

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

Date: 22 November 2023

Public Authority: Northumberland County Council
Address: County Hall
Morpeth
Northumberland
NE61 2EF

Decision (including any steps ordered)

1. The complainant has requested pre-application advice for specific planning applications. Northumberland County Council (“the Council”) withheld the information under the exception provided by regulation 12(5)(d) (Confidentiality of proceedings) of the EIR.
2. The Commissioner’s decision is that the Council has correctly applied regulation 12(5)(d).
3. The Commissioner does not require further steps.

Request and response

4. On 26 February 2023, the complainant wrote to the Council and requested information in the following terms:

**“Planning Application [redacted by ICO]
Planning Application [redacted by ICO]**

Pre-Application advice was given in respect of the two planning applications detailed above. I would like to know in respect of each application:

- **Who gave this advice**
- **What advice was given”**

5. The Council responded on 15 March 2023, under the reference of 12060. It stated that the requested information was withheld under regulation 12(5)(d).
6. Following an internal review Council wrote to the complainant on 22 May 2023. In this it maintained its position that regulation 12(5)(d) was engaged.

Scope of the case

7. The complainant contacted the Commissioner on 23 May 2023 to complain about the way their request for information had been handled, and specifically that the Council was not entitled to rely upon regulation 12(5)(d).

Reasons for decision

Regulation 12(5)(d) – Confidentiality of proceedings

8. Regulation 12(5)(d) of the EIR says that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.
9. The engagement of the exception rests on three conditions being met.
10. First, the confidentiality referred to by a public authority must specifically relate to the confidentiality of proceedings. In his guidance

'Confidentiality of proceedings (regulation 12(5)(d))¹', the Commissioner interprets 'proceedings' as possessing a certain level of formality. They will include, but are not limited to: formal meetings to consider matters that are within the authority's jurisdiction; situations where an authority is exercising its statutory decision making powers; and legal proceedings.

11. The information withheld under this exception relates to a pre-application advice process offered by the Council. The Commissioner has previously acknowledged in a range of decisions (e.g., FER06996769², FER0900414³, IC-115533-Y4T6⁴, IC-206377-X4X4⁵) that such a process represents a 'proceeding' for the purposes of the exception.
12. The Commissioner is therefore satisfied that regulation 12(5)(d) of the EIR is engaged because the information relates to the Council's pre-application advice process.
13. Second, this confidentiality must be provided by law. The Council has explained that it considers the information to meet the threshold for the common law of confidentiality. This is because the information is not trivial, and was submitted to it voluntarily as part of the pre-application advice process.
14. Having considered the context in which the information has come to be held, the Commissioner is satisfied that this information is subject to the common law of confidentiality.
15. Third, it must be demonstrated that disclosure would have an adverse effect on the confidentiality of the proceedings.

¹ https://ico.org.uk/media/for-organisations/documents/1626/eir_confidentiality_of_proceedings.pdf

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2173203/fer0696769.pdf>

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2618026/fer0900414.pdf>

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022697/ic-115533-y4t6.pdf>

⁵ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4024160/ic-206377-x4x4.pdf>

16. The Council has explained that parties who submit information to it as part of the pre-application advice process will do so in the expectation that it is confidential. Publication of the information would therefore undermine this expectation.
17. On this basis, the Commissioner has decided that disclosure would have an adverse effect on the confidentiality of proceedings. Regulation 12(5)(d) has therefore been found to be engaged.
18. The Commissioner must next consider the balance of the public interest. In doing so, he has taken into account the EIR's express presumption in favour of disclosure and the public interest in transparency and accountability.
19. The Commissioner recognises in this case that there is a public interest that public authorities are appropriately open and transparent about their decision-making processes. This is particularly so in respect of concerns about planning matters.
20. However, and as noted in the above cited decisions, the Commissioner also recognises that there is a strong public interest in ensuring that the Council is able to provide a robust pre-application advice process to prospective planning applicants, the purpose of which is to improve the efficiency and effectiveness of the planning application system, and reduce wasted resources by helping to prevent planning applications being made that are unlikely to be approved. In the circumstances of this case the Commissioner is aware that the matter remains live, with one of the planning applications subject to appeal (as noted in the related decision notice IC-237099-S9Z6). The Commissioner is also aware that the pre-application advice relate to specific residential address – and therefore is connected to a clearly identifiable householder. In the Commissioner's view disclosing the specific information requested in this case would discourage full engagement with the pre-application process, both from this applicant and others, for fear of the public dissemination of such information.
21. The Commissioner has therefore decided that, in all the circumstances, the public interest in maintaining the application of regulation 12(5)(d) outweighs the public interest in disclosure.
22. 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).

23. 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)(d) was applied correctly.

Right of appeal

24. 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

25. 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.
26. 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