

The Environmental Information Regulations 2004 (the EIR)

Decision notice

Date: 28 September 2023

Public Authority: South Hams District Council
Address: Follaton House
Plymouth Road
Totnes
Devon
TQ9 5NE

Decision (including any steps ordered)

1. The complainant requested information from South Hams District Council (the Council) regarding internal communications in relation to a specific planning application. The Council disclosed some information but withheld the rest under Regulation 12(4)(e) of the EIR.
2. During the course of the Commissioner's investigation the Council disclosed further information but withheld the remainder under Regulation 12(4) (e) of the EIR.
3. The Commissioner's decision is that the Council has successfully engaged Regulation 12(4)(e) with the public interest balanced in favour of withholding the requested information.
4. The Commissioner does not require any steps to be taken.

Request and response

5. On 16 February 2023, the complainant made the following request for information:

"1. Could we please see the officer report recommending approval of planning application (redacted) sent to Ward Councillors (names redacted) on or around 20.01.2023.

2. Could we also have copies of all emails and correspondence at LPA level relating to this application (i.e. between members of the planning team, consultees, Ward members and the Parish Council).

6. The Council responded to the request for information on 16 March 2023. It stated:

'Thank you for your request for information.....which has been considered in accordance with the Environmental Information Regulations (2004) (EIR).

External correspondence between Officers and the planning agent, Members and the Parish Council and other correspondence with external consultees is released (please see the attached).

However, in accordance with Part 3, (12)(4)(e) correspondence sent to or from Officers and Ward Members, Including the Officer Report you have requested, constitute internal communication and are therefore considered exempt from release. Whilst the application has been determined, the application is within the time period for an appeal to be made to the Planning Inspectorate and therefore the Council considers the planning application to be live and release of these emails and other internal records could inhibit planning officers from carrying out their work. In this case, there is a need for officers to work in a 'safe space' to allow a free and frank debate and reach decisions without being hindered by external comment, without the 'chilling effect' which is likely to flow from the disclosure of emails. Protecting the integrity of the decision-making process is important. Releasing the emails and experiencing the 'chilling effect' would likely lead to poorer quality advice and would produce less well formulated decisions.

In accordance with 13(1) of the Environmental Information Regulations (2004) the names of junior officers operating in an administrative capacity have been redacted'.

7. As the complainant was dissatisfied with the Council's response, they requested an internal review on 17 March 2023 stating that:

'In the case of -(redacted). Prima facie it appears that the influence of the ward members views following referral of the recommendation to approve culminated in a revised officer delegated report. Should this be the case it would represent an unreasonable deviation from due process, suggesting non planning matters were considered in order to refuse the scheme. FOI request (redacted) seeks to clarify in this respect.

It is for the public good that public authorities are held to account. Where there is a plausible suspicion of wrongdoing, this creates a public interest in disclosure. As this FOI request relates to matters of probity within the planning process then the public interest case outweighs (name redacted) argument that potential harm in terms of a chilling effect might occur amongst members of the planning office.

Therefore, the internal communications and the original case officers report both fail the test for qualified exemption on the grounds of public interest'.

8. The Council carried out an internal review and upheld its original decision.
9. The complainant contacted the Commissioner in March and April 2023 to complain about the way the Council had responded to their request.
10. On 12 May 2023 the Commissioner contacted the Council for copies of all the requested information asking for it to specify which information had been redacted or withheld and under which EIR exception or exceptions.
11. The Council responded on 28 May 2023 by sending the Commissioner copies of the requested information, including that which had been disclosed, redacted or withheld. The Council also disclosed a copy of an email together with a draft report from a case officer which it mistakenly withheld from the complainant as it deemed it to be an internal email when it was not. In this draft report (which the Council has clarified was dated 18 January 2023) the case officer recommended 'conditional approval' of the planning application'. The Council gave the Commissioner permission to pass this report and the email to which it was attached to the complainant which he did on 1 June 2023. This report was the one requested by the complainant in question 1 of his request dated 16 February 2023.
12. On receipt of this information the complainant stated that he wanted to see all the requested information to clarify why the case officer's subsequent report dated 3 March 2023 recommended that the planning application be refused. He said disclosure of the requested information in its entirety would help to establish why the original recommendation was reversed. He said it was important to know if 'officers were told/asked/encouraged to change their view as a result of influence from ward or parish councillors who, if they did not agree with the officer recommendation, were supposed to rely on the committee process to discuss their concerns in a public forum'. The complainant also stated he required clarification as to whether the landscape officer and others had

been consulted prior to the planning officer's original recommendation or afterwards prior to the subsequent report to see whether 'undue influence' had been applied. Finally, he pointed out that disclosure of the email circulating the case officer's first report revealed that a ward member diverted from the normal planning process by forwarding the report to the Parish Council and inviting councillors' comments as to whether the case should go to committee rather than making his own independent decision. The complainant believed these matters were suggestive that the Council failed to follow the correct planning process.

13. The Commissioner put these points regarding the manner in which the planning application was apparently processed to the Council on 13 June 2023 as evidence it deviated from the normal planning process which the complainant argued was a public interest argument in favour of the requested information being disclosed.
14. The Council responded on 23 June 2023 and disclosed an internal 'information sheet' which established that no internal consultees were consulted at the point the planning application was registered. The Council also disclosed an internal email dated 1 February 2023 which it said was evidence the landscape officer was first consulted *after* the initial officer's report was sent to Ward Members.
15. With regard to the change in position from the initial officer's report recommending approval of the planning application, the Council stated it was not uncommon for there to be a difference of opinion between a planning officer's initial recommendation and any subsequent advice provided by senior colleagues. This is what happened in the present case with the Senior Officer identifying that, due to the prominent location, the landscape officer's comments should be sought.
16. The Council disputed that its councillor diverted from the planning process or acted inappropriately. It pointed out that in accordance with the Council's scheme of delegation (which formed part of its constitution) the officer provided the councillors with their recommendation and having received the report, the ward councillor, being aware of local interest in the application, then sought the views of the Parish Council as to their opinion whether the application would benefit being determined by the Development Management Committee, or through the delegated route allowed in the Council's scheme of delegation. The Council pointed out that this was in compliance with the Council's Scheme of Delegation contained within its constitution.
17. In relation to any concerns about the actions of an elected Councillor, the Council pointed out that there were procedures in place to report matters to its Monitoring Officer as a Standards Complaint. It added that it was not aware of any such complaint in relation to the present case.

18. The Council concluded that it did not believe any of the points raised by the complainant (as specified above) tipped the balance of the public interest towards disclosure of the requested information as due process had been followed and the reasons for the original refusal still stood.
19. The Commissioner shared the above comments with the complainant who disputed the Council's statement that due process had been followed. His view was that there was 'significant circumstantial evidence' of undue influence being exerted on the planning decision and disclosure of the internal communications would support this.
20. As the Council disclosed the case officer's report identified in question 1 of the complainant's request during the course of the Commissioner's investigation, the scope of his investigation will be limited to the internal communications referenced in question 2 which the Council has withheld under Regulation 12(4)(e) the EIR.

Reasons for decision

Regulation 2(1) of the EIR – definition of environmental information

21. Regulation 2(1) of the EIR provides the following definition of environmental information:

“...any information in written, visual, aural, electronic or any other 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...”

22. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.
23. The Council has dealt with the complainant's request under the EIR and having seen the requested information the Commissioner is satisfied it is environmental within the definition of Regulation 2(1)(c) of the EIR.

Regulation 5 – duty to make environmental information available on request and regulation 12(4)(a) of the EIR.

24. Under Regulation 5(1) of the EIR and subject to a number of EIR provisions and exceptions, a public authority that holds environmental information shall make it available on request.

Regulation 12(4)(e) – internal communications

25. Regulation 12(4)(e) states that information is exempt from disclosure if it involves 'the disclosure of internal communications'. It is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. Rather, as long as the requested information constitutes an internal communication then it will be exempt from disclosure.
26. However, Regulation 12(4)(e) is subject to the public interest test, therefore where the exception is engaged, the Commissioner must also consider whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure of the disputed information.
27. The Commissioner's guidance on Regulation 12(4)(e)¹ defines the concept of communications as 'broad and will encompass...letters, memos, and emails, but also notes of meetings or any other documents if these are circulated or filed so that they are available to others'.

¹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/regulation-12-4-e-internal-communications/>

28. The information which has been withheld under Regulation 12(4)(e) comprises internal email exchanges between officers, councillors and administration staff discussing the planning application.
29. The Commissioner has viewed the withheld information and is satisfied that it constitutes internal communications and is therefore covered by Regulation 12(4)(e) of the EIR.
30. Having satisfied himself that the requested information is covered by Regulation 12(4)(e), the next step for the Commissioner is to consider the public interest test.

The public interest test.

31. The Commissioner's guidance for public authorities confirms that public interest arguments should focus on the protection of internal deliberation and decision-making processes. This reflects the underlying rationale for the exception which is to protect a public authority's need for a 'private thinking space'. This needs to be weighed against the competing public interest factors in favour of disclosure. The Commissioner has considered the relevant factors below.

Public interest test factors in favour of disclosure

32. The Council has acknowledged the general public interest in transparency in its decision-making processes to promote openness.
33. The Council also acknowledged that disclosure of the requested information would allow the public a better understanding of how the planning process operates and how public finances are spent.
34. The complainant believes it is in the public interest for public authorities to be held to account for decisions made. In this case he believes it is in the public interest for the requested information to be disclosed as it would shed light on the reasons why the original planning case officer's report recommended support for the planning application, but the subsequent one, refused it. The complainant argued it was important to know whether Council officers were told/asked/encouraged to change their view as a result of influence from ward or parish councillors. In the complainant's views any such discussions should take place in a public forum such as a committee. He therefore concluded that the Council failed to follow the correct planning process.
35. The Council did explain during the course of the Commissioner's investigation that it was not uncommon for there to be a difference of opinion between a planning officer's initial recommendation and any subsequent advice provided by senior colleagues. This is what happened in the present case with the Senior Officer identifying that, due to the

prominent location, the landscape officers' comments should be sought. The Council disputed the complainant's allegation that it had not followed due process when considering and making a decision regarding, the planning application.

36. The complainant believes that in cases where there is a plausible suspicion of wrongdoing, this supports a public interest in disclosure. This is because his request relates to matters of probity within the planning process. Such matters, in his opinion, outweigh the arguments of safe space and the chilling effect advanced by the Council.

Public interest test factors in favour of withholding the information.

37. However, referencing the Commissioner's guidance on internal communications² the Council stated public interest arguments in favour of withheld information should be focused on the protection on internal deliberation and decision-making processes. An important underlying rationale for Regulation 12(4)(e) is the protection a public authorities need for private thinking space and the necessity to avoid any chilling effect which would inhibit free and frank internal discussions in decision making.
38. The Council argued that its planning staff should have a safe space to be able to develop ideas, debate live issues and reach decisions away from external interference and distraction. The Council also pointed out that planning matter was still 'live' in the sense that the time period for an appeal to the Planning Inspectorate had not yet passed. For this reason, the safe space argument carried 'significant weight'. The Council stated that the requested information contained discussions, debates and enquiries about a complex case. Therefore, disclosure of this information would mean these discussions, debates and enquiries would be less likely to be fully explored which was not in the public interest.
39. The Council also argued that disclosure of the requested information might have a chilling effect on any future discussions its officers and members might need to have when engaging in free and frank discussions. For example, in this case, discussions by Council officers informed the decision making of the planning application. Disclosure in this case could damage the quality of future discussions in relation to this planning application and any future applications. The Council reiterated that if members and senior officers felt unable to have free

² <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/regulation-12-4-e-internal-communications/>

and frank discussions and conversations on future applications because of the prospect of disclosure, then more junior officers and members would be likely to feel inhibited from seeking appropriate advice. This in turn would lead to poorer decision making and a lack of confidence in the planning application system. The ability of members to engage in the planning process with the expectation that their communications with officers will be protected is critical to local democracy.

40. In conclusion the Council argued that significant weight should be attributed to the safe space and chilling effect arguments in the present case. The Council added that withholding the requested information would not affect the public's right to challenge a planning application during the formal planning process including lodging an appeal with the Planning Inspectorate. The Council also pointed out that the EIR do not circumvent existing planning procedures and the processes for public scrutiny which already exist. Facilitating public engagement with environmental issues is one of the principles behind the EIR. However, the need for a safe space in relation to internal communications for a live planning matter such as the one in this case, carries significant weight and the detrimental impact that disclosure could have on the quality of decision making strengthen the public interest in withholding the information.
41. For the reasons mentioned above the Council believed that the balance of the public interest favours maintaining Regulation 12(4)(e) of the EIR.

Balance of the public interest

42. During the course of the Commissioner's investigation the Council disclosed the planning officer's first report in respect of the planning application which the complainant had identified in question 1 of his request. The only outstanding information therefore is the emails and correspondence at LPA level relating to the application (i.e., between members of the planning team, consultees, Ward members and the Parish Council. This information has been withheld in its entirety by the Council under Regulation 12(4)(e) of the EIR.
43. The Commissioner notes the complainant's belief that disclosure of the outstanding information would help to explain why the planning officer's second report reversed the decision in the first one recommending support. In the complainant's view, the Council failed to follow due process in relation to the planning application and for this reason the public interest supports disclosure of the requested information. The Council also expressed the view that the Council's councillor acted inappropriately and diverted from the planning process.

44. The Commissioner has put these concerns to the Council which has responded by stating that it is not uncommon for there to be a difference in opinion between a planning officer's initial recommendation and any subsequent advice provided by senior colleagues. The Council has also stated that it acted with due process and disputed that its councillor diverted from the planning process or acted inappropriately.
45. The Commissioner accepts there is a public interest in favour of the requested information being disclosed as it would promote transparency and accountability for decisions made and money spent by public authorities. And this applies to the planning process undertaken by the Council.
46. However, the Commissioner also recognises that when considering and making decisions regarding planning applications, a Council should be allowed a safe space to develop ideas, debate live issues and reach decisions away from external interference and distraction.
47. The Commissioner has also taken into account and given weight to the fact that the planning matter is still 'live' in the sense that the window for an appeal to the Planning Inspectorate is still open.
48. The Commissioner also accepts the Council's arguments that disclosure of the requested information might have a chilling effect on any future discussions its officers and members may need to have when engaging in free and frank discussions.
49. In view of the above, the Commissioner's conclusion is that the public interest is balanced in favour of withholding the outstanding requested information.

Right of appeal

50. 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

51. 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.
52. 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

Gerrard Tracey
Principal Adviser - FOI and Transparency
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF