

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 4 April 2022

Public Authority: Coventry City Council
Address: The Council House
Earl Street
Coventry
CV1 5RR

Decision (including any steps ordered)

1. The complainant requested the pre-application planning advice relating to particular planning applications. Coventry City Council (the 'Council') ultimately denied holding the requested information.
2. The Commissioner's decision is that the Council correctly handled the request under the EIR. He also finds that, on the balance of probabilities, the Council does not hold the requested information for the reasons set out in this notice. However, by failing to provide its substantive response to the request within 20 working days, the Council has breached Regulation 5(2) of the EIR.
3. The Commissioner does not require the Council to take any steps to ensure compliance with the legislation.

Background

4. The request below involves 'informal' planning related advice. From the explanation given by the Council, the Commissioner understands that pre-application advice is confidential advice given to an applicant. It is not a formal planning submission and does not form part of the planning register.
5. The Council stated that:

"When officers give pre application advice they make it clear that the advice is "the informal opinion of an officer and does not constitute formal determination."

And:

"Our pre application advice will tell the potential developer what we expect to see if, and when, they submit their formal application. We would expect any application will have taken pre application advice on board."

6. The Council also explained that there is no requirement for officers to keep formal minutes of meetings relating to the provision of informal advice. Pre-application meetings are to discuss the matters ahead of a report to the applicant that sets out those matters.
7. The Council advised that (post this request) it now charges for pre-application advice and provides a more detailed response to the applicants whereas, previously, an officer may have set it out in an email to them.
8. In the case under consideration here, the Council has advised the complainant that:

"The Outline application has been granted permission and is available to view on the Council's website. Information has been requested about informal pre application discussions and advice given to the applicants and not in respect of the Outline application that was formally submitted."

Request and response

9. On 13 April 2021, the complainant wrote to the Council and requested information in the following terms:

"Full disclosure of the pre-application advice given by the Council as follows:

Planning application Out/2016/1874. Box 5 refers to advice given by [name redacted] on 5/5/2016,

Planning application RMM/2019/3059. Box 7 refers to advice given under reference Prep2019/0172.

Full details of both please."

10. The Council responded, late, on 17 May 2021. It denied holding some of the requested information (as referenced by boxes 5 and 7 in the request). Specifically, it said:

“Furthermore, with regards to the two responses requested (references to Boxes 5 and 7) we are unable to locate the responses and therefore advising you as per Regulation 12(4)(a) of the EIR (Information not held). It is possible that this advice may have been given in a meeting from an officer.”

11. The Council also appeared to confirm that it held some information about the pre-application advice but was refusing to provide it:

“After consideration, the Council believes the pre-application advice falls under the exception of Regulation 12(5)(e) of the EIR (confidentiality of commercial or industrial information).”

12. It said that the associated public interest favoured maintaining the exception.

13. The complainant requested an internal review on 19 May 2021 raising a number of points.

14. The Council provided its internal review outcome on 16 June 2021. It apologised for the delay in issuing its substantive response to the request, and addressed each of the points raised by the complainant. The Council clarified its original position:

‘To clarify our original response, we have confirmed that we were unable to locate the specific information you requested and therefore confirmed it was not held by the Council.

Our searches concluded that the specific information is not held. The Council has no reason to request the pre application advice from the applicant as we have no need to see it. However, you may wish to contact the applicant directly to request this information. When officers give pre application advice they make it clear that the advice is the “informal opinion of an officer and does not constitute formal determination.”’

15. The Council also advised the complainant as follows:

“We have provided responses to all the points raised. In summary, the pre application advice is not held. However, if records were located, the Council believes the pre-application advice falls under the exception of Regulation 12(5)(e) of the EIR (confidentiality of commercial or industrial information) whereby disclosure of the confidential information would cause harm to the legitimate interests of the applicant.”

16. The Commissioner understands that the complainant had raised a formal corporate complaint relating to the subject matter of the request; however, this is not material to this investigation so he has not considered this aspect any further.

Scope of the case

17. The complainant originally contacted the Commissioner on 16 May 2021 to complain about the way her request for information had been handled. At that point her complaint focussed on the lack of a substantive response to her request.
18. The Commissioner notes that the Council's response was provided the following day without any further action on his part, and that the complainant had then requested an internal review.
19. Following the Council's internal review, the complainant remained dissatisfied with its handling of her request and asked the Commissioner to investigate her complaint, which was set out in a letter of 7 July 2021.
20. Although the complainant has raised concerns about the Council's reliance on Regulation 12(5)(e) (amongst other issues), on 28 March 2022, as part of its investigation response, the Council confirmed it was withdrawing its reliance on Regulation 12(5)(e);, the Commissioner had understood this to be the Council's intention but the confirmation makes its position definitive.
21. Furthermore, on 29 March 2022, the Council advised the Commissioner as follows:

“...the Council's original response initially applied the Regulation 12(5)(e) exception as it was of the opinion that pre-application advice met the criteria within the regulation, based on the nature of the ultimate planning application to which it related. The application was for a housing development which ultimately the applicant would be looking to dispose of the individual units on a commercial basis (for profit) and it is the Council's opinion that the information would have caused harm to the legitimate interests of the applicant if disclosed. Although the pre-application advice does not form part of the actual planning register, it is advice given as to what the Council would expect to see and which would be expected to be taken on board, if and when, a formal application is submitted, which in this case it had done.

However, once the searches had been undertaken in relation to the pre-application advice and it was found that the Council did not hold this information, this exemption should not have been applied and only Regulation 12(4)(a) should have been engaged. This was an error on our behalf and we acknowledge that this should have addressed this in both our original response and review”.

22. The Commissioner has, therefore, considered whether the requested information is environmental. He has also examined whether, on the balance of probabilities, the Council holds any information in scope of the request. In addition, he has considered the delay in this case.

Reasons for decision

23. The Commissioner has first considered whether the Council was correct to handle the request under the EIR.

Is the requested information environmental information?

24. Regulation 2(1) of the EIR defines environmental information as any information in any material form on:

- “(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)."
25. The Commissioner considers that the phrase "any information...on" should be interpreted broadly. In this case the requested information concerns information associated with a specific planning application.
26. The Council told the Commissioner it considered that the request fell under the EIR for the following reasons:
- "As per the guidance [Commissioner's guidance¹], information about planning matters and planning decisions are very often environmental information. The information being requested was the pre-application advice given in confidence by the Council to the applicant. This advice sets out what the Council would expect to see if and when a formal application is submitted. It is therefore expected that any application will have taken the pre application advice on board and thereby used in that planning application."
27. The Commissioner considers that any information held within the scope of the request would fall within regulation 2(1)(c) "activities affecting or likely to affect the elements and factors referred to in (a) and (b)".
28. The Commissioner is, therefore, satisfied that the requested information constitutes environmental information and that the Council was correct to handle the request under the EIR.
29. He will next consider whether, on the balance of probabilities, the Council holds any of the requested information in accordance with Regulation 12(4)(a) of the EIR.

Regulation 5(1): duty to make information available

Regulation 12(4)(a) – information not held at the time of the request

30. Regulation 5(1) of the EIR states that, subject to other provisions, a public authority holding environmental information shall make it available on request.

¹ <https://ico.org.uk/for-organisations/regulation-2-1-what-is-environmental-information/>

31. Regulation 12(4)(a) provides an exception from the duty to make information available if the authority does not hold the requested information at the time of the request.
32. In cases where there is a dispute as to the information held by a public authority, the Commissioner will use the civil standard of proof, ie the balance of probabilities. Accordingly his investigation will consider the public authority's reasons for stating that it does not hold the information in question, as well as the extent and reasonableness of any search conducted. The Commissioner will also consider any arguments put forward by the complainant as to why the information is held (as opposed to why it ought to be held).

The complainant's view

33. The complainant submitted the following as part of her grounds of complaint:

'CCC [the Council] loss of all documents is of particular concern. CCC states that all documents relating to this request, are lost i.e. "cannot be located". This covers any documents pre Outline application and Reserved matters (including latest communications which CCC admit to in another Corporate Complaint response). However, regardless of loss of all documents, reports, communications, minutes of meetings which have taken place, CCC can comply with the information/records they do hold.'

The Council's view

34. In response to the Commissioner's investigation, the Council has explained the following:

"Investigations were originally made of the planning portal and the planning application indicates that pre-application advice was given. Boxes 5 and 7 are the corresponding boxes within the planning applications that states whether pre-application advice was given. However, as it has been pointed out to the requester, the pre-application advice is confidential advice given to the applicant and does not form part of the planning register itself.

Searches were conducted of the planning department data store using the references generated for the pre-application advice (shown within the planning application), however it was subsequently identified that no records were held.

At the time of the pre-application advice being given (2016 and 2019) there was no requirement for officers to keep formal minutes of a meeting that is providing informal advice.

Therefore, this advice may have been sent out in an email to the applicant. From the application forms it only identifies one individual who gave advice in 2016 and who is no longer with the Council. Therefore, searches could not be made of their personal email accounts as this account will have been deleted following his departure from the Council.

As there was no requirement to retain this guidance, it is not a case that the information has been lost, deleted or destroyed but that it was never retained, as we had no reason to do so as it does not form part of the planning register, as stated previously.

We would advise that Coventry City Council have introduced and now charge for pre-application advice and provide a more detailed response to the applicants.”

The Commissioner’s decision

35. The Commissioner’s remit is to establish whether, on the balance of probabilities, information falling within the scope of the request is held.
36. However, based on its submissions above, the Commissioner is satisfied by the Council’s explanations as to why no pre-application advice exists. He considers the Council’s searches to have been reasonable and understands that the Council’s former officer, who may have given informal advice in 2016 by way of email to the applicant, has left the Council and his email account has not been retained.
37. The Commissioner’s decision, on the balance of probabilities, is that no information is held in scope of the request and that the Council was, therefore, correct to state that it did not hold the requested information.
38. The Commissioner does not require the Council to take any steps in respect of this decision.

Procedural Matters

Regulation 5(2) – Duty to make environmental information available on request

39. Regulation 5(2) of the EIR says that the public authority must make the information available as soon as possible and no later than 20 working days after the date of receipt of the request.
40. In this case, the Council failed to respond in full to the request within 20 working days. The complainant submitted her request for information on 13 April 2021. The Council provided its substantive response after 22 working days on 17 May 2021.

41. Whilst noting the Council's explanation that the delay was attributed to officers considering the criteria for the Regulation 12(5)(e) exception, the Council failed to provide its substantive response within the requisite 20 working days' timeframe.
42. As such, the Council has breached regulation 5(2) of the EIR.

Other matters

43. The Commissioner has made a record of the delay in this case. He expects the Council to comply with the statutory deadlines when responding to future requests.
44. The Commissioner will use intelligence gathered from individual cases to inform his insight and compliance function. This will align with the goal in his draft "Openness by Design strategy"² to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in his "Regulatory Action Policy"³.

² <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

³ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

45. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

46. 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.
47. 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
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