

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 6 March 2020

Public Authority: West Berkshire District Council
Address: Council Offices
Market St
Newbury
RG14 5LD

Decision (including any steps ordered)

1. The complainant has requested a Habitat Survey relating to a specific planning application. West Berkshire District Council withheld the information under the exception for the protection of the environment – regulation 12(5)(g).
2. The Commissioner's decision is that West Berkshire District Council has correctly withheld the requested information under regulation 12(5)(g).
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 28 May 2019, the complainant wrote to West Berkshire District Council (the "council") and requested information in the following terms:
"Phase 1 Habitat Survey prepared by the applicant of Planning application no: 18/02485/OUTMAJ"
5. The council responded on 18 June 2019. It stated that it was withholding the information under the exception for the protection of the environment – regulation 12(5)(g) of the EIR.
6. Following an internal review the council wrote to the complainant on 9 August 2019. It stated that it was maintaining its position.

Scope of the case

7. On 28 November 2019 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the requested information.

Reasons for decision

Regulation 12(5)(g) – Protection of the environment

9. Regulation 12(5)(g) provides an exception from the duty to make environmental information available if it would harm the protection of the environment to do so.
10. In general terms, making environmental information available to the public ultimately contributes to a better environment, by increasing people's awareness and understanding of environmental issues. This principle is recognised in EU Directive 2003/4/EC on Protection of the environment (regulation 12(5)(g)) – EIR guidance 20120516 Version: 1.1 4 public access to environmental information, which the EIR implement.
11. However, there may be situations when disclosing the information would actually have an adverse effect on the environment. The Directive says that a request may be refused if disclosure would adversely affect "the protection of the environment to which such information relates, such as

the location of rare species" (Article 4(2)(h)). So if, for example, a public authority holds information about the breeding site of a rare bird species and disclosing the location of the site would expose the site to interference or damage, then the exception may be relevant because disclosure could adversely affect the protection of the environment.

12. To refuse a request for environmental information under the exception in regulation 12(5)(g), public authorities will need to establish:

- that the information in question relates to the aspect of the environment that is being protected;
- how and to what extent the protection of the environment would be affected; and
- that the information is not on emissions

13. The council has explained that the Phase 1 Habitat Survey was withheld under Regulation 12(5)(g) for the following reasons (addressing the criteria identified in paragraph 12):

- The information in question relates to the aspect of the environment that is being protected as the council has a duty to safeguard protected species and concerns relating to these are highlighted in the Habitat Survey.
- The protection of the environment is likely to be adversely affected by releasing sensitive information relating to the location of protected species as past experience has shown that illegal activity is highly likely to occur as a result. The council has stated that, in addition, releasing the document and redacting the areas that relate to 'environmentally sensitive areas' (as suggested by the complainant) would identify the information relating to the specific protected species that had been redacted. Consequently, as the release of information under EIR automatically places it in the public domain, there is no way of preventing the information being used for illegal activity, which would harm the elements of the environment in question.
- The information does not relate to emissions.

14. The council has provided additional arguments in relation to the adverse effects which it considers disclosure would cause to the protection of the environment.

15. The council confirmed that it has a duty of care for the protection of identifiable species and, being a large rural authority with 75% of it being within an Area of Outstanding Natural Beauty (AONB), it has significant populations of great crested newts, bats, badgers, otters and water voles. The council confirmed that, in light of this, it does not release technical reports on any planning applications for fear that disclosure could lead to criminal activity. The council provided the Commissioner with the following examples of relevant criminal activity:
- a. A developer submitted an application without the necessary environmental requirements for planning and was told he had to supply the information. Instead he demolished the building which contained bats. The ecologist employed by the developer subsequently telephoned the council to report what had occurred as she did not want to be associated with his actions.
 - b. The largest private orchard in Berkshire was destroyed following the Planning Authority's refusal to grant planning permission, making it possible for a new planning application to be submitted two years' later when all the ecological data had been set to zero.
 - c. The council was in the process of building a new primary school in Theale and had installed netting to prevent protected species from nesting. This was criminally destroyed by environmentalists wishing to prevent the development¹.
16. The council has submitted that, given these examples, it is concerned beyond 50% that releasing this information would put wildlife in the area at risk. It clarified that, in addition, this specific site has been subject to a local plan examination, which was followed by a public examination by an independent Planning Inspector who found it to be suitable for residential development. The council considers that all of the environmental information was debated at that time.
17. From the evidence she has seen, the Commissioner is satisfied that the requested information relates to the aspect of the environment that is being protected, namely, information relating to the location of protected species, and, therefore, it falls within the scope of this exception.

¹ The council provided the following link to an associated news report:
<https://www.newburytoday.co.uk/news/home/26965/council-to-remove-bird-netting-from-theale-hedgerows.html>

18. Disclosure under the EIR is essentially a disclosure into the public domain. The Commissioner accepts that disclosing the report would enable a person to do something that would harm the elements of the environment in question - disclosure would provide intelligence about the location of protected, identifiable species, intelligence which could be used by members of the public intent on interfering with, or damaging, the site and the species in question.
19. As disclosure of the withheld information would endanger the protected species in question, and would adversely affect the protection of the environment, the Commissioner has determined that the exception at 12(5)(g) is engaged and has gone on to consider the public interest test.

Public interest in disclosure

20. The council has argued that disclosure of the information would generally promote transparency of its planning processes and accountability of public authorities and spending.
21. The complainant has specifically argued that it is believed that the data contained within the withheld information is inaccurate in reflecting the significance of the wildlife and ancient woodland areas.
22. With regard to the accuracy of the data, the council has argued that it addressed this point at a meeting of its Executive meeting held on 30 May 2019 in response to a specific question posed by the complainant. The council has argued that it was able to show that the data provided by the Thames Valley Ecological Records Centre, which was included in the Extended Phase 1 Habitat Survey was more advanced than that of the Forestry Commission.
23. The complainant has further argued that data in the withheld information is expected to highlight further recommendations highlighting the call for additional surveys to assess the extent and existence of wildlife. The council has stated that bullet point 3 of approved policy HSA15, which was adopted following public examination addresses this concern and states '*The scheme will be supported by an extended phase 1 habitat survey together with further detailed surveys arising from that as necessary.*'. The council confirmed that additional surveys were provided to the local planning authority but not made publicly available.
24. The complainant has argued that the council is seeking to introduce a pathway which will disturb the habits of protected species. They submitted that Natural England and Woodland Trust have issued letters

advising of the implications of their actions but that the council has failed to take into consideration their advice.

25. The council has counter-argued that a case officer's report, which was submitted to the Eastern Area Planning Committee on 18 September 2019, confirms that Natural England did not have any objections to the application in question. The council has further argued that the location of the pathway was planned sensitively, and Natural England had no objections to this either. In relation to comments made by the Woodland Trust, the council has argued that, although they are a pressure group and not a statutory body, it considers that it is clear from the case officer's report that these were taken into consideration². The council has further argued that, should the complainant have wanted to contest the decision made by the Eastern Area Planning Committee to grant planning permission, they could have taken it to judicial review.
26. The complainant has argued that ecological/environmental data relating to other development areas with similar challenges, within the immediate vicinity, is available within the public domain. The council has stated that it does not agree with the complainant's assertion that the ecological/ environmental data relating to other development areas with similar challenges within the immediate vicinity is available within the public domain, as this is incorrect.

Public interest in maintaining the exception

27. The council has argued that there is a public interest in avoiding harm to the environment, and the release of information on protected species would identify their whereabouts.
28. It has further argued that it is highly likely that this information would be used for illegal purposes such as hunting if it is obtained by people with criminal intent, which should be avoided.
29. The council has argued that the public interest in this matter has been served by the fact that an Extended Phase 1 Habitat Survey has been carried out by professional ecologists.

² The case officer's report is published online here:
<http://planning.westberks.gov.uk/rpp/index.asp?caseref=18/02485/OUTMAJ>

30. The council has submitted that, even though there is a general public interest in making environmental information available, it is considered this is outweighed by the concern that the information would be used to the detriment of the environment.

Balance of the public interest

31. The Commissioner acknowledges that there is always some public interest in disclosure of information to promote transparency and accountability in the work of public authorities.
32. In assessing the weight of the arguments for disclosure, she has taken into account the nature of the information and the timing of the request. She has also taken into account how far disclosing the requested information would further the public interests identified. She is also mindful that Regulation 12(2) specifically states that a public authority shall apply a presumption in favour of disclosure.
33. However, the Commissioner must also take into account the purpose of the exception – namely to allow a public authority to refuse to disclose environmental information if it would harm the protection of the environment to do so. Having accepted that regulation 12(5)(g) is engaged at all means that there is some public interest in not disclosing the information.
34. The Commissioner has balanced the real and significant threat to the protected species in question which would occur through disclosure against the public interest arguments in favour of disclosure. She recognises that there is a public interest in providing reassurance that public authorities have taken proper advice where there is a possibility that protected species would be threatened. However, where disclosing such information which would provide reassurance would undermine the very protection which is being sought, significant counterbalancing reasons for compromising this protection will need to be provided.
35. The Commissioner is mindful that the complainant has genuine concerns about the matters addressed in the withheld information and she acknowledges that these concerns carry some genuine public interest weight in favour of disclosure. However, she also notes that the council has convincingly rebutted the specific concerns raised by the complainant.
36. The Commissioner also accepts that information relevant to this matter has been available as part of the planning approval process and that this process provides a mechanism and remedy for addressing concerns. The Commissioner does not consider it to be her role to assess whether public authorities have reached correct or defensible decisions in

relation to governance of planning matters. Whilst the complainant has raised concerns in good faith about the council's handling of the associated planning application in this case, it is not within the Commissioner's remit to reach any conclusions in this regard, nor is it the purpose of the EIR to provide an alternative route for scrutiny already provided by established planning law.

37. Having considered the arguments and reviewed the information at issue, the Commissioner does not consider that the disclosure of the withheld report justifies the risk to the protection of the environment. She has therefore concluded that the council correctly applied regulation 12(5)(g) to the request in this case.

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@justice.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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