

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 3 August 2023

Public Authority: Swansea Council
Address: Civic Centre
Oystermouth Road
Swansea
SA1 3SN

Decision (including any steps ordered)

1. The complainant requested various information in respect of a particular planning application for a new vehicular access road with associated infrastructure. Swansea Council (the 'council') refused the request citing regulation 12(4)(d) (material in the course of completion) of the EIR. During the course of the Commissioner's investigation, the council withdrew its reliance on this exception but sought to apply regulation 12(5)(d) (the confidentiality of proceedings) and regulation 12(4)(e) (internal communications) to the information. The Commissioner's decision is that the council was entitled to rely on regulation 12(5)(d) and regulation 12(4)(e) to refuse the request. The Commissioner does not require any steps.

Request and response

2. On 21 December 2022, the complainant wrote to the council and requested the following information in respect of Planning Application reference number 2022/2638/FUL for a new vehicular access road with associated infrastructure:

"...all information relating to the above Planning Application...This information should include all internal and external correspondence. Specifically, all communication involving:

- Head of Planning

- Team Leader
 - Case Officer
 - Applicant
 - Agent
 - Internal Departments, eg. Highways, Drainage, Ecology
 - Any external third parties/consultees, National Rail, NRW, etc
 - All submitted documents.”
3. The council responded on 23 January 2023. It confirmed that it held the requested information but refused to disclose the information citing regulation 12(4)(d) of the EIR. This position was maintained following an internal review dated 20 February 2023.

Scope of the case

4. The complainant contacted the Commissioner on 21 February 2023 to complain about the way their request for information had been handled.
5. The complainant informed the Commissioner that the application is particularly contentious and it affects the survival of a factory situated adjacent to the site. They added that, in the past, consultee responses would be available to the public to view and comment on online. The complainant further stated that not knowing the views of important consultees like highways and ecology on the application concerned has drastically reduced their ability to be informed and comment on the decision making process.
6. The complainant has further stated that they are perplexed as to why the council is refusing to disclose information which in the past has been historically available.
7. During the course of the Commissioner’s investigation the council withdrew its reliance on regulation 12(4)(d) and sought to rely on regulation 12(5)(d) and regulation 12(4)(e), sending an amended response directly to the complainant. The Commissioner will consider whether the council correctly applied the exceptions cited to the request.

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. Determining whether this exception is engaged requires consideration of the following:
 - Are the 'proceedings' in question ones that the exception is intended to protect?
 - Is the confidentiality of those proceedings provided by law?
 - Would disclosing the information adversely affect that confidentiality?
10. The first question to consider is what is meant by 'proceedings'. Proceedings will cover a range of activities, however, the word implies a degree of formality so it does not cover an authority's every action. It will include, but is 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
 - legal proceedings.
11. In each of these cases, the proceedings are a means to formally consider an issue and reach a decision. 'Proceedings' could include, for example, the consideration of a planning application by a planning authority, or an internal disciplinary hearing in a public authority: both of these have a degree of formality. What constitutes an authority's proceedings may be set out in its constitution, in its standing orders, or in law.
12. The Commissioner is therefore satisfied that information in respect of a planning application falls within the council's formal 'proceedings'.
13. The information which has been withheld under regulation 12(5)(d) consists of external consultee responses in respect of the planning application subject to this request.
14. The council has confirmed that all information required to be published under planning legislation is available online. As this does not include the external consultee responses, the council considers that there would be a clear expectation from those consultees that their responses would remain confidential. In the council's view, the information is not otherwise accessible, is not trivial in nature and was communicated in circumstances importing an obligation of confidence. It therefore

considers that it has the necessary quality of confidence to support the application of the exception.

15. The council has stated that it is still considering the planning application, including the comments submitted, and has yet to complete the report or make a decision on the application. It has further stated that it is likely that the applicant will submit amended plans following the consultation exercise. It further stated that when these plans are received, the council will publish them online and will carry out a re-consultation exercise, meaning that comments received to date will have limited weight in the determination of the application. It considers that disclosure of the information at this stage would have a negative impact on the ability of the public to effectively engage in the process, since its publication would relate to a planning application which is not proceeding in this form.
16. The council also considers that publishing this information before a decision had been made would adversely affect the planning application process as if it became known that this type of information has been disclosed, external consultees would be less willing to provide their full and candid assessment of the application.
17. The complainant has argued that the planning application case file should be accessible on demand, and stated that historically a member of the public could walk into a civic centre and view a hard copy of the file, subject to the redaction of personal data.
18. The complainant has further stated that up until a few months ago, this sort of information was available online, arguing that statutory consultees could not refuse to provide their comments. They argue that the public must be able to view the comments of the relevant consultees, otherwise there is no transparency in the decision making process.
19. The complainant has further stated that they require this information to be informed and to meaningfully comment on the decision making process, which they believe puts them at a significant disadvantage.
20. The council informed the Commissioner that historically, a member of the public could only view a hard copy of the full planning application file, including consultation responses, after a decision was made on the planning application. It confirmed that this changed when it first began to publish the register electronically. However, following legal advice, it was decided to revert back to the previous practice of only making available the information it was legally required to do so until the application had been determined.

21. The council also confirmed that the consultation exercise is simultaneous with all parties, therefore it is not possible for one consultee to wait until everybody else has submitted their response before making theirs.

The Commissioner's position

22. In determining whether the exception applies in this case, the Commissioner has referred to his own guidance, previous decision notices and the council's submissions.
23. In decision notice IC-115533-Y4T6¹, the Commissioner found that the council was correct to rely on regulation 12(5)(d) to withhold information in relation to a pre- planning application. Additionally, based on the council's submissions, the Commissioner is satisfied that disclosure of external consultee responses to the planning application in this case meets the required criteria referred to in his guidance, and would be likely to have an adverse effect on the confidentiality of proceedings. He has therefore concluded that regulation 12(5)(d) is engaged.
24. The Commissioner must next consider the balance of the public interest.

Public interest test

25. The council has acknowledged that disclosure of the information would promote accountability and transparency in its decision making process, particularly in relation to its consideration of planning applications.
26. Having confirmed that the full planning application documentation is published after the council has made its decision, the council considers that the timing of the request is a significant factor in its consideration of the public interest test. As stated in paragraph 15 of this notice, the application is live, and the applicant is likely to submit amended plans following discussions with the council.
27. The council further considers that it is important for third parties to have a relationship of trust with the council, and that interested parties would be less likely to submit comments if they are made publicly available, thereby reducing public involvement in the planning process. The council considers that there is a considerable public interest in ensuring that the effectiveness of the planning application process is not undermined.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022697/ic-115533-y4t6.pdf>

The Commissioner's conclusion

28. The Commissioner has taken into consideration the explicit presumption in favour of disclosure under regulation 12(2) of the EIR.
29. The Commissioner has also carefully considered the arguments both for and against disclosure and accepts there is a public interest in disclosure insofar as this would promote transparency and accountability of decisions taken by a public authority.
30. Additionally, the Commissioner accepts that it is very important for the public to have a voice in planning matters, which is part of the general public interest in openness and transparency. However it is also important for third parties to have a relationship of trust with the council and there is a considerable public interest in ensuring that the effectiveness of the planning application process is not undermined. The Commissioner has placed considerable weight on the timing of the request, and the fact that the application was yet to be determined. 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.

Regulation 12(4)(e) – internal communications

31. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. Regulation 12(4)(e) is a class based exception so it is not necessary to demonstrate prejudice or harm to any particular interest in order for it to be engaged.
32. 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.
33. The Commissioner's guidance on regulation 12(4)(e)² 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.'

² [Internal communications \(regulation 12\(4\)\(e\)\) \(ico.org.uk\)](https://ico.org.uk/our-work/information-access-to-information/subject-access-request/sar-exceptions/124e-internal-communications)

34. The information which has been withheld under regulation 12(4)(e) consists of the internal communications in respect of the planning application subject to this request.
35. The council informed the Commissioner that that the information referred to above has not been disseminated outside of the council.
36. Having viewed the withheld information the Commissioner is satisfied that it constitutes internal communications and therefore regulation 12(4)(e) applies to the information. The Commissioner has therefore gone on to consider the public interest test required by Regulation 12(1)(b) of the EIR.

Public interest test

37. The council has acknowledged that disclosure of information would promote accountability and transparency in its decision making process, particularly in relation to its consideration of planning applications.
38. As with the information withheld under regulation 12(5)(d), having confirmed that the full planning application documentation is published after the council has made its decision, the council considers that the timing of the request is a significant factor in its consideration of the public interest test. In this case, the application is live and the applicant is likely to submit amended plans following discussions with the council.
39. The council argued that it needs to ensure a safe space for its staff to engage in free and frank discussion in the course of their duties. It added, that planning applications are often finely balanced, therefore Officers need to be able to openly discuss the weight to be attributed to individual factors before a decision is made on an application, for it to be considered as a whole, and potentially to be defended at any subsequent appeal. It argued that if all internal comments on an application are made public, the planning process would become a formal ritual in which free thinking and frank expression of views would be inhibited.
40. The council further stated that the application proposals are typically amended during the planning process as a result of negotiation with the applicant, which could change the views of those who have submitted comments. The release of those comments could therefore be premature. It further argued that disclosure of information relating to a superseded proposal will adversely affect the planning process and cause confusion.

The Commissioner's conclusion

41. The Commissioner has taken into consideration the explicit presumption in favour of disclosure under regulation 12(2) of the EIR.
42. The Commissioner has also carefully considered the arguments both for, and against disclosure and accepts there is a public interest in disclosure insofar as this would promote transparency and accountability of decisions taken by a public authority.
43. Additionally, the Commissioner accepts that it is very important for the public to have a voice in planning matters, which is part of the general public interest in openness and transparency, however it is also important for all internal parties involved in the planning application process to be able to openly discuss the weight to be attributed to individual factors before a decision is made on an application, for it to be considered as a whole, and potentially to be defended at any subsequent appeal.
44. The Commissioner has placed considerable weight on the timing of the request, and the fact that the application was yet to be determined. The Commissioner has therefore decided that, in all the circumstances, the public interest in maintaining the application of regulation 12(4)(e) outweighs the public interest in disclosure.

Right of appeal

45. 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

46. 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.
47. 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.....

Catherine Dickenson
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