

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

**Date:** 13 July 2020

**Public Authority:** Sheffield City Council  
**Address:** Town Hall  
Pinstone Street  
Sheffield  
S1 2HH

**Decision (including any steps ordered)**

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1. The complainant has requested pre-application planning details for a specific address from Sheffield City Council (the "Council"). The Council provided some information but withheld the remainder, citing regulations 12(5)(d) (confidentiality of proceedings), 12(5)(e) (commercial confidentiality) and 12(5)(f) (voluntary supply of information) of the EIR.
2. The Commissioner's decision is that the Council has correctly applied the exception at regulation 12(5)(d) of the EIR. However, the Council breached regulation 11(4) by failing to provide its internal review response within the required 40 working days.
3. The Council is not required to take any steps to ensure compliance with the legislation.

**Background**

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4. The request refers to planning applications, details of which can be found by inputting the planning reference numbers (in the request below) into the Council's planning portal<sup>1</sup>.

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<sup>1</sup> <https://planningapps.sheffield.gov.uk/online-applications/>

5. Requests for advice may be made by developers prior to submitting planning applications (pre-planning enquiries). This is to identify any possible issues before the submission of a formal planning application.
6. 15/03023/FUL concerns the development of an existing property, the application being made in August 2015. There were no pre-planning enquiries made for this application.
7. The withheld information in this case relates to a pre-planning enquiry which was subsequently made (dated between July and November 2016), in connection with the property referred to in application 15/03023/FUL. However, no formal planning application was proceeded with after this enquiry.
8. In May 2018, a formal planning application for a single dwelling next to the property above was submitted (18/01869/FUL). There were no pre-planning enquiries made for this application.
9. Another formal application for this site, in respect of two further dwellings, has since been submitted, in February 2020. This is currently being processed (20/00569/FUL).

## **Request and response**

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10. On 24 September 2019, the complainant wrote to the Council and requested information in the following terms:

*"Please could you send me details of pre-application planning enquiries relating to 27 South Street Mosborough Sheffield S20 5DE.*

*The relevant planning reference number are 15/03023/FUL and 18/01869/FUL".*

11. On 18 October 2019, the Council responded. It provided a link to some information held on its website and refused to provide the remaining information. It cited the following exceptions as its basis for doing so: regulation 12(5)(d) and regulation 12(5)(e) of the EIR.
12. On 23 October 2019, the complainant requested an internal review.
13. Following an internal review, the Council wrote to the complainant on 24 January 2020. It maintained its position in respect of regulations 12(5)(d) and 12(5)(e), and added reliance on regulation 12(5)(f) of the EIR.

## Scope of the case

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14. The complainant contacted the Commissioner on 2 January 2020 to complain about the way her request for information had been handled. The Commissioner required further information, which was provided on 16 January 2020.
15. The complainant has asked the Commissioner to consider timeliness and also the regulations cited to withhold the requested information.
16. During the Commissioner's investigation, the Council confirmed that it wished to withhold all of the remaining information on the basis of regulation 12(5)(d) of the EIR.
17. The Council has described the withheld information as follows:

*"... the developer and architect, sought advice from the council for various proposals. The information which is caught by the request includes drawings and advice issued around which the council and the developer exchanged views".*
18. The Commissioner has viewed the withheld information in this case and agrees with this description.

## Reasons for decision

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19. The EIR provide a right of access to environmental information. That right of access is, of course, subject to a number of exceptions, which allow a public authority to withhold information. The definition of environmental information includes (at regulation 2(1)(c)) information on measures, such as policies, legislation, plans and activities affecting or likely to affect the elements of the environment. The consideration of a planning application is a measure affecting the environment. The right of access to this information should therefore be considered under the EIR.

### **Regulation 12(5)(d) - confidentiality of proceedings**

20. Regulation 12(5)(d) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that public authority, or any other public authority, where such confidentiality is provided by law.
21. It is important to recognise that the test for applying the exception is whether a disclosure to the world at large would undermine the confidentiality of the proceedings in question. Therefore, although some information may have been revealed to one of the parties involved in

the proceedings, the Commissioner will consider the impact of disclosing the withheld information to the general public.

22. The term 'proceedings' is not defined in the EIR. However, the Commissioner in her guidance on this exception<sup>2</sup> has said that she considers that:

*"... the word implies some formality, i.e. it does not cover an authority's every action, decision or meeting. It will include, but is not limited to:*

- *formal meetings to consider matters that are within the authority's jurisdiction;*
- *situations where an authority is exercising its statutory decision making powers; and*
- *legal proceedings.*

*In each of these cases the proceedings are a means to formally consider an issue and reach a decision. 'Proceedings' could include, for example, the consideration of a planning application by a planning authority, or an internal disciplinary hearing in a public authority; both of these have a degree of formality."*

23. In the Commissioner's view the term 'proceedings' should be taken to mean a formal means to consider an issue and reach a decision. Proceedings should be governed by formal rules.

24. The Council has explained:

*"Preplanning applications are an established element of the planning system where key issues are expected to be resolved as far as possible. If a scheme is submitted which fails to meet the council's published planning policy requirements, and there have been no meaningful pre-application discussions, that could be regarded as an unreasonable approach. Such an application runs the risk of being refused without further negotiation.*

*Participation in this stage is voluntary as there is no legal obligation for an individual to do so. There is a fee dependent on the nature of the enquiry. The preplanning process constitutes "proceedings" because it is a formal process falling within the exception".*

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<sup>2</sup>[https://ico.org.uk/media/fororganisations/documents/1626/eir\\_confidentiality\\_of\\_proceedings.pdf](https://ico.org.uk/media/fororganisations/documents/1626/eir_confidentiality_of_proceedings.pdf)

25. The Commissioner accepts that pre-application enquiries and the associated advice have the necessary formality to constitute a 'proceeding' for the purposes of regulation 12(5)(d).
26. The second condition that has to be satisfied when applying regulation 12(5)(d) is that the confidentiality of the proceedings in question has to be protected by law. That confidentiality must be provided for in statute or derived from common law. In this case the Council has said that the information is subject to the common law duty of confidence. The Council advised:

*"The disclosure of this information would adversely affect the duty of confidentiality that attaches to these proceedings, especially where no full application was forthcoming".*

And:

*"I contacted the developer who has said their understanding was that their engagement in the pre-planning application process was with an expectation of confidentiality.*

*I regard the submission of information in the pre-application process as having been imparted under an obligation of confidence.*

*I consider that releasing preplanning application information would damage the general principle of confidentiality itself. Developers submit preplanning applications at their own cost. It would undermine the whole process if information was routinely disclosed to the public at large".*

27. In the Commissioner's view, the common law of confidence will apply where the following two conditions are satisfied. First, the information has the necessary quality of confidence. This means that the information must not otherwise be accessible and be of importance to the confider and not trivial. Secondly, the information was communicated in circumstances importing an obligation of confidence. An obligation of confidence can be expressed explicitly or implicitly.
28. The Commissioner considers that the first element is satisfied; the issue to which the information relates, i.e. pre-application enquiries which were subsequently not proceeded with, is certainly not a trivial one. The Commissioner has also viewed the withheld information and is satisfied that its contents are not trivial.

29. The Commissioner notes that on its planning portal<sup>3</sup>, the Council's "Pre-application enquiry form" for smaller developments (as would be the case here), states:

**"Confidentiality**

*Please note that under the Environmental Information Regulations 2004, the council can be asked for the recorded information it holds. We will consult with third parties as to whether any of the exceptions are engaged, before deciding whether the public interest in withholding the information outweighs the public interest in disclosing the information".*

30. Nevertheless, and in accordance with a previous decision notice which considered the application of regulation 12(5)(d) to pre-application planning advice<sup>4</sup>, the Commissioner accepts that the withheld information has the quality of confidence as it is clearly not of a trivial nature, is not in the public domain, and was communicated in circumstances importing an obligation of confidence.
31. The next step in deciding whether the exception is engaged relates to an adverse effect. The exception is only engaged where disclosing the information would adversely affect that confidentiality. It is not enough that the confidentiality is provided by law, there must also be an adverse effect on that confidentiality.
32. The Commissioner's aforementioned guidance on regulation 12(5)(d) states:

*"'Adversely affect' means there must be an identifiable harm to or negative impact on the interest identified in the exception. Furthermore, the threshold for establishing adverse effect is a high one, since it is necessary to establish that disclosure would have an adverse effect. 'Would' means that it is more probable than not, ie a more than 50% chance that the adverse effect would occur if the information were disclosed".*

33. The interest that is protected by regulation 12(5)(d) is the confidentiality of proceedings, where that confidentiality is provided by law.

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<sup>3</sup> <https://www.sheffield.gov.uk/home/planning-development/pre-application-enquiry>

<sup>4</sup> [https://ico.org.uk/media/action-weve-taken/decisionnotices/2014/1018960/fer\\_0532222.pdf](https://ico.org.uk/media/action-weve-taken/decisionnotices/2014/1018960/fer_0532222.pdf) (paragraphs 53-55)

34. While the Commissioner is mindful that pre-application enquiries and the related advice may be provided within a confidential context, since the introduction of the EIR, authorities should be aware that no information can be subject to a blanket restriction on disclosure. It is the duty of public authorities to show in each specific instance that information is being withheld for the reasons identified in the exception being applied.
35. In this case, the Commissioner does consider that disclosure would have an adverse effect on the confidentiality of the pre-application process as it would damage the general principle of confidentiality itself and result in harm to the interest the exception is designed to protect. Disclosing the specific information requested in this case would discourage full engagement with the pre-application process for fear of the public dissemination of such information. Had the initial enquiries under consideration here led to a formal application, then the Commissioner considers that there may have been a higher expectation by the parties concerned that their earlier enquiries, and any associated advice, may be disclosed in order to further public understanding about the planning development in question. However, this particular pre-planning enquiry was not proceeded with so there would be little, if any, expectation that its details would be disclosed at a date some years later. Put simply, the pre-application enquiries under consideration have been superseded and replaced by two actual formal applications which are viewable on the Council's planning portal.
36. In view of the above, the Commissioner considers that the exception under regulation 12(5)(d) is engaged in respect of the withheld information.

*The public interest test*

37. As the EIR exceptions to the disclosure of information are subject to the public interest test, the Commissioner has gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosing the information, below.
38. The Commissioner invited the complainant to explain why she disagreed with the Council withholding the requested information but she did not provide any reasons in support of her position.

*Public interest arguments in favour of disclosing the requested information*

39. The Council acknowledged that disclosure supports the transparency agenda, making it clear how local authorities deliver services, spend money and make decisions.
40. It also accepted that there is a public interest in any matters relating to planning being disclosed to understand what has been considered by the local planning authority in relation to a particular plot of land and what

was discarded as a result. However, it also noted that this particular pre-application was an initial enquiry which did not proceed and did not lead to a full planning application.

*Public interest arguments in favour of maintaining the exception*

41. The Council argued:

*"There is limited public interest in disclosing information which relates to an interest which is private in nature. Information about the pre-application planning enquiries for an individual property is a private interest and as such there is limited public interest in disclosing this information.*

*It would be unfair to disclose information which the developer has provided to the Council with the expectation that the Council would protect the confidentiality of this information".*

**Balance of the public interest arguments**

42. In considering the public interest arguments the Commissioner notes that the Information Tribunal in *Ofcom v the ICO and T-Mobile* found that: *"for a factor to carry weight in favour of the maintenance of an exception it must be one that arises naturally from the nature of the exception. It is a factor in favour of maintaining that exception, not any matter that may generally be said to justify withholding information from release to the public, regardless of content"*<sup>5</sup>. On appeal to the High Court, Lord Justice Laws confirmed the Tribunal's approach as lawful, commenting (at paragraph 47) that *"the Tribunal's view set out at paragraph 58 was indeed reasonable; but more than that... it accords with the statutory scheme"*.
43. The Commissioner is of the opinion that the arguments presented in favour of maintaining the exception do arise naturally from the nature of the exception and has therefore given them due weight.
44. In line with her guidance on the exception 'Confidentiality of proceedings (regulation 12(5)(d))'<sup>6</sup>, the Commissioner accepts that there will always be a general public interest in protecting confidential information. Breaching an obligation of confidence undermines the relationship of

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<sup>5</sup> Appeal no. EA/2006/0078, para 58

<sup>6</sup> [https://ico.org.uk/media/for-organisations/documents/1626/eir\\_confidentiality\\_of\\_proceedings.pdf](https://ico.org.uk/media/for-organisations/documents/1626/eir_confidentiality_of_proceedings.pdf)



trust between confider and confidant. For this reason, the grounds on which confidences can be breached are normally limited. Therefore, where the exception is engaged, the Commissioner accepts that there will always be some inherent public interest in maintaining it.

45. Countering this, the Commissioner accepts that there is always a general public interest in disclosure. However, in determining the balance of public interest, she considers a key factor is how far the information would add to public understanding. In this case she finds this to be minimal as, in effect, these pre-application enquiries have been superseded.
46. It is noted that the Council contacted the person who submitted the pre-planning application under consideration here and that he objected to its disclosure. He advised that he was well versed with the transparency of the planning process, but as he was only making pre-application enquiries he had no expectation that information relating to his initial enquiries would be disclosed to the wider public in response to an information request. He indicated that his expectation may be different had he submitted a formal planning application.
47. Although the complainant has not submitted any arguments to support her view that the information should be disclosed, the Commissioner notes the Council's comments regarding her private interests in the development. However, it is noted that her concerns are not made in respect of the actual pre-planning application under consideration here, rather they are in respect of the formal application which was made later and which was for a different design. It must also be noted that the interests to be balanced under the EIR are 'public' interests, not 'private' interests and the Commissioner must consider the wider effects on the pre-planning process in respect of disclosure in this case.
48. The Commissioner acknowledges that there is a public interest in transparency in this case to enable members of the public to understand proposals being made at the pre-application enquiries stage and, more generally, in transparency regarding the overall development. However, the pre-application under consideration was not proceeded with - a different design, submitted by a different party, went ahead which did not include pre-application enquiries.
49. Far greater weight, is placed on the ability to carry out the pre-application planning advice process effectively. As stated above, confidentiality is needed to ensure the process is at its most effective.
50. Furthermore, the Commissioner can envisage very little public interest in the disclosure of details of a pre-application which was not proceeded with and has since been superseded.

51. Therefore, taking all of the above into account, the Commissioner considers that the public interest in this case lies in maintaining the exception. Her conclusion is that the exception to the duty to disclose environmental information at regulation 12(5)(d) properly applies to the requested information.

### **Procedural matters**

52. The complainant has requested that the Commissioner also consider the time taken by the Council to respond to her request for an internal review.
53. Regulation 11(4) requires a public authority to inform the requester of the outcome of the internal review as soon as possible and not later than 40 working days after that date on which an internal review was requested.
54. The complainant submitted her internal review request on 23 October 2019, but the Council did not provide its response until 24 January 2020. Given this, the Commissioner finds that the Council has breached regulation 11(4) of the EIR.

## Right of appeal

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55. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

56. 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.
57. 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** .....

**Carolyn Howes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**