

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

**Decision notice**

**Date:** 30 September 2020

**Public Authority:** Snowdonia National Park Authority  
**Address:** [Bethan.Hughes@snowdonia.gov.wales](mailto:Bethan.Hughes@snowdonia.gov.wales)

**Decision (including any steps ordered)**

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1. The complainant requested a copy of a particular pre-application planning file. Snowdonia National Park Authority ('the Authority') withheld the information requested under regulations 12(5)(f) and 12(5)(e). The Commissioner's decision is that the Authority has correctly applied regulation 12(5)(f) to the withheld information. She does not require any steps to be taken.

**Request and response**

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2. On 22 September 2019, the complainant wrote to the Authority quoting a particular planning pre-application reference number and requested information in the following terms:  
*"Can I see the above please".*
3. The Authority responded on 8 October 2019 and stated that the information requested was considered exempt under regulation 12(5)(f) of the EIR.
4. On 8 October 2019 the complainant requested an internal review of the Authority's handling of the request. He stated that the Welsh Government had advised him that planning pre-applications *"are subject to both types of FOI request and that they are open to public consultation"*.

5. The Authority provided the outcome of its internal review on 18 October 2019 and maintained that the information requested was exempt under regulation 12(5)(f). The Authority stated that it also considered regulation 12(5)(e) to apply to the requested information.

## **Scope of the case**

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6. The complainant contacted the Commissioner on 5 December 2019 to complain about the way his request for information had been handled.
7. The scope of the Commissioner's investigation into this complaint is to determine whether the Authority correctly withheld the information requested under regulations 12(5)(f) and 12(5)(e).

## **Reasons for decision**

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### **Regulation 12(5)(f) – interests of the person who provided information to the public authority**

8. Regulation 12(5)(f) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –
  - (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.
9. The Commissioner's published guidance on this exception<sup>1</sup> explains that its purpose is to protect the voluntary supply to public authorities of information that might not otherwise be made available to them. In such circumstances a public authority may refuse disclosure when it would adversely affect the interests of the information provider. The wording of

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1638/eir\\_voluntary\\_supply\\_of\\_information\\_regulation.pdf](https://ico.org.uk/media/for-organisations/documents/1638/eir_voluntary_supply_of_information_regulation.pdf)

the exception makes it clear that the adverse effect has to be to the person or organisation providing the information rather than to the public authority that holds the information.

10. With regard to engaging the exception, and as recognised by the Information Tribunal, a four stage test has to be considered, namely:
  - Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?
  - Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?
  - Has the person supplying the information consented to its disclosure?
  - Would disclosure adversely affect the interests of the person who provided the information to the public authority?
11. Where the four stages of the test are satisfied, the exception will be engaged. The public interest test will then determine whether or not the information should be disclosed.

#### *The Authority's position*

12. The Authority explained that there is no formal or legal requirement for a developer to submit a pre-application advice request. These requests are provided voluntarily by developers in order to identify any potential issues early in the planning process so that they can be given consideration before deciding whether to submit a formal planning application. As such, the withheld information in this case was supplied by the developer on a voluntary basis.
13. The Authority also confirmed that pre-application advice requests are not planning applications and are therefore not subject to the normal public access requirements and formal reporting of plans in the same way that planning applications are. The Authority is therefore of the view that the developer submitted the request with the reasonable expectation that it would remain confidential. As such, the Authority considers that it would be unable to disclose the information other than in response to a request under the EIR.
14. On receipt of the original request the Authority consulted with the developer to ask for their views on disclosure. The developer confirmed that they considered the information to be confidential until such time as a formal planning application was submitted.
15. As with all the exceptions in regulation 12(5), the threshold necessary to justify non-disclosure, because of adverse effect, is a high one. The

effect must be on the interests of the person who voluntarily provided the information and it must be adverse.

16. The Authority explained that the pre-application advice request and subsequent initial response by the Planning Officer concerns a proposal for a large housing development which would be classed as a large, major development. The Planning Officer in this case raised a number of issues which needed to be considered prior to moving ahead with any plans. A request from the agent for a meeting in October 2019 was made, which was later cancelled as the agent needed more time to consider matters with their client. No progress has been made in terms of moving plans forward since, and the Authority considers the pre-application advice stage to be open and ongoing.
17. The Authority explained that, due to its nature, the proposal is of significant interest in the local community and is likely to attract a number of strong objections as well as supporters. The plans are at a very early 'scoping' stage, and there is no certainty that the development will go ahead. The Authority considers that disclosure of the withheld information would adversely affect the interests of the developer as they will be drawn into responding to local tensions and objections on plans which may be substantially amended before any application is submitted, or perhaps abandoned altogether. By being forced to defend its position at this initial stage of development the developer will have to spend time and money defending its plans which have yet to be confirmed.
18. The Authority advised the Commissioner that it is rare for it to receive pre-application advice requests for large major residential developments, due to its area being a national park. This demonstrates the potential significance of this development as such opportunities are few and far between, and there are potentially large financial gains for the developer. The Authority pointed out that the developer is likely to have commercial competitors and as such disclosure of commercially sensitive plans will have an adverse effect on the developer. The Authority explained that it is entirely possible, and legal, to submit a planning application on land that an applicant does not own. This course of action would be open to any competitor of the developer who could also move to purchase the land in question or make an increased offer to the landowner.

#### *The Commissioner's position*

19. The Commissioner accepts that, unlike formal planning applications, there is no statutory requirement in terms of publishing pre-application planning documentation in the same way that certain planning information has to be made available via a public planning file.

20. The complainant has suggested that as the development in this case is classed as a 'major development' the developer needs to undertake statutory pre-application consultation in accordance with the Planning (Wales) Act 2015. In light of this, he considers the information should be disclosed. He provided the Commissioner with links to Welsh Government guidance relating to this statutory consultation process.
21. The Commissioner has considered the information provided by the complainant and she also put this point to the Authority. The Authority confirmed that, should the developer in this case decide to proceed with the proposed development, they would need to undertake a statutory public consultation allowing at least 28 days for responses. Responses received to this public consultation would then need to be presented in the form of a consultation report to the Authority as part of the formal planning application process. In essence, this will mean that the developer will be required to make plans, drawings and associated documentation publicly available as part of the statutory consultation process, prior to submitting a planning application. The Authority pointed out that this public consultation process is entirely different to the pre-application advice process that it operates, which the withheld information relates to. It also confirmed that there is no requirement on it to make any pre-application advice documentation publicly available before any statutory public pre-application consultation. The Authority confirmed that, as the developer in this case has yet to proceed with any planning application, no public consultation has taken place to date.
22. The Commissioner has considered the evidence provided by the complainant and considers that the statutory public consultation he referred to does not refer to pre-application advice requests and dialogue with local planning authorities prior to deciding whether to proceed with a development. The Commissioner understands that, under the statutory pre-application consultation process, developers are required to consult with three groups:
  - Adjoining owners and occupiers to the application site;
  - Community consultees; and
  - Specialist consultees.
23. The complainant has also stated that *"pre-apps are subject to both types of FOI request"*. Whilst all official information held by a public authority is subject to the FOIA and the EIR in that an individual can make a request for it this does not necessarily mean that it will be released as it could be subject to an exemption/exception from the duty to disclose.

24. The Commissioner has been provided with correspondence the Authority has had with the developer regarding its views about disclosure of the withheld information. The Authority consulted with the agent both at the time the request was received and again as a result of the Commissioner's investigation and on both occasions the agent has refused consent to disclosure of the information in question. The Commissioner also notes that at the time the developer sought pre-application advice, it indicated that:

*"Due to the commercial sensitivity of the proposal, we request that this pre-application enquiry and any response is confidential".*

25. Based on the evidence available to her, the Commissioner accepts that the developer in this case was not under any obligation to supply the information to the Authority as the pre-application advice is a voluntary process and developers are not obliged to seek pre-application planning advice prior to submitting a planning application. The Commissioner also accepts that the Authority is not entitled to disclose the information other than under the EIR.
26. The Commissioner interprets the wording of "would adversely affect" in regulation 12(5)(f) to set a relatively high threshold in terms of likelihood which has to be met in order for the exception to be engaged. She does not consider it sufficient that disclosure may or could have some level of adverse effect but rather that disclosure *would* have an adverse effect and the likelihood of this happening must be more substantial than remote.
27. The Commissioner notes that the pre-application advice request was submitted at a very early scoping stage and at the time of the request, and still now, there is no certainty that the development will go ahead, or indeed that a formal planning application will be submitted. The Commissioner accepts that, had the information been disclosed at the time of the request, the developer may then have faced significant objections to plans which it may have decided not to formally submit. This would clearly have had an adverse effect upon the developer's interests. If, as in the case, the developer was continuing to consider their options as regards the proposed development, disclosure of the withheld information might have caused it to delay any formal application and it may have incurred costs as a result of the actions of interested parties who would seek to prevent the development occurring prior to the planning application process.
28. Whilst the Commissioner has not been provided with specific evidence of any commercial competitors of the developer she accepts 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.

29. Having considered the withheld information and the relevant arguments, the Commissioner is satisfied that disclosure of the withheld information prior to a decision being made regarding the relevant planning application would result in adverse effects to the developer's interests.
30. As she has determined that regulation 12(5)(f) is engaged the Commissioner has gone on to consider the public interest test.

***Public interest in disclosing the information***

31. The Authority acknowledges that there is a public interest in transparency and openness regarding the pre-application planning advice. Disclosure would provide the public with assurances of probity in planning decisions where planning applications are subsequently submitted. However, the Authority considers that there is a 'time and place' for making such information available. For that reason, pre-application advice is made public on receipt of a valid planning application. The Authority does not consider there is a public interest in disclosing advice on development proposals which may never come to fruition.

***Public interest in maintaining the exception***

32. The Authority stated that:

*"The whole purpose of the pre-application planning service is for developers to be able to get advice on the issues which need to be taken into consideration before formulating their final plans, to ultimately save time and money for themselves. In the same way, the Authority gains by receiving higher quality applications with fewer issues that need to be addressed, which again saves on costs for the planning service and avoids delays in the processing of applications. If it became known that the information in the pre-application advice process is released on a regular basis, developers will be far less likely to use and pay for this service, and instead will bypass it and move directly to submitting an application. This is clearly not in the wider public interest, as we are a publicly funded authority".*

33. The Authority considers that there is a public interest in maintaining regulation 12(5)(f) as developers should be able to discuss initial proposals with the Authority in a full and frank matter in order that any potential issues are identified and discussed. The Authority believes developers are entitled to 'thinking space' when scoping initial plans and to have time to consider any advice from the Authority and reconsider

their proposal, if necessary. The Authority is of the view that it is reasonable for the developer to expect that this can be done privately, without public scrutiny.

34. The Authority confirmed that, as a large major development, there is a statutory requirement for the developer in this case to undertake public consultation on proposals prior to submitting a formal planning application. This requirement means that the public will have access to plans and will be able to comment on, or object to, any proposals much sooner than with other planning applications. The Authority considers that the statutory consultation process allows a much greater opportunity for the public to scrutinise and participate in planning applications of this nature.
35. The Authority acknowledged that it is right and proper that this development will be subject to full public scrutiny, but only at such time when the proposals have been progressed sufficiently to enable the developer to confirm they are in a position to submit a planning application. At the time of the request, there was no such certainty and the Authority considers that the public interest in maintaining this exception is particularly strong whilst proposals are at such an early stage in the planning and development process.

### ***Balance of the public interest test***

36. The Commissioner accepts that there is an inherent public interest in transparent and accountability, particularly in cases like this where planning decisions involve large developments which are likely to have a significant impact on the local community.
37. The Commissioner acknowledges that the pre-planning application service enables to developers to address any potential issues or difficulties with development proposals prior to submitting a formal planning application. The Commissioner considers that the ability for developers to submit confidential requests for pre-application advice will arguably save the Authority's and the developer's time, money and resources. She accepts that disclosing information relating to the pre-application process would result in harm, both in terms of time and expenditure, to the interests of the developer.
38. Whilst the Commissioner accepts that the withheld information might be of interest to those potentially affected by the proposed development, she does not consider that its disclosure would enhance understanding of the actual scope or character of the development or enable informed decisions to be made as to whether to support or object to the development. As identified by the Authority, the pre-application advice was sought at a very early stage in the process and a number of issues



were raised which the developer would need to consider before submitting any formal application.

39. The Commissioner considers that 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 including the statutory pre-application consultation process, which this specific development would be subject to. The Commissioner does not consider that it is the purpose of the EIR to circumvent existing procedures within planning law and the mechanisms for public scrutiny which already exist. Whilst she acknowledges that facilitating public engagement with environmental issues is one of the general principles behind the EIR, she does not consider that, in this case, disclosure of the withheld information would assist in furthering this principle, at least not to the extent that any public benefit would outweigh the public interest in protecting the interests of the information provider.
40. Having considered the relevant facts and the submissions provided the Commissioner has concluded that, in this case, the balance of the public interest favours maintaining the exception.
41. As the Commissioner has determined that the information is exempt under regulation 12(5)(f) she has not gone on to consider the Authority's application of regulation 12(5)(e).

## Right of appeal

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42. 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)

43. 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.
44. 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 .....

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