

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 19 February 2024

Public Authority: Cumberland Council
Address: Allerdale House
Workington
CA14 3YJ

Decision (including any steps ordered)

1. The complainant asked for information in relation to pre-application planning advice from Cumberland Council (the Council). The Council refused to provide the requested information citing regulations 12(5)(d) – confidentiality of proceedings and 12(5)(f) – interests of the person providing the information, of EIR.
2. The Commissioner's decision is that the Council is entitled to rely on regulation 12(5)(d) in the circumstances of this case and he considers that the balance of the public interest favours maintaining the exception.
3. The Commissioner does not require the Council to take any steps as a result of this decision.

Request and response

4. The complainant initially wrote to the Council on 25 April 2023 and requested information in the following terms:

"under the Freedom of Information Act I would request access to the preplanning advice associated with planning application HOU/2023/0042."
5. The Council responded on 3 May 2023 and refused to provide the requested information citing regulation 12(5)(d) as its basis for doing so. On 9 May 2023, the Council provided an internal review and maintained its position. It further cited regulation 12(5)(f).

6. The complainant challenged the Council's response to their internal review request:

"The Council's statement on confidentiality states that pre-planning is confidential until an application is submitted. A planning application is a public procedure and transparency is essential.

The Council did not follow its own policy statement in keeping pre-planning advice as confidential whilst the application it refers to was under consideration or after a decision had been reached."

7. The planning application was granted on 7 June 2023 and the complainant again requested the pre-planning advice on 21 June 2023.
8. The Council responded on 4 July 2023 stating its position remained the same and regulations 12(5)(d) and 12(5)(f) were cited.
9. The complainant requested an internal review on 8 October 2023 and the Council responded on 10 October 2023 advising its position remained unchanged.
10. The Council explained:

"The planning application is submitted but still pending consideration. The disclosure of the pre-planning information would have an adverse effect on the applicant who provided the information therefore Regulation 12(5)(f) is also engaged."

Scope of the case

11. The complainant contacted the Commissioner on 18 October 2023 to complain about the way their request for information had been handled. In their complaint they reiterated the point raised at paragraph 6 above.
12. During the Commissioner's investigation, the Council further explained its position regarding the withheld information:

"The Council considers the Pre-Planning advice service a formal proceeding as it is a service offered by all Local Planning Authorities and feeds into the assessment of the Planning Application once it has been formally submitted.

In this case a site meeting was carried out and the planning application was then called to the planning committee held on 7th June 2023 which provided the objectors and applicants an opportunity for their comments to be considered by the planning committee. Details of this committee can be found here:

[Agenda for Planning Committee on Wednesday, 7th June, 2023, 10.30 am | Cumberland Council \(moderngov.co.uk\).](#)

In addition to the above, there are multiple decision notices by the ICO recognising the formality of the pre-planning advice process and accepts that it represents a 'proceeding' for the purpose of the exception. Examples of such decision notices:

IC-206377-X4X4, IC-115533-Y4T6, IC-236187-N5R0."

13. Based on the Council's submissions, the Commissioner's investigation will therefore focus on the Council's reliance on regulation 12(5)(d) of the EIR.

Reasons for decision

Regulation 12(5)(d)

14. Regulation 12(5)(d) of 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.
15. The engagement of the exception rests on three conditions being met.
16. 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.
17. 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,

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>

FER0900414³, IC-115533-Y4T6⁴, IC-206377-X4X4⁵) that such a process represents a 'proceeding' for the purposes of the exception.

18. The Commissioner is therefore satisfied that regulation 12(5)(d) of EIR is engaged because the information relates to the Council's pre-application advice process.
19. 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.
20. 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.
21. Third, it must be demonstrated that disclosure would have an adverse effect on the confidentiality of the proceedings.
22. The Council has explained there is an expectation that the pre-application advice process is confidential, and that the publication of the information would therefore undermine this expectation. All applications would have the expectation that any information would be subject to confidentiality.
23. It explained that preplanning advice is a chargeable service available to customers in order to provide advice and achieve a successful planning application. Further information regarding pre applications can be found here: [Pre-planning advice \(allerdale.gov.uk\)](https://www.allerdale.gov.uk/pre-planning-advice) there is also a disclaimer at the bottom of the page which outlines the confidentiality of the application.

"Preplanning advice is considered to be confidential. Section 100A(4) of the Local Government Act 1972 allows a local authority to consider

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>

matters in private, where those matters concern the discussion of sensitive or confidential information.”

24. Given that the customer specifically marked the documents as 'strictly confidential' and sensitive private information was contained within those documents and discussed at the pre-application meeting, the Council consider there was a statutory basis for regarding the proceedings as confidential.
25. The Council argued there is an expectation of confidence and the information provided at pre-application stage remains confidential. If that was not the case individuals would be less willing to provide information for fear of disclosure.
26. Having considered the Council's detailed arguments, which it is not appropriate to repeat here, the Commissioner has determined that disclosure would have an adverse effect on the confidentiality of proceedings. Regulation 12(5)(d) is therefore engaged.
27. 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.
28. 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.
29. 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 information from the pre-application process may discourage open and frank engagement with the pre-application process, or similar processes.
30. 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).

31. The Council has argued that: “The public interest of gaining such information was considered irrelevant as the pre-planning application and actual planning application differed greatly. The release of the requested information would not increase any public knowledge of those issues, there was no additional information within the information which the public are not already aware of. There is therefore nothing of any significance to be added to the general factors in favour of disclosure mentioned above and expanded upon in the Decision Notice:
https://cumberlandcouncil.my.site.com/pr3/s/planning-application/a3X3X00000IraKWUAZ/hou20230042?c_r=Arcus_BE_Public_Register”
32. There would therefore be no gain to the public interest by releasing the information requested.
33. The planning application was agreed by councillors at the public planning committee in June 2023 in where the objectors were present, and [name redacted] gave representations. The decision was issued on 8 June 2023. Although the decision has been issued and the application is now determined, for the reasons outlined above the Council feel it is still necessary to withhold this information by virtue of the applicant’s request of confidentiality and the irrelevance of the pre application information to the wider public interest.
34. The Commissioner has decided that, in the circumstances of this particular case, rather than being equally balanced, the public interest in maintaining the exception at regulation 12(5)(d) outweighs the public interest in disclosure.
35. 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) is cited correctly.

Right of appeal

36. 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

37. 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.
38. 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

Susan Duffy
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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