

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 5 February 2024

Public Authority: The Planning Inspectorate
Address: Temple Quay House
The Square
Bristol BS1 6PN

Decision (including any steps ordered)

1. The complainant requested correspondence between The Planning Inspectorate ("PI") and the Department for Levelling Up, Housing and Communities in respect of the recovery of an appeal about a proposed housing development. PI refused the request under the exception for internal communications (regulation 12(4)(e)).
2. The Commissioner's decision is that PI correctly withheld the requested information under regulation 12(4)(e) but that it failed to carry out an internal review and breached regulation 11(2).
3. The Commissioner does not require PI to take any further action.

Background

4. The complainant in this case is RPS Consulting Ltd (RPS) which acts on behalf of Miller Homes Ltd (Miller Homes).
5. In 2020 Miller Homes submitted a planning application to Cheltenham Borough Council (the "council") for a residential development comprising 350 homes in Shurdington Road, Cheltenham. The application was refused and an appeal was submitted to PI in October 2022.
6. PI explained to the Commissioner that, in March 2023, the Planning Casework Unit (PCU) at the Department for Levelling Up Housing and Communities (DLUHC) notified PI that the appeal should be "recovered". The term "recovery" means that instead of an Inspector deciding the appeal the Inspector will instead make a recommendation and it will be the Secretary of State (SoS) who makes the final decision. PI notified Miller Homes of this in March 2023.
7. In further correspondence with Miller Homes and, in response to the suggestion that the matter had been "de-recovered", PI confirmed that this was not the case and that the appeal decision remained with the SoS. This is the context within which the request under consideration in this decision notice was submitted.

Request and response

8. On 10 July 2023 the complainant wrote to PI and requested the following information:

"I am requesting copies of all correspondence between the Planning Inspectorate and the Department for Levelling Up, Housing and Communities in respect of the recovery and de-recovery of appeal 3309156 - Land South of A46 Shurdington Road, Leckhampton, Cheltenham."
9. PI responded on 7 August 2023 and confirmed that it was withholding the requested information under the exception for internal communications (regulation 12(4)(e)).
10. On 9 August 2023 the complainant asked PI to carry out an internal review.
11. At the time the complainant submitted their complaint to the Commissioner PI had not carried out an internal review.

Scope of the case

12. On 2 November 2023 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
13. The Commissioner has considered whether PI correctly withheld the requested information.

Reasons for decision

Regulation 12(4)(e) - Internal communications

14. 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.
15. PI withheld correspondence falling within the scope of the request between itself and the Department for Levelling-up Housing and Communities (DLHC). It confirmed that PI is an executive agency of DLHC (the parent department).
16. The Commissioner's guidance on regulation 12(4)(e) states:

"Internal communications include communications between an executive agency and its parent department. Communications between executive agencies, or between an executive agency and another central government department, are also internal communications."¹
17. Having considered the above, the Commissioner is satisfied that the withheld information constitutes internal communications and that regulation 12(4)(e) is, therefore, engaged. He has gone on to consider the public interest test.

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/what-are-internal-communications/#executive>

Public interest in disclosure

18. 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.
19. PI has acknowledged that there is always a degree of benefit in making information held by public authorities available as it increases public participation in decision making and aids the transparency and accountability of government, in this case, with regard to maintaining an open and transparent process through which planning decisions are made.
20. PI has further recognised that appeals and subsequent appeal decisions affect the environment in which people live and it has acknowledged disclosure would provide further background information and transparency regarding the communications exchanged between itself and PCU.
21. In relation to the process of recovery regarding the appeal, the complainant has argued that it is in the public interest to clarify the process by which such a decision is made and the role of officials in the decision, regardless of the overall outcome.
22. The complainant has further argued that the planning application proposes dwellings and affordable housing in an area with a housing shortage. It considers that there is both a national and local need for housing and this provides public interest grounds for disclosure.
23. The complainant has also highlighted that a proportion of the proposed development site is situated on land owned by the Church. It is reported that forty per cent of the development comprises affordable homes, mainly for social rent from the Church Housing Association. The complainant has pointed to the Church's support for the development and the Bishop of Gloucester's criticism of the SoS' handling of the matter².

Public interest in maintaining the exception

24. The Commissioner's guidance explains that public interest arguments relating to the exception should focus on the protection of internal deliberation and decision-making processes. This reflects the underlying

² <https://www.churchtimes.co.uk/articles/2023/11-august/news/uk/decision-to-call-in-housing-scheme-is-incomprehensible-bishop-of-gloucester-tells-gove>

rationale for the exception: to protect a public authority's need for a 'private thinking space'.³

25. PI has confirmed that its public interest considerations in this case relate to the protection of thinking space and the ability to have full and frank discussions without concern that the information will be disclosed.
26. PI has argued that the specific concern in this case is that a disclosure of the information would affect the frankness with which officials can have discussions with each other and provide any necessary advice. It considers that disclosure of the information would inhibit discussion and deliberation and consequently undermine and degrade the decision-making process. PI considers that officials need to be able to discuss frankly and with candour, without the inhibition that would be caused if such disclosure was made. PI considers that the public interest in protecting this safe space is heightened here because the planning case in question is still live and a decision has not been reached.
27. PI has argued that there is public interest in protecting the integrity of the appeal process, allowing its staff and PCU staff room to communicate on an appeal, without fear that such exchanges will be disclosed, detracting from PI's ability to process appeals and providing a space around the decision making process.
28. PI considers that future publication of the overall appeal decision will largely satisfy the public interest in this matter. The appeal is still live and the release of the information might be interpreted by those that see them to indicate the eventual outcome of the appeal. PI considers that this type of speculation would not be helpful to any party.

Balance of the public interest

29. The Commissioner recognises that there is a public interest in the openness and transparency of the decision making process regarding this planning matter. He accepts that the public interest in transparency in this case is heightened because of the scale of the proposed development and its potential benefits to the community and also because of the confusion around the 'recovery' decision in this case.

³ <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/the-public-interest-test/>

30. The Commissioner accepts that these factors constitute legitimate arguments in favour of disclosure of the information.
31. The Commissioner also accepts that the intention of the exception is to facilitate effective public authority decision making and to provide a safe space for this to happen. He considers that it is an accepted fact that the need for a safe space will be strong when options associated with a decision are being considered.
32. Disclosing information when a decision has not been reached is likely to have an impact on the effectiveness of the process of deliberation because it may give an inaccurate indication of the nature of the decision and, in turn, prompt enquiries which require engagement and distraction away from the process. The Commissioner accepts that the appeal process provides a mechanism for addressing concerns about the substantive planning matter. Whilst there may be concerns about the process itself, he does not consider these necessarily outweigh the public interest in allowing a decision to be reached as effectively as possible.
33. In relation to the other factors in favour of disclosure in this case, the Commissioner is mindful of the broader public interest in the availability of housing, particularly affordable housing. He also acknowledges the specific context within which the proposed development has been made and he is mindful of the support it has received from the Church.
34. However, he also notes that support for the development is not universal within the local community and there is evidence that many are against it and have been critical of the Church's role⁴.
35. It is not the Commissioner's role to adjudicate on the planning appeal, however, as the complainant has invoked support for the development as public interest grounds for disclosure it is incumbent on him to test these against the available evidence. Having considered the available evidence he does not consider that the selective support for the development carries much weight here.
36. Moreover, as the focus of the request is on the process of the appeal in respect of decisions around the question of "recovery", rather than on the decision itself, the Commissioner considers that there is limited public interest in this information being disclosed. Whilst he recognises the complainant's genuine concern and interest he does not consider

⁴ See, for example: <https://www.gloucestershirelive.co.uk/news/cheltenham-news/cheltenham-residents-blast-bishop-gloucester-8680892>

that the public interest in disclosure outweighs the public interest in protecting PI's ability to carry out its obligations effectively. Having noted that the appeal is still live and that the information is of restricted value he does not think that the public interest benefits of disclosure would justify the damage to PI's ability to reach a decision within a safe space.

37. The Commissioner also accepts PI's argument that the public interest in this matter is served by the provision of the appeal decision, which the Commissioner understands PI has advised the complainant will soon be issued.
38. 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).

39. In this case the Commissioner's view is that the balance of the public interest 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(4)(e) was applied correctly.

Procedural matters

Regulation 11 – internal review

40. Regulation 11(1) of the EIR states:

"Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request."

41. Regulation 11(2) states:

"Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which

the applicant believes that the public authority has failed to comply with the requirement.”

42. In his case the complainant asked PI to carry out an internal review on 9 August 2023.
43. PI failed to issue a review response and the Commissioner, therefore, finds that it breached regulation 11(2).

Right of appeal

44. 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

45. 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.
46. 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

Christopher Williams
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