

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 27 March 2024

Public Authority: Mid Devon District Council
Address: Phoenix House
Phoenix Lane
Tiverton
EX16 6PP

Decision (including any steps ordered)

1. The complainant requested information with regards to pre-application advice for a planning matter. Mid Devon District Council ("the council") refused part of the request as personal data, identified another part as not being a valid request for information, and refused the remaining under regulation 12(4)(a) as information not held.
2. The complainant disputed that the information was not held and the handling of the request.
3. The Commissioner's decision is that regulation 12(4)(a) is engaged to the information the council stated was not held. But he finds that the council breached regulation 14 as it did not issue a valid refusal notice.
4. The Commissioner does not require any steps.

Request and response

5. On 3 August 2023 the council received the following information request from the complainant:

"I asked which officer was consulted and gave the advice quoted on the application form – not who was not involved. However your use of the words 'my understanding is' conveys to me that you know exactly what happened as now that you are the case officer the file is available to you where any preapplication advice should be documented and recorded.

I am aware of the detail of the Pre Application advice policy file which is available on the MDDC Website. There is a correct procedure which should have been followed and a fee paid. Your response has prompted further questions which require answers please

Who was the officer consulted and giving this advice please?

Was a fee charged for the advice and how much was it please?

May we please see the written pre application advice?

Does this advice give rise to a concern of officer predetermination?"

6. The council responded on 24 August 2023. For the first part of the request the council refused to provide the information under regulation 6 as personal data. The council did not state what legislation it was relying on in refusing this part of the request.
7. For the second and third part it stated the information does not fall under the definition of available information as per regulation 3(2) of the EIR.
8. For the fourth part, the council advised this was not a request for recorded information.
9. The complainant requested an internal review, which was received by the council on 29 August 2023, dissatisfied with the council's response to the first three parts of his request.
10. The council provided its internal review on the 22 September 2023. For the first part of the request it maintained it does not provide third party personal data.
11. For the second and third part of the request the council amended its response that the information is not held as per regulation 12(4)(a) of the EIR.

Scope of the case

12. The complainant contacted the Commissioner on 8 October 2023 to complain about the council's handling on his request. He has confirmed to the Commissioner that he is not satisfied with the way in which the council refused his request and then denied it held the information. He also disputes the council's position to the parts of the request where it has stated that no information is held.
13. The scope of the case is for the Commissioner to determine whether the council holds any information to the second and third part of the request and whether the council has issued a valid refusal notice under the EIR.
14. The complainant has told the Commissioner that the council has since released the information to the first part of his request in response to a later request. As the information has since been provided to the complainant, the Commissioner will not go on to consider whether the personal data exception is engaged in this case.

Reasons for decision

Regulation 12(4)(a) of the EIR – Information held/ not held

15. Regulation 5(1) of the EIR requires a public authority that holds environmental information to make it available on request.
16. Regulation 12(4)(a) of the EIR allows a public authority to refuse to provide the requested information if it does not hold it at the time of the request being received.
17. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request).
18. In this case the council has stated that no information is held to parts 2 and 3 of the request - the pre-application advice and the fee that was charged. The Commissioner has asked the council what searches it undertook in order to determine the information was not held.

19. The council has responded to the Commissioner explaining that the council's Planning Officer searched his records and relevant planning folders on the council's S Drive (central server).
20. The complainant has provided a copy of the planning application to the Commissioner and in it he is of the view that there was some pre planning advice given. He is of this view because:
 - on page 11 of the application under Policy and Procedure 1.1 it says: "through negotiations with the applicant, it has been agreed..." and;
 - on page 12 at point 1.4 it states: "Due to this, the Local Planning Authority recommended that the applicants submitted an application to vary the condition to correct this error. However, the applicants initially submitted the application to remove the condition entirely. As mentioned in paragraph 1.1, subsequent negotiations have meant that the applicants agreed to change the description of this application to vary the wording of the condition rather than removing it entirely."
21. The complainant has told the Commissioner that, to him, 'recommended' is synonymous to 'advised' and so he views the content of the report as confirming that advice was given to the applicant.
22. The Commissioner asked the council whether these mentioned negotiations or recommendations were recorded.
23. The council has told the Commissioner that these were not recorded and that the negotiation described in the application was a verbal comment made by a council officer. It also has stated that the council did not note these recommendations of the planning application as the planning application was not made by the council, the applicant filled in the application form and made the note.
24. The council has also explained to the Commissioner that pre-application advice is a very specific piece of information to request. It needs to be formally applied for and a fee paid. In this case, no application for pre-application advice was made and with that, no fee was paid.
25. The Commissioner has also asked the council whether there is information held that is similar to that requested, and if so, and has the council given appropriate advice and assistance to the applicant in line with the duty contained at regulation 9 of EIR?
26. The council has confirmed to the Commissioner that there is no similar information to that requested.

27. On consideration of the explanations provided by the council, the Commissioner is satisfied that it has contacted the most relevant officer in relation to this request and that sufficient searches were carried out to establish if the pre-application advice was made and paid for.
28. The Commissioner has no evidence to dispute the council's explanations that the mentioned negotiations or recommendations in the planning application were verbal and not recorded.
29. The Commissioner therefore finds that on the balance of probabilities, the information requested in parts 2 and 3 of the request is not held and the council was correct to apply regulation 12(4)(a) of the EIR.

Regulation 14 of the EIR - Issuing a valid refusal notice

30. Regulation 14 of the EIR states that a valid refusal must be issued within 20 working days following receipt of the request and should specify the reasons not to disclose the information including:

“(3)(a) any exception relied on under regulations 12(4), 12(5) or 13”
31. In this case the council initially applied regulation 2(3) of the EIR to refuse parts 2 and 3 of the request and later amended it to regulation 12(4)(a) as information not held. For the first part of the request the council applied regulation 6 as it considered it to be personal data, but it did not specify what legislation it was relying on.
32. Regulation 6 of the EIR relates to the form and format of information, not personal data which was the reason for the council's refusal.
33. As the council did not apply the relevant exception in its refusal notice, the Commissioner finds it has breached regulation 14 of the EIR.
34. As the Commissioner has now determined this case, he does not require any steps, but he does expect the council to ensure it is applying the relevant exceptions to any information it might refuse to provide to future information requests.

Right of appeal

35. 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: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

36. 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.
37. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Daniel Perry
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Information Commissioner's Office
Wycliffe House
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