry. It is clear that the public disclosure of such information would inhibit the council's ability to effectively conduct an inquiry. She therefore accepts that it is more probable than not that disclosure of the information would adversely affect the course of justice, and the exception provided at regulation 12(5)(b) is engaged.

Public interest arguments in favour of disclosing the information

14. The Commissioner would highlight that regulation 12(2) of the EIR requires the public authority to apply a presumption in favour of disclosure. This emphasis reflects the potential importance of environmental information to the public.
15. The Council has acknowledged the general public interest in transparency and accountability in the disclosure of information held by public authorities.
16. The complainant considers that disclosure is in the public interest and does not accept that it would result in any real harm. He also considers that the correct planning process has not been followed as he believes that there was a requirement for a 'pre-application submission' to the Council.
17. The complainant also considers that justification for the planning proposal is contained in the withheld information and that it should be placed in the public domain to inform the Town & County Planning process. He has further argued that Town and County Planning is not a secretive process, with the general public being invited to comment on proposals, yet the only information in the public domain relating to the application is an application form with no supporting documentation. He has argued that the decision to withhold these minutes/notes makes it impossible for the public to make informed comment on the proposal.

Public interest arguments in favour of maintaining the exception

18. The Council considers that disclosure of the information cannot be released without affecting the investigation outlined in paragraph 10 of this notice. The information needs to remain confidential to ensure that there is a fair and balanced investigation, and if necessary, that the enforcement action could progress to further judicial action.
19. In terms of the public interest test undertaken, the Council informed the Commissioner that the overriding consideration at the time of the review was the timing of the FOI request. It coincided with the initial enforcement investigation commencing and it was felt that disclosure of notes of any meeting held at that time between the developer and the Enforcement Officer related to the enforcement investigation which had just been instigated
20. It is the role of the enforcement officer to confirm if there is a condition which needs rectification, the option is to either comply or seek to vary the condition. Additionally, the enforcement officer would not make or provide any advice on planning itself (eg a phasing of the development

/road). The enforcement officer had a narrow remit and it was for the Planning officers to decide in relation to conditions and variances.

21. The Council also considers that it is not critical to see the inspection notes to make a comment on the planning application. Comments recorded would be limited to advice the enforcement officer gave in relation to compliance. It has further argued that the notes would disclose what was discussed between parties during an ongoing case which the enforcement officer is trying to investigate. Non-compliance with the enforcement action could result in further enforcement meetings taking place and/or further action being taken.
22. In relation to the complainant's comments regarding a pre-application consultation, the Council explained that with major applications there is a requirement to do a pre application consultation (PAC), this is a statutory consultation required when there are major developments. However, because it was an application for the removal/variation of condition following the granting of planning permission under Section 73 of the Town & County Planning Act 1990 to vary a condition only (as planning had already been granted previously) a PAC was not required in this case.
23. The Council has further stated that it is possible there has been confusion with regards to its planning form as this details 'pre-application advice/consultation' which is completely different to the PAC referred to above (but sounds very similar). This pre-app advice relates to any planning applicant asking for pre-application advice; for example to ask if planning is likely to be granted or even required which is a paid for service.

The balance of the public interest test arguments

24. The Commissioner acknowledges the presumption in favour of disclosure provided for under regulation 12(2) of the EIR, and the general public interest in transparency and accountability. However, she can find no evidence that the correct planning process has not been followed, or that withholding the information would inhibit the public from making an informed comment on the planning application. She also considers that the public interest in this exception will always be strong due to the fundamental importance of the general principle of upholding the administration of justice, and in particular, the importance of not prejudicing inquiries.
25. The Commissioner also recognises the degree of harm which would be done to the course of justice is closely linked to the timing of the request and the associated stage that a relevant process has reached. She accepts that the disclosure of information during an ongoing investigation is significantly likely to cause a greater degree of harm to

an enquiry than after its completion. She therefore considers that the balance of the public interest is weighted in favour of maintaining the exception and the Council was entitled to rely on regulation 12(5)(b) in respect of the withheld information.

Right of appeal

26. 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

27. 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.
28. 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

**Catherine Dickenson
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