

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

Date: 18 December 2023

Public Authority: Buckinghamshire Council
Address: The Gateway
Gatehouse Road
Aylesbury
HP19 8FF

Decision (including any steps ordered)

1. The complainant has requested information about a proposed development and related pre-application advice. The Buckinghamshire Council ("the Council") disclosed some information and withheld the remainder 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 7 March 2023, the complainant wrote to the Council and requested information in the following terms:

“Development at Gomm Valley, High Wycombe

Pursuant to Clause 4.10 Confidentiality and information sharing, of the Planning Performance Agreement (Planning Ref No. PPA21/00007/PP) between Buckinghamshire Council and Taylor Wimpey West London dated November 2021, I request the following information:

1. Under Clause 4.1 The Scope of this PPA, (a) ‘Pre-application advice’, a copy of the issues log recording the LPA feedback, as updated from time to time through the PPA timeline.
 2. Under Clause 4.4 The Local Authority’s Performance Standards the following:
 - b) written advice given by the Lead Officer following pre-application meetings;
 - c) written responses provided by the LPA to report submissions and highway design drafts;
 - e) written responses provided by the LPA to all correspondence, including emails, draft meeting notes and telephone calls.
 3. Under Clause 4.5 The Applicant’s Performance Standards, a) agendas for meetings.”
5. The Council responded on 6 April 2023. It indicated that:
- The information relating to pre-planning application advice was withheld under regulation 12(4)(d); and,
 - The information relating to part 2 e) of the request was withheld under regulation 12(4)(b).
6. On 12 May 2023, the complainant sought an internal review. In this the complainant removed part 2 e) from their request but sought a review in respect of the remaining withheld information.
7. Following an internal review, the Council wrote to the complainant on 28 June 2023. It revised its position and indicated that all the information previously withheld under regulation 12(4)(d) was now withheld under regulation 12(5)(d).

Scope of the case

8. The complainant contacted the Commissioner on 23 August 2023 to complain about the way their request for information had been handled, and specifically that the Council had incorrectly withheld the information under regulation 12(5)(d).
9. During the course of investigation, the Council disclosed some of the previously withheld information, but confirmed that the remainder continued to be withheld under regulation 12(5)(d).

Reasons for decision

Is the requested information environmental?

10. Regulation 2(1) of the EIR defines environmental information as being information 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)...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);

11. The Commissioner has reviewed the information and considers that it relates to 'measures' as defined by (c). For procedural reasons, he has therefore assessed this case under the EIR.

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

12. 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.
13. The engagement of the exception rests on three conditions being met.
14. 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.
15. 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.

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 Commissioner is therefore satisfied that the first condition is met because the information relates to the Council's pre-application advice process.
17. 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, and specifically under a 'Planning Policy Agreement' ("PPA") between the Council and developer.
18. 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 and that the second condition is met.
19. Third, it must be demonstrated that disclosure would have an adverse effect on the confidentiality of the proceedings.
20. 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.
21. On this basis, the Commissioner has decided that disclosure would have an adverse effect on the confidentiality of proceedings and that the third condition is met. Regulation 12(5)(d) has therefore been found to be engaged.
22. 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.
23. 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.
24. 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 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.

25. The Commissioner is also aware, from the Council's submissions, that the planning matter remains live and has not been concluded, and that the developer has indicated that an appeal is to be submitted – which the Council has indicated is likely to take the form of a planning inquiry. The withheld information is likely to form part of the Council's evidence. The Commissioner considers that this further increases the public interest in maintaining the exception.
26. 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.
27. 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).
28. 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

29. 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

30. 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.
31. 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