

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

Date: 18 July 2024

Public Authority: South Kesteven District Council
Address: Council Offices
The Picture House
St Catherine's Road
Grantham
NG31 6TTX

Decision (including any steps ordered)

1. The complainant has requested information about pre-application planning advice relating to a proposed solar farm development. South Kesteven District Council ("the Council") refused the request, citing regulation 12(5)(d) (the exception for confidentiality of proceedings) of the EIR.
2. The Commissioner's decision is that the Council was entitled to apply regulation 12(5)(d) to withhold the requested information.
3. The Commissioner requires no steps as a result of this decision.

Request and response

4. On 5 September 2023, the complainant wrote to the Council and requested information in the following terms:

"Re. proposed Solar Farm on [redacted] I should like to have copies of all records (including correspondence and phone calls) regarding the pre-application advice requested and offered to/from Integrum

Renewable Energy Ltd and, if involved, [name redacted], the landowner who is aiming to lease his land”

5. The Council responded on 31 October 2023, refusing the request under regulation 12(5)(d) of the EIR. It upheld this decision at internal review.

Scope of the case

6. The complainant contacted the Commissioner on 6 March 2024 to complain about the way his request for information had been handled. He disagreed with the application of regulation 12(5)(d) to refuse the request.
7. The analysis below considers whether the Council was entitled to apply regulation 12(5)(d) to refuse the request.
8. The Commissioner has viewed the withheld information.

Reasons for decision

Is the requested information environmental?

9. If information falls within the definition of “environmental information” at regulation 2(1) of the EIR, any request for it must be considered under the EIR.

10. Regulation 2(1)(c) of the EIR applies to information on:

“(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...”.

11. As the requested information relates to planning advice and consent, the Commissioner considers that the requested information is information on measures (regulation 2(1)(c)) as they affect the elements of the environment. 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 in question must specifically relate to the confidentiality of proceedings. In his guidance on regulation 12(5)(d)¹, the Commissioner interprets 'proceedings' as possessing a certain level of formality.
15. The information withheld under this exception relates to a confidential, pre-application, paid advice service, offered by the Council. The Council said that:

"Where the Council receives pre-application advice requests, officers will provide an impartial assessment of those proposals and indicate any potential policy conflicts or shortcomings with the application as well as areas where further information may be required."
16. The Commissioner has previously acknowledged in a range of decisions² that such a process represents a 'proceeding' for the purposes of engaging regulation 12(5)(d).
17. The Commissioner is therefore satisfied that the information in this case relates to the confidentiality of proceedings.
18. 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 as part of the pre-application advice process, which the applicant would consider to be confidential.
19. The pre-application advice process is a voluntary process rather than a statutory function, which is intended to assist developers to identify and address any potential issues early on during the planning process, prior to submitting a planning application for formal consideration. While the

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-12-5-d-confidentiality-of-proceedings-environmental-information-regulations/>

² See, for example, <https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4028767/ic-264856-g0v2.pdf>, <https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4028093/ic-261144-d2h6.pdf>, <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4027925/ic-253477-s4d1.pdf>

planning application and its supporting documents are made available for public consumption and consultation, pre-application advice does not form part of the planning application process or outcome (the applicant may choose to take the advice or not) and is regarded as confidential by both the Council and planning applicants.

20. Having considered the context in which the information has come to be held by the Council, the Commissioner is satisfied that it is subject to the common law duty of confidentiality.
21. Thirdly, it must be demonstrated that disclosure would have an adverse effect on the confidentiality of the proceedings in question.
22. The Council argued that planning applicants have expectations about how their information will be treated. The Commissioner considers that if applicants enter into a part of the planning process they understand to be confidential, and the Council then discloses that information to the world at large, there is likely to be significant damage to the relationship that applicant has with the Council, as well as future relationships that Council may have with that applicant or others.
23. The Commissioner notes in this case that at the time of the request no formal planning application had been submitted, and the possibility therefore remained that further advice might be sought.
24. The Commissioner accepts that, if applicants do not feel they can trust the Council, this would significantly undermine the process of providing a confidential pre-application opinion, and would undermine their ability to have full and frank discussions regarding the planning proposals at hand.
25. The Commissioner understands that part of the purpose of the pre-application process is to avoid the Council spending time and resources on considering inappropriate and non-compliant planning applications. Whilst the pre-application process provides no guarantee that a subsequent application will be approved, it assists applicants, and the Council, by potentially improving the quality of applications.
26. In this case, the Commissioner considers that disclosing the withheld information would discourage full engagement with the pre-application process, by the applicant, and by future applicants, for fear of the public dissemination of such information. The Commissioner is therefore satisfied that disclosure would have an adverse effect on the confidentiality of the pre-application process, as it would damage the general principle of confidentiality itself and result in harm to the interests the exception is designed to protect.

27. The three conditions referred to in paragraph 13 are therefore met and regulation 12(5)(d) of the EIR is engaged.

Public interest test

28. 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 general public interest in transparency and accountability surrounding planning decisions.

Public interest arguments favouring disclosure

29. The complainant argued that any proposal to keep pre-planning application information confidential should only be employed at the express request of the planning applicant, and he referred the Commissioner to guidance issued by the Local Government Association³ which he felt supported that view. He believed the applicant in this case had made no such request. He also said any undertaking of confidentiality given by the Council failed to take account of the EIR's presumption in favour of disclosure.

30. He also argued that the Council's handling of other, similar planning applications was a matter of local public concern.

31. The Council acknowledged that disclosure would serve the public interest in transparency and accountability and that it would increase public understanding of prospective development schemes.

Public interest arguments favouring maintaining the exception

32. The Council offered the following arguments:

- Providing a confidential setting for pre-application advice allows for comprehensive and frank discussions that may not take place if public. Keeping conversations confidential improves engagement.
- Applicants who do not engage with pre-application advice are more likely to have their planning applications rejected, costing the Council more time and money.
- An applicant does not need to follow any pre-application advice provided when submitting any formal planning application. Nor is

³ <https://www.local.gov.uk/sites/default/files/documents/pre-application-services--bf1.pdf>

the decision maker for any subsequent formal planning application bound by any pre-application advice.

33. It also said that the advice given will be reflected in the resultant planning decision:

“...the applicant is not obligated to take the advice. Pre-application advice that is taken will then be included in the application and therefore available, advice that is not taken will also likely be addressed by the council in any rejection.”

Public interest balancing test

34. The Commissioner accepts that there will always be a general public interest in protecting confidential information. Breaching an obligation of confidence undermines the relationship of trust between confider and confidant. For this reason, the grounds on which confidences may be breached are normally limited. Therefore, where this exception is engaged, the Commissioner accepts that there will always be some inherent public interest in maintaining it.
35. The Commissioner understands that the confidential pre-application process is a service that saves public money by enabling the Council to flag up and advise on any planning problems before the formal application stage commences. If pre-application advice was to be routinely published, the Commissioner recognises that some applicants would be deterred from seeking advice. This would result in the submission of greater numbers of poor formal applications which would need refinement and resubmission, increasing the time, effort and expenditure required to deal with planning applications, to the detriment of applicants, the Council and the wider public.
36. The Commissioner recognises that the complainant has a personal interest in the information and he acknowledges that there is a broad public interest in disclosing information that provides transparency around decisions made in respect of planning matters. He also accepts that a solar farm development could potentially affect the wider community, and that it involves a change of use of land, from agricultural to energy generation, and so there is also a broader public interest in making the information available.
37. However, the Commissioner is conscious that the pre-application process is not one which is designed to enable interested parties, including the public, to comment on proposals by applicants. Once a planning application has been submitted, the planning process provides precisely such a role and opportunity. In the Commissioner's view such transparency, and more specifically, this route to public engagement in

the planning process at a later stage in the process (but still prior to a local authority's decision on a particular application) significantly reduces the public interest in the disclosure of confidential information about pre-application planning advice.

38. On the complainant's point that the applicant has not requested that the information be kept confidential, the Commissioner is unaware as to whether that is the case. However, he notes that the guidance the complainant refers to makes it clear that "Councils retain discretion in regard to decisions on disclosure of information in any instance...". He expects any decision on disclosure, or on engaging an exception, to be taken by the public authority itself, following proper consideration of all relevant factors.
39. The Commissioner also considers that the public interest in disclosing pre-application advice is mitigated by the fact that any advice given is superseded by the subsequent, public, formal planning application process, which follows strict procedures. On that point, the Council has explained:

"All planning applications received by the Council are published on the Council's website and consulted on in accordance with the legislative requirements and in accordance with the Council's Statement of Community Involvement. Every planning application is fully assessed by the case officer and after consideration and consultation with residents and statutory consultees, the officer will prepare a report to either a senior manager or the Planning Committee where a final decision will be taken. In the case of decisions made by the Planning Committee then these are heard in public and there is the opportunity for residents to speak at the meeting. Details of planning applications are publicised on the Council's website including all comments received from Statutory Consultees and other interested third parties (including residents).

Planning Officers remain impartial and use their professional judgement to make their recommendations. They are not only bound by the Councils' rules and procedures but where they are also Members of the Royal Town Planning Institute (RTPI) they are bound by the relevant code of conduct. Senior Officers, including the Development Management and Enforcement Manager and Assistant Director of Planning are full Chartered Members of the RTPI.

Any planning application must be determined in accordance with the Development Plan unless material considerations indicate otherwise; this requirement is set down in legislation and reinforced by the National Planning Policy Framework and Planning Practice Guidance."

40. Although the Commissioner recognises why the complainant has requested the information, the public interest under the EIR also relates to the broader public interest, which can include the interest in allowing authorities to provide robust pre-application advice and to preserve the integrity of the formal planning application process.
41. The Commissioner notes that at the time of the request, no formal planning application had been submitted. Disclosure at this time, therefore, would increase the likelihood of disruption to the formal planning process, via enquiries regarding non relevant pre-application matters, should a formal application then be made. Knowledge of what is included in pre-application advice will add little to the public's consideration of the details of any formal application (which would be published), which might take a completely different form to that presented at the pre-application stage.
42. Taking all of the above into account, the Commissioner has concluded that the public interest in favour of withholding the information in this case is greater than the public interest in disclosure.
43. 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

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.

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