

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

Date: 28 October 2024

Public Authority: Uttlesford District Council
Address: Council Offices
London Road
Saffron Walden
CB11 4ER

Decision (including any steps ordered)

1. The complainant requested pre-application information relating to a specific site. Uttlesford District Council (the "Council") withheld the requested information under the exception which relates to the interests of the information provider (regulation 12(5)(f)).
2. The Commissioner's decision is that the Council correctly applied regulation 12(5)(f) to the request. He does not require any steps to be taken.

Request and response

3. On 17 May 2024 the complainant asked the Council for the following information:

"Copies of all correspondence, submissions and advice referring to The Three Horseshoes, Mole Hill Green principally including pre application advice relevant to the public house or the land to the rear. Please could this cover the last 2 years, from May 2022."

4. The Council responded on 17 June 2024 and confirmed that it was refusing the request, citing the exception relating to the interests of the information provider (regulation 12(5)(f)).
5. Following an internal review the Council wrote to the complainant on 2 July 2024 and confirmed that it was maintaining its position.

Scope of the case

6. On 10 July 2024 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
7. The Commissioner has considered whether the Council was entitled to withhold the requested information.

Reasons for decision

Is the requested information environmental?

8. Regulation 2(1) of the EIR defines environmental information as being information on:
 - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

- (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)...as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
9. The withheld information consists of pre-application planning advice so the Commissioner is satisfied that it relates to a measure as defined in regulation 2(1)(c). For procedural reasons, he has therefore assessed this case under the EIR.

Regulation 12(5)(f) – interest of the information provider

10. Regulation 12(5)(f) of the EIR states that:

“a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

f) the interests of the person who provided the information where that person

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure;”

11. As with all the regulation 12(5) exceptions, the Commissioner considers that, in order to demonstrate that disclosure “would adversely affect” a confider’s interests, a public authority must demonstrate that the adverse effect is more likely than not to occur.

12. The Commissioner's published guidance on this exception explains that its purpose is to protect the voluntary supply to public authorities of information that might not otherwise be made available to them¹. In such circumstances a public authority may refuse disclosure when it would adversely affect the interests of the information provider. The wording of the exception makes it clear that the adverse effect has to be to the person or organisation providing the information rather than to the public authority that holds it.
13. The Council has confirmed that the withheld information was submitted on a voluntary basis and consists of pre-application advice. The Council has stated that it would not have had the right to require the person submitting the information (the "developer") to provide this to it as no formal application had been made at that time. The Council confirmed that requests for pre-application advice are provided voluntarily by a developer in order identify issues early enough to take these into account in any formal planning applications.
14. The Council further confirmed that in response to the request it asked the developer whether the information could be disclosed and that the developer declined to give consent.
15. In light of the above, the Commissioner is, therefore satisfied, that the first three stages of the test have been met.

Would disclosure adversely affect the interests of the person who provided the information to the public authority?

16. In considering whether there would be an adverse effect on the interests of the person who voluntarily provided the information, the Council needs to identify harm to the person's interests which is real, actual and of substance, and to explain why disclosure would, on the balance of probabilities, directly cause harm.
17. There is no requirement for the adverse effect to be significant – the extent of the adverse effect would be reflected in the strength of arguments when considering the public interest test (i.e., once the application of the exception has been established). However, a public authority must be able to explain the causal link between disclosure and the adverse effect, as well as why it would occur. The need to point to specific harm and to explain why it is more probable than not that it would occur reflects the fact that this is a higher test than 'might

¹ https://ico.org.uk/media/for-organisations/documents/1638/eir_voluntary_supply_of_information_regulation.pdf

adversely affect', which is why it requires a greater degree of certainty. It also means that it is not sufficient for a public authority to speculate on possible harm to a third party's interests.

18. The Council has argued that release of the requested information at this stage in the process, with a formal planning application not yet submitted, could potentially raise further tensions in the area which are not based on final facts or on the form that a planning application may take.
19. The Council has suggested that it is always possible that, following the receipt of pre-application advice, a developer takes a decision that no formal application should be made. Disclosing the information at the time of the request, therefore, would raise tensions in the area whereas, in reality, the developer may have taken a decision not to submit a formal application.
20. The Council considers that disclosing the advice would, therefore, provided potential objectors with information which would be subsequently used to formulate objections against the developer's plans at a time when no formal planning application has been submitted. The developer may then face significant objections to plans which have not and may not form part of a formal application. In the Council's view, this would clearly have had an adverse effect upon the developer's interests. If the developer was continuing to consider their options in relation to the site, further delays and costs may have been incurred as interested parties sought to prevent any development occurring prior to the planning application being submitted.

The Commissioner's conclusions

21. The Commissioner has considered the information provided by both parties and would point out that even in respect of information generated by the Council, if its content is based on information received from a third party, it will effectively be considered to be received from a third party.
22. The Commissioner has also taken into consideration the fact that the developer has not consented to the disclosure of the information.
23. The Commissioner considers that the timing of the request is significant as no formal planning application had been submitted to the Council. He accepts that disclosing the information relating to the pre-application process would be likely to result in harm, both in terms of time and expenditure to the developer given the potential for them to be contacted and challenged over plans which had not been formalised.

24. Having considered the withheld information and the relevant arguments, the Commissioner is satisfied that disclosure of the withheld information prior to a decision being made regarding the relevant planning application would result in the adverse effects to the developer's interests specified above.
25. In reaching his conclusions the Commissioner has referred to a number of previous decision notices he has issued in relation to comparable request for pre-application advice². He considers that the conclusions reached in those notices can also be transposed to this notice.
26. Based on the above, the Commissioner has determined that regulation 12(5)(f) is engaged.
27. As the exception is engaged, the Commissioner has gone on to consider the associated public interest test required by regulation 12(1)(b). The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. When carrying out the test the Commissioner must bear in mind the presumption towards disclosure provided in regulation 12(2).

The public interest in favour of disclosing the information

28. The Council has acknowledged that the central public interest in the information being disclosed is to create transparency about the advice provided by the Council to the developer. The Council has noted that disclosure will also provide assurances of probity in planning decisions where planning applications are subsequently submitted.
29. The complainant disputes the Council's position regarding disclosure causing concern to neighbours and neighbouring properties and has instead argued that local people would rather know what is being planned in their community.
30. The Commissioner considers that some weight must always be attached to the general principles of accountability and transparency. These in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.

² See: <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/4017925/ic-46328-m8b2.pdf>; <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022421/ic-163072-b1d1.pdf>; <https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4031065/ic-295165-z8g5.pdf>

31. In the circumstances of this case, the Commissioner recognises that disclosure of the information would provide public transparency about the pre-application advice that the Council provided to the developer and allow the public to reach an informed position in relation to any potential proposed development.

The public interest in maintaining the exception

32. The Council has argued that the central public interest in the exception being maintained is that individuals and organisations should be able to seek advice from their planning authorities on a confidential basis for ideas that they have for potential future developments free from the public eye initially. The Council suggested that pre-application advice request is a way for developers to 'test the waters' as regards particular types of developments in particular areas. Developers, the Council has argued, can also receive advice as to what the issues would be likely to be prior to drawing up formal plans for approval, thereby saving time and money themselves, but also time and costs to the Council by minimising the issues that a formal application might raise.
33. The Council has confirmed that the public has a right to object to planning issues once formal planning applications are submitted for approval. The Council considers that the public, therefore, do have a forum in which to register their objections to planning applications, and these will be taken into account when planning applications are being considered. Prior to that time, however, the Council has argued that developers should be able to seek informal advice from authorities without disclosing their development plans to their neighbours or to their competitors.
34. The Council has argued that, in many cases pre-application advice may result in no formal applications being submitted, or significantly different plans being submitted. The Council, therefore, considers that disclosure of the information prior to the formal applications being received may therefore result in objections being received to plans which are never formally submitted. According to the Council's position, disclosure would, therefore, waste both Council time dealing with the objections, as well as potentially causing concerns to neighbours or neighbouring properties and, potentially, for some developments affecting house values in the area. The Council has also suggested that disclosure of pre-application advice requests would also alert commercial competitors to early potential development plans within the area.
35. The Council has further argued that if pre-application advice is disclosed on a regular basis then developers may decide not to engage with planning authorities in the future at such an early stage. This would, in the Council's view, have the effect of increasing the costs of planning

applications as developers may submit inappropriate plans which would have been identified earlier had advice been sought. The Council considers that this could slow the planning process down, increasing costs and delaying planning decisions being taken.

The balance of the public interest test arguments

36. The Commissioner accepts that there is an inherent public interest in transparency and accountability. The Commissioner also acknowledges that local residents might have legitimate concerns about prospective developments which may potentially have a negative impact on their lives.
37. The Commissioner is satisfied that disclosure of the withheld information, which was provided to the Council in confidence, would have an adverse effect on the individual who provided it. It may also prevent other parties from confiding in the Council regarding similar matters in the future. The Commissioner considers that there is a strong public interest in maintaining the voluntary supply of information from individuals and developers to the Council and in maintaining the relationship between the parties.
38. He accepts that disclosing pre-application advice, which might identify highly speculative proposals which may never appear in a subsequent application, or proposals which never reach the application stage, has the potential to cause harm to parties volunteering such information. Harm might take the form of objections or other speculative correspondence to a developer from neighbours or from rival developers who may use aspects of the advice for their own interests to the detriment of the recipient of the pre-application advice. The central factor, though, is that the content of pre-application advice provides a false premise upon which third parties can either build opposition to a prospective development or otherwise form a view. In short, until a formal planning application is made, information associated with a proposed development is speculative.
39. The Commissioner notes that the relevant section of the Council's website confirms that pre-application is a voluntary service and that information provided by third parties could be subject to disclosure under the EIR³.
40. Whilst the Commissioner recognises that the developer would have a reasonable expectation that information they provided to the Council

³ <https://www.uttlesford.gov.uk/planning-pre-application-advice>

about the planning application could be the subject of an information request, he accepts that they would equally have a reasonable expectation of confidentiality in respect of certain sensitive information provided voluntarily, and in confidence. Disclosure of such information could deter planning applicants from engaging in free and frank discussions with the Council in the future, and this could have a negative impact on planning and development generally.

41. Finally, the Commissioner recognises that the planning process provides a formal mechanism for the public to access information about an application and to submit objections. For the reasons set out above, he does not consider that disclosure of the requested pre-application information is necessary to facilitate public engagement with planning decisions.

42. Having considered the relevant facts and the submissions provided, the Commissioner has concluded that in this case the balance of the public interest favours maintaining the exception.

43. 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).

44. As covered above, in this case the Commissioner’s view is that the balance of the public interests 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(5)(f) was applied correctly.

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.

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