

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

Date: 31 March 2022

Public Authority: Caerphilly County Borough Council

Address: foi@caerphilly.gov.uk

Decision (including any steps ordered)

1. The complainant requested pre-planning information in respect of a proposed expansion at Trinity Fields School. Caerphilly County Borough Council (the Council) withheld the information under regulation 12(4)(e) (internal communications) of the EIR. The Commissioner's decision is that the Council has correctly applied regulation 12(4)(e) to the request. He does not require any steps to be taken.

Request and response

2. On 23 January 2021 the complainant wrote to the Council and requested information in the following terms:

"Has there been a formal pre-application enquiry submitted for the proposed expansion of Trinity Fields School? If so we would like a copy of the response from the planning department including any consultation responses".
3. The Council issued a refusal notice on 12 March 2021 stating that the information requested was exempt under regulation 12(4)(e) of the EIR.
4. On 22 March 2021 the complainant requested an internal review of the Council's decision to withhold the information requested.

5. The Council provided the outcome of its internal review on 4 May 2021 and upheld its decision that the information was exempt under regulation 12(4)(e).

Scope of the case

6. The complainant contacted the Commissioner on 5 May 2021 to complain about the way their request for information had been handled.
7. The scope of the Commissioner investigation into this complaint is to determine whether the Council was entitled to withhold the information under regulation 12(4)(e).

Reasons for decision

Regulation 12(4)(e) – internal communications

8. Regulation 12(4)(e) provides an exception for information which constitutes an 'internal communication'. In order for the exception to be engaged it needs to be shown that the information in question constitutes a communication within one public authority, specifically, the authority to which the request is made.
9. The exception for internal communications is class-based, meaning that there is no need to consider the sensitivity of the information in order to engage the exception. However, such factors might be relevant when considering the balance of the public interest.

Is the exception engaged?

10. The withheld information in this case consists of emails between council officers for the purpose of obtaining observations, comments and recommendations about the Council's proposal to improve/develop Trinity Fields School and Resource centre, which provides support to children with learning difficulties. The emails were sent with the purpose of obtaining/providing pre-planning advice in respect of the proposed development.
11. The Commissioner notes that the potential planning applicant in this case is the Council itself, specifically the Education Department. A number of Council departments, such as the Ecology department and Environmental Health were consulted in order to provide pre-application advice to the planning applicant.
12. Having viewed a sample of the withheld information the Commissioner is satisfied that the information comprises communications that were

solely "internal" to the Council as it consists of emails exchanged only between Council officers. As such, the exception at regulation 12(4)(e) is engaged. The Commissioner has therefore gone on consider the public interest test

The public interest test

13. Regulation 12(1)(b) requires that where the exception under Regulation 12(4)(e) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. The Commissioner is mindful of the provisions of Regulation 12(2) which state that a public authority shall apply a presumption in favour of disclosure.

Public interest in favour of disclosing the information

14. The Council has acknowledged that there is a public interest in transparency and openness in its decision making. The Council accepts that in this case there is a significant public interest in the disclosure of information relating to the proposed expansion of Trinity School along with the possible loss of a public open space. The Council recognises that the public is interested in any proposals for the site and advised that there are strong feelings both in favour of additional facilities proposed for the school and against the loss of an open space to accommodate the proposed extension to the school. Disclosure in this case could provide the public with a clearer understanding of proposals and the issues considered by the Council throughout the process. This could enable the public to more actively participate in the decision making process.
15. The Council accepts that planning decisions and the planning process should be as open and transparent as possible, particularly where decisions may affect an entire community, as in this case. However, the Council considers that this requirement would be served at the formal planning application stage when relevant information would be made publicly available and the application would be open for comments and objections by the public. The Council also pointed out that disclosure of the pre-application information would be of limited use as proposals and plans may differ from any formal planning application that is submitted as the planning agent (the Education Department) would have taken into account the feedback, comments and recommendations made during the pre-application stage.
16. The Council also confirmed that it took into account the presumption in favour of disclose under regulation 2(2) when deciding where the public interest lies in this case.

17. The complainant considers that pre-planning advice should be robust and impartial and they would be concerned if an officer considered unable to discuss planning concerns openly. The complainant pointed out that the Council's refusal to release the information requested in this case could apply to any pre-planning discussions concerning local authority proposed developments as such communications would always be classed as internal communications. The complainant does not think that this would be in the public interest.
18. The complainant advised that "the proposed development has been scrutinised in the public domain and by several elected committees and a decision notice has already been issued to move to planning stage". The complainant also advised that a number of elected members had raised questions about the proposal, which had not been addressed. The complainant pointed out that the development proposed, is sited "on a public playing field funded through public funds which have increased from £5m to £12.7m". They disagree that it is in the public interest for the requested information to be withheld in this case.

Public interest in maintaining the exception

19. The Council pointed out that there are considerable benefits to planning applicants utilising the pre-planning application advice service as early discussions can help to address any potential issues prior to a formal application being submitted. Pre-planning advice is a voluntary process which is aimed to help the applicant "receive advice prior to the submission of a formal application and enables the Council to highlight any planning issues in principle or requirements affecting an individual case at an early stage. This enables the planning process to run more smoothly and often speeds up the planning process. Any disruption or hindrance to this process would not be in the public interest".
20. The Council reiterated that the information includes details of observations, comments and recommendations received from officers from a number of department in relation to the proposed works at Trinity School. The Council considers it is important that officers "are able to identify and consider what is needed to achieve the goals of the project they are required to deliver and what the options are and then determine what is feasible before a planning application is submitted for consideration via the formal planning process".
21. The Council considers that disclosure of the withheld information in this case would impact on officers' ability to work together and discuss matters freely. The communications were made for internal purposes only to assist officers in the Education department in respect of a possible planning application. The Council contends that disclosure would inhibit the ability of the officers involved to debate the potential planning issues and prevent a free and frank exchange of views. As a

result, the quality of advice and decision making would suffer as a result.

22. The Council considers it important that it has a safe space to debate issues relating to the proposal away from public scrutiny and disclosure of the withheld information could have a chilling effect on the free and frank exchange of views in the future. The Council confirmed that the proposed development at Trinity School has not yet progressed beyond the pre-application stage and as such it considers the matter very much 'live'. In light of this, officers need a safe space to consider the pre-application advice received without interference from external sources. The Council acknowledges that officials are expected to be impartial and robust in meeting their responsibilities and the possibility of disclosure should not necessarily deter them from expressing their views. However, in this case the Council believes that disclosure would lead to a loss of frankness and candour by officers when providing pre-application advice. In addition, the Council considers that disclosure could have a chilling effect when future pre-planning applications are considered.
23. The Council advised that the project has attracted considerable interest from the local community both in favour of and against the proposal. It has resulted in members of the public putting information about the proposal on social media platforms, which includes details of staff positions involved in the project. The Council contends that disclosure of the information would inhibit officers expressing their views and opinions about the project, which would in turn undermine the decision-making process as a whole. The Council believes it is important for good governance that officials are able to fully engage with each other away from the public gaze and there should be no disincentive to doing so.
24. The Council considers that disclosure would result in officers spending time and resources justifying why an option was or was not being considered and whether sufficient weight was being given to a particular option. The Council confirmed that the proposal is still a 'work in progress' and will gather momentum as various stages of the project are reached. The Council considers that it is important that it is able to "consider all options and this requires a private space in which to undertake scenario planning and risk assessment. In this context, disclosure of advice and opinions may close off discussion, undermining frank reporting and the identification and assessment of potential risks".
25. Finally, the Council considers that disclosure may result in developers in the future being more reluctant to engage in the pre-planning application process. This could in turn undermine the relationship between developers and the Council and therefore adversely affect the Council's ability to effectively manage the planning process. This would not be in the public interest.

Balance of the public interest

26. The Commissioner's guidance¹ on this exception explains that although a wide range of internal information will be caught by the exception, public interest arguments should be focussed on the protection of internal deliberation and decision-making processes. This reflects the underlying rationale for the exception being that it protects a public authority's need for a 'private thinking space'.
27. With regard to attributing weight to the public interest arguments in favour of maintaining the exception, the Commissioner accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This may carry significant weight in some cases. In particular, the Commissioner considers that the need for a safe space will be strongest when the issue is still live.
28. The Commissioner appreciates that there is strong local public interest in matters concerning the proposed expansion of the school and the potential loss of green space and that there are individuals both in favour of, and against the proposal. The Commissioner accepts that disclosure of the withheld information would provide the public with an insight into the options that are being considered for the site.
29. The Commissioner acknowledges that the pre-planning application service enables developers the opportunity to eliminate any potential difficulties with prospective applications prior to formal submissions.
30. Whilst he accepts that the withheld information might be of interest to those potentially affected by the proposed development, he does not consider that its disclosure would necessarily 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 Council, the planning application that is submitted in the future is likely to be different from the version submitted as part of the pre-application process. Any planning decision on the development will be made on the information provided as part of the formal planning process and not on any speculative, initial proposals.
31. It is clear to the Commissioner that, at the time of the request, the proposed development was at an early stage and still very much live.

¹ <https://ico.org.uk/media/for-organisations/documents/2021/2619005/12-4-e-internal-communication-31122020-version-31.pdf>

The Commissioner notes that, at the time of this decision notice the development has still not progressed being the pre-application stage and no planning application has yet been submitted. The Commissioner therefore accepts that the Council required a safe space in order to deliberate issues around the potential development. The Commissioner considers that if planning matters relating to the development were completed then the risk of prejudicing the planning process would be reduced. However, this is not the case, therefore the need to maintain the safe space gives more weight to the argument for maintaining the exception. He also recognises the danger of a 'chilling effect' on future internal deliberations about the subject matter being caused through disclosure of the withheld information.

32. 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, the Commissioner considers that the argument for a safe space for internal communications carries significant weight in this case. Given the detrimental impact that disclosure may have on the quality of decision making, there is a stronger public interest in not disclosing the withheld information.
33. Having considered the relevant facts and the circumstances of this case, the Commissioner's view is that the balance of the public interest favours maintaining the exception. 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(4)(e) was applied correctly.

Right of appeal

34. 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

35. 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.
36. 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
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