

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 13 December 2022

Public Authority: Bolsover District Council
Address: The Arc
High Street
Clowne
Derbyshire S43 4JY

Decision

1. The complainant requested information from Bolsover District Council ("the Council") relating to a planning application.
2. The Council relied on both regulation 12(5)(e) (commercially confidential) and regulation 12(5)(f) (impact on provider) to withhold the requested information.
3. The Commissioner's decision is that the Council has correctly engaged both regulation 12(5)(e) and regulation 12(5)(f) and that the combined public interest of maintaining both exceptions outweigh the public interest in disclosure.
4. The Commissioner does not require the Council to take any steps.

Request and response

5. The complainant made the following information request to the Council on 11 November 2021:

"Could you please ensure that I receive a copy of all correspondence relevant to the live Planning application that BDC have had with Waystone or others over the last 3 years since June 2018 until today.

In particular any exchanges with highways England and DCC Highways regarding the M1 junction and Barlborough roundabout and highway major junctions issues."

6. On 9 December 2021, the Council refused to provide the requested information stating that some of the information was already publicly available and directed the complainant to the relevant part of its website where some of the requested information could be seen. The Council also cited regulation 12(4)(d) (information in the course of completion), regulation 12(4)(e) (internal communications) and regulation 12(5)(f) (confidentiality of commercial or industrial information) of the EIR as its basis for withholding information.
7. In its internal review the Council maintained this position and additionally cited regulation 12(5)(d) (confidentiality of proceedings) of the EIR.

Scope of the case

8. The complainant contacted the Commissioner on 14 March 2022 to complain about the way their request for information had been handled.
9. The Commissioner notes the complainant's argument that their request is for information dating from June 2018 to the date of the request and that, in this case, a planning application had been made and outline planning permission granted in June 2018, subject to a section 106 legal agreement pursuant to the Town and Country Planning Act 1990. The complainant objected in particular to the Council's reliance on the confidentiality of its pre-application advice service in this context.
10. The Commissioner commenced his investigation on 7 November 2022 with a letter to the Council inviting the Council to reconsider the request and provide submissions setting out which exceptions in the EIR it wished to rely on to withhold information. The Commissioner noted that the Council cited regulation 12(5)(f) in its response but then referred to confidentiality of commercial or industrial information. The Commissioner pointed out to the Council that regulation 12(5)(e) was the exception for commercial or industrial information and invited the Council to clarify which exceptions it was relying on to withhold information.
11. On 29 November 2022, the Council issued a response to the Commissioner. The Council agreed that it had incorrectly cited 12(5)(f) of the EIR. The Council explained that, on reflection, both regulation 12(5)(e) and 12(5)(f) applied to some of the withheld information and went on to explain to the Commissioner its reasoning in respect of these two exceptions.

12. In its response to the Commissioner, the Council explained that on 26 June 2018 the Council approved outline planning permission for the development in question (App no: 17/00640/OUT) subject to a section 106 legal agreement containing a number of conditions which required substantial negotiation.
13. The Council explained that the withheld documents related to exchanges and negotiations in relation to the planning conditions which required a highly technical solution.
14. The Council also explained that the resolution to grant permission subject to the above conditions had now expired and any re-submitted application would need to be reconsidered with reference to the recently adopted Local Plan, any changes in national policy, and any other material changes in circumstances since 2018.
15. The Council explained that should it receive a re-submitted planning application, the public would get another opportunity to provide comments through the formal consultation process. Additionally, if and when the conditions for discharge were satisfied, then the formal consultation with statutory consultees, e.g., National Highways and Derbyshire County Council Highways would be published on the Council's website together with the final design of junction 30 and the Treble Bob roundabout and relevant risk assessments and technical information.
16. The Commissioner requested copies of the withheld information which was subsequently provided to him by the Council.
17. The Commissioner considers that the scope of his investigation is to determine whether the Council is entitled to rely on regulations 12(5)(e) and 12(5)(f) of the EIR to withhold information.

Reasons for decision

18. The following analysis sets out why the Commissioner has concluded that the Council was entitled to rely on regulation 12(5)(e) and 12(5)(f) of EIR this particular case.

Regulation 12(5)(e) – Confidentiality of commercial or industrial information

19. Regulation 12(5)(e) states that:

“a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.”

20. The Commissioner’s published guidance on this exception explains that, in order for this exception to be applicable, there are a number of conditions that must be met. These are:
 - Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality provided to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?
21. The Council explained to the Commissioner that some of the withheld information is commercial in nature as it relates to the development of land.
22. The Council further explained that the information was provided by the developer under the common law duty of confidence, i.e., it is of importance to the developer, it is not in the public domain, it was provided in confidence and the developer would not expect the information to be disclosed to the public.
23. The developer is a commercial organisation which would expect to be allowed to protect its bargaining position in the context of negotiations with the Council and other stakeholders, namely National Highways and Derbyshire County Council Highways, regarding its proposed technical solution to the conditions imposed on its planning application.
24. The developer’s economic interest would be adversely affected by disclosure of the withheld information. For example, the developer commissioned a report modelling differences in traffic impacts for two potential scenarios. This is highly technical and complex work which would be of value to other developers.
25. Moreover, the resolution to grant planning permission has now lapsed and it is possible that the developer may not make another application. Therefore, the withheld information relates to a planning matter which is not currently live.
26. On this basis, the Commissioner has decided that disclosure would have an adverse effect on the confidentiality of the commercial

information and therefore regulation 12(5)(e) has been found to be engaged.

Regulation 12(5)(f) – detriment to the confider

27. Regulation 12(5)(f) of the EIR states 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”

27. As with all the Regulation 12(5) exceptions, the Commissioner considers that, in order to demonstrate that disclosure “would adversely affect” a confider’s interests, a public authority must demonstrate that the adverse effect is more likely than not to occur.

28. The Council argued that the developer was under no legal obligation to provide the withheld information to the Council relating to the discharge of the planning conditions at the stage the information was provided. Furthermore, the developer did not supply the information or undertake negotiations with the expectation that the Council would disclose it to the world at large. The Council explained that the developer had not consented to the disclosure of the information nor would be likely to due to its commercially sensitive nature (as explained in relation to regulation 12(5)(e) above).

28. The Council firmly believes that disclosure of the withheld documents would adversely affect the developer’s interests as the documents contain details of complex negotiations with the Council and National and Derbyshire County Council Highways as to what would be acceptable in terms of planning policies and planning considerations, including risk assessments. This negotiation process ultimately serves to save both the Council (and statutory consultees) and the developer from spending unnecessary resources on planning applications (discharge of conditions or resubmitted planning application) that are not likely to succeed due to unresolved issues.

29. For broadly the same reasons as in relation to Regulation 12(5)(e), the Commissioner considers that disclosure of the withheld information would adversely affect the provider of the information – therefore Regulation 12(5)(f) also applies to the withheld information.

Public interest test

30. The Commissioner has found that the withheld information is covered by both Regulation 12(5)(e) and Regulation 12(5)(f). The EIR allow the public interest test to be aggregated.
31. In this case, the public interest in disclosure is the same, regardless of the exception applied, namely that planning processes should be transparent.
32. The Commissioner understands that this particular planning matter is of great significance to the local area and is therefore of great interest to the complainant. The Commissioner also acknowledges that the Council's reference to the confidentiality of its pre-application service as the initial reason given to the complainant for withholding information was confusing in the context of this case.
33. However, having seen the withheld information and received a substantial explanatory response from the Council, in the circumstances of this case, the Commissioner is satisfied that the public interest in transparency is met by the disclosure of the information that the Council has already placed in the public domain. Furthermore, should a re-submitted planning application be made, the public would get another opportunity to provide comments through the formal consultation process. Additionally, if and when the conditions for discharge were satisfied, then the formal consultation with statutory consultees, e.g., National Highways and Derbyshire County Council Highways would be published on the Council's website together with the final design of junction 30 and the Treble Bob roundabout and relevant risk assessments and technical information.
34. The Commissioner is required to consider the aggregated public interest in maintaining both exceptions. There is a strong public interest in protecting information which has a commercial sensitivity as disclosure will damage the ability of the subject of that information to compete on a level playing field with its competitors. There is also a likelihood that similar developers will not entrust the Council with their commercially sensitive information in the future – and that in turn could lead to poorer decision-making in planning matters, which is not in the public interest.

35. More broadly (and particularly relevant to Regulation 12(5)(f)), public authorities rely on a supply of environmental information being provided to them on voluntary basis. This helps to inform the formulation, development, and implementation of policy. If individuals and organisations do not trust the Council with sensitive information, they will be less candid with the Council and the Council will therefore find it more difficult to perform its statutory functions – this would not be in the public interest.
36. The Commissioner has therefore decided that, in all the circumstances, the aggregated public interest in maintaining the application of regulation 12(5)(e) and 12(5)(f) outweighs the public interest in disclosure.

Right of appeal

37. 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

38. 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.
39. 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

Michael Lea
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