

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 26 October 2022

**Public Authority:** Herefordshire Council  
**Address:** Plough Lane  
Hereford  
HR4 0LE

#### **Decision (including any steps ordered)**

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1. The complainant requested from Herefordshire Council ("the Council") the pre-application advice for a proposed housing development. The Council withheld the requested information under regulation 12(5)(f) (Interests of the person who provided the information) of the EIR.
2. The Commissioner's decision is that the Council was entitled to withhold the requested information under regulation 12(5)(f).
3. The Commissioner does not require the Council to take any steps.

#### **Request and response**

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4. On 16 December 2021, the complainant wrote to the Council and requested information in the following terms:  
"Old Kilns Site 205812/ce  
On 5<sup>th</sup> April 2020 all pre application advice.  
(Planning Ref: P20444/3/0)"
5. The Council responded on 14 January 2022. It issued a refusal notice stating that the information was withheld under regulation 12(5)(f).

6. Following an internal review, the Council wrote to the complainant on 21 March 2022. It maintained its original response.

## Scope of the case

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7. The complainant contacted the Commissioner on 26 March 2022 to complain about the way their request for information had been handled, and specifically that the Council was not entitled to withhold the information under regulation 12(5)(f).
8. The scope of this case and of the following analysis is whether the Council was entitled to rely upon regulation 12(5)(f) to withhold the requested information.

## Reasons for decision

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### Regulation 12(5)(f) – Interests of the information provider

9. Regulation 12(5)(f) states:

*For the purposes of paragraph 1(a), 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...*

10. 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

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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)

adversely affect the interests of the information provider. The wording of 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 it.

11. The guidance also explains that, with regard to engaging the exception, - and as recognised by the First-tier Tribunal (Information Rights) in the case of *John Kuschnir v Information Commissioner and Shropshire Council (EA/2011/0273)*<sup>2</sup> - 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?
12. 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.
13. The Council has stated that the information provider is a planning applicant for a proposed development. The Council has further stated that there is no formal or legal requirement for the planning applicant to make a request for pre-application advice, and that the planning applicant has confirmed to it that they do not consent to the public disclosure of the information in question.
14. The Commissioner is therefore satisfied that the first three stages of the test have been met.

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<sup>2</sup>[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i750/2012\\_04\\_25%20Mr%20Kuschnir%20decision.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i750/2012_04_25%20Mr%20Kuschnir%20decision.pdf)

Would disclosure adversely affect the interests of the person who provided the information to the public authority?

15. In considering whether there would be an adverse effect on the interests of the person who voluntarily provided the information, the Council needs to identify harm to the person's interests which is real, actual and of substance, and to explain why disclosure would, on the balance of probabilities, directly cause harm.
16. There is no requirement for the adverse effect to be significant – the extent of the adverse effect would be reflected in the strength of arguments when considering the public interest test (i.e., once the application of the exception has been established). However, a public authority must be able to explain the causal link between disclosure and the adverse effect, as well as why it would occur. The need to point to specific harm and to explain why it is more probable than not that it would occur reflects the fact that this is a higher test than 'might adversely affect', which is why it requires a greater degree of certainty. It also means that it is not sufficient for a public authority to speculate on possible harm to a third party's interests.
17. The Council has explained the basis of why it considers disclosure would adversely affect the interests of the person:

"Release of the requested information at this stage in the process, with outline permission yet to be granted and a potential reserved matter application yet to be considered, could potentially raise further tensions in the area which are not based on final facts. Release would re-ignite objections amongst local residents, leading to further comments which are not relevant to the application under consideration, but would result in further time and costs in having to address these, which would further delay a decision on this application. This would result in harm which is real, actual and of substance, directly causing harm to interests in terms of time and expenditure to the applicant given the controversial nature of the development."
18. Having considered the Council's explanation, the Commissioner is satisfied that the disclosure of the information would adversely affect the interests of the planning applicant. He has therefore concluded that the Council was correct to apply the exception provided by regulation 12(5)(f).

The public interest

19. As the exception is engaged for the information, the Commissioner has considered the associated public interest test required by regulation 12(1)(b). The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. When carrying out the test the Commissioner must bear in mind the presumption towards disclosure provided in regulation 12(2).

*The public interest in disclosure*

20. Some weight must always be attached to the general principles of accountability and transparency. These in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
21. In the circumstances of this case, the Commissioner recognises that disclosure of the information would provide public transparency about the pre-application advice that the planning applicant received in respect of a subsequent planning application. The Commissioner understands that this planning application is contested by local residents on the basis that it will impact negatively upon their homes and local infrastructure, as well as the cause environmental issues such as drainage problems.

*The public interest in maintaining the exception*

22. The Council argues that there is an inherent public interest that the pre-application advice relating to an un-determined planning application is subject to appropriate confidentiality. Should such information be routinely disclosed to the public it would inhibit prospective applicants' willingness to use the process, a benefit of which is that it reduces the burden upon the Council and prospective applicants in dealing with planning applications that are not likely to success due to unrealised issues.
23. In the context of this case, the Council further argues that the planning application was un-determined at the time of the request, and that individuals had the ability to engage with, and influence the outcome of the application, through the statutory planning process.

*The balance of the public interest test arguments*

24. The Commissioner accepts that there is an inherent public interest in transparency and accountability, particularly in cases like this where the proposed development will impact upon a local community.
25. The Commissioner acknowledges that the pre-planning application service enables developers to address any potential issues or difficulties with development proposals at an early stage of the planning process,

and 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 Council and developer time, money and resources. He 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.

26. 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. 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 he acknowledges that facilitating public engagement with environmental issues is one of the general principles behind the EIR, he 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.
27. Having considered the relevant facts the Commissioner has concluded that, in this case, the balance of the public interest favours maintaining the exception.
28. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner (SGIA/44/2019)*, "If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).
29. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(5)(f) was applied correctly.

## **Right of appeal**

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30. 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: 0203 936 8963

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)

31. 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.
32. 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 .....**

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