

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

Date: 3 December 2024

Public Authority: Dacorum Borough Council
Address: The Forum
Marlowes
Hemel Hempstead
Hertfordshire HP1 1DN

Decision (including any steps ordered)

1. The complainant requested information about a specific planning application. Dacorum Borough Council (the "Council") disclosed information and withheld other information under the exceptions for commercial confidentiality (regulation 12(5)(e)) and the interests of the information provider (regulation 12(5)(f)).
2. The Commissioner's decision is that the Council correctly withheld the information under regulation 12(5)(f).
3. The Commissioner does not require any further steps.

Request and response

4. On 6 February 2024 the complainant wrote to the Council and asked for the following information:

(In relation to planning application 23/01894/FUL)

"...business plan, updated economic viability report and detailed winery designs submitted by the applicant"

5. The Council responded on 17 May 2024 and disclosed redacted versions of the requested documents. It confirmed that it was withholding the outstanding information under the exceptions for commercial confidentiality (regulation 12(5)(e)) and the interests of the information provider (regulation 12(5)(f)).
6. On 17 May 2024 the complainant asked the Council to carry out an internal review.
7. Following an internal review Council wrote to the complainant on 21 June 2024 and confirmed that it was maintaining its position.

Scope of the case

8. On 25 July 2024 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner has considered whether the Council was entitled to withhold information under the exceptions cited.

Reasons for decision

Is the requested information environmental?

10. 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);
11. In this case the request relates to decisions made in respect of a planning application. The Commissioner is satisfied that the information relates to measures and economic analyses as defined in regulation 2(1)(c) and regulation 2(1)(e) of the EIR. For procedural reasons, he has therefore assessed this case under the EIR.

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

12. The request relates to a planning application relating to the proposed development of a vineyard. The information in question was submitted to the Council by the planning applicant (the "Provider").
13. Information can be withheld under regulation 12(5)(f) if disclosure would adversely affect the interests of the person who provided the information, where that person was under no legal obligation to supply it, did not supply it in circumstances which would entitle the public authority to disclose it (apart from the EIR) and has not consented to disclosure.
14. Regulation 12(5)(f) is an adverse-affect exception. This means that there is a requirement to consider whether disclosure would result in a harmful consequence in order to engage the exception. The exception is subject to a public interest test under regulation 12(1)(b), and the

exception can only be maintained should the public interest test support this.

15. The Commissioner has had sight of the relevant correspondence and he notes that the information was provided to the Council as part of the pre-application process with the explicit understanding that it would remain confidential.
16. The Commissioner recognises that pre-application advice is a service provided by planning authorities to assist those considering whether to submit a formal planning application. He is mindful that there is no obligation for individuals to request pre-application advice prior to submitting a formal planning application and that any advice given does not directly determine whether a subsequent application is approved or rejected. Any information provided to the Council as part of the pre-application process is, therefore, submitted voluntarily.
17. The Council confirmed that the withheld information was submitted by the Provider in the pre-application phase. The information was presented to the Council to enable it to understand the present and projected economic viability of the proposal, sensitive design details and confidential strategies.
18. The Council confirmed that it has consulted with the Provider regarding the request and they have confirmed that they do not consent to the disclosure of the information. The Council also provided the Commissioner with information given by the Provider during this consultation. The Commissioner notes that the Provider has given specific reasons why disclosure of each element of the withheld information would result in harm to their interests.
19. The Council has confirmed that disclosure of the information would result in harm to the interests of the provider. The Council explained that the withheld information consists of detailed pricings, operating margins, bespoke designs, commercial strategies and information which would give a competitor an unfair advantage. The Council has also noted that the information contains details of the wine making process and other bespoke operating processes used by the provider.
20. The Commissioner considers that, given the context within which the information was given, the Provider would have a reasonable expectation that it would remain confidential. He also accepts that disclosing the withheld details about the Provider's business would provide competitors with insights into their commercial operations which would allow them to change their strategies, to the detriment of the Provider. He accepts that the Provider will have expended time and resources in creating and developing its business model and that

disclosure of the information would provide other businesses and potential suppliers with the means to, for example, undermine profit margins.

21. The Commissioner recognises that, whilst they would have a reasonable expectation that information they were providing to the Council could be the subject of an EIR request, the Provider would equally have a reasonable expectations of confidentiality in respect of information relating to their business affairs.
22. The Commissioner is satisfied that, given the nature of the information, its disclosure would adversely affect the interests of the Provider. As such, the Commissioner is satisfied that regulation 12(5)(f) is engaged.
23. 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.

Public interest in disclosing the information

24. The complainant has argued that the planning application to which the request relates follows on from previous planning applications from the same applicant and does not differ in any material respect either in the built form or the overall plans for redevelopment of the site from agricultural use to other business uses. The complainant has stated that previous applications have all been rejected and the current application has attracted objections from a large number of the public
25. The complainant considers that, in view of the potential disruption to the local community that the development would cause, there are grounds for full transparency and scrutiny of the viability of the business which underpins the proposed development.
26. The Commissioner accepts that there is a general public interest in the public being able to engage with planning decisions, particularly contentious ones which are likely to have an impact on the local community. Making relevant information available will assist the public in understanding the reasons for any subsequent decisions and facilitate informed objections which will enhance the planning process.

Public interest in maintaining the exception

27. The Commissioner has accepted that disclosure of the information would result in adverse effects to the Provider's business interests. He considers that there is an inherent public interest in the prevention of adverse effects on the interests of the third party provider of information, and the principle of confidentiality.

28. The Commissioner also considers that the timing of the request is relevant here. The Council has confirmed that, at the time the request was made the planning application in question had not been decided and the matter was, therefore, still live. In addition to harming the Council's reputation with regard to the maintaining of confidences disclosure could also disrupt the planning decision process, resulting in the Council fielding correspondence querying disclosed information which may not have a material bearing on the resulting planning decision.
29. The Commissioner also notes that the Council disclosed redacted versions of the requested documents to the complainant. It is, therefore, arguable that the public interest in this matter has been served by the information already disclosed.

Balance of the public interest

30. In accordance with regulation 12(1)(b), in order to withhold the information from disclosure, a public authority must demonstrate that the public interest in maintaining the exception outweighs the public interest in disclosing the information. Such a public interest test must be carried out against the requirement set out in regulation 12(2) that a public authority shall apply a presumption in favour of disclosure. This means that on occasion a public authority should disclose information even though this would adversely affect the interests of the information provider.
31. There will always be some public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding of environmental matters, a free exchange of views, and more effective public participation in environmental decision-making, all of which ultimately contribute to a better environment.
32. The application of regulation 12(5)(f) may arise, as in this case, in relation to planning matters; for example where an applicant requests information on pre-application discussions between a local authority and a developer. The Commissioner considers that there is a high level of public interest in public participation in planning matters. However, this would have to be balanced against the ability of a local authority to carry out the planning process, something which could be undermined if developers and others become reluctant to engage with local authorities as a result of disclosure.
33. In order to warrant harm to the Provider's business interests and disruption to the planning process, there would need to be compelling and specific public interest reasons for disclosure.

34. The Commissioner recognises that the complainant has genuine concerns about the proposed development and that their concerns may be shared by the wider community. However, it is not the Commissioner's role to determine whether the proposed development should be approved or rejected to pre-determine what factors the Council should consider in reaching its decision as a planning authority.
35. In the Commissioner's view, the public's right to challenge a planning application is not affected by the non-disclosure of the requested information. He has no evidence that disclosure of the specific withheld information about the Provider's business model is necessary for an informed view to be reached on the planning and environmental factors which contribute to a planning decision.
36. The right to scrutinise and challenge can be properly exercised during the formal planning process. Where there are concerns about the conduct of a public authority there are, similarly, other remedies for addressing this which do not necessitate the global disclosure of the information. The Commissioner also notes that redacted versions of the information were disclosed to the complainant and that, arguably, the Council has met the public interest in transparency.
37. The Commissioner does not consider that it is the purpose of the EIR to circumvent existing procedures within planning law and the mechanisms for public scrutiny which already exist. Whilst he acknowledges that facilitating public engagement with environmental issues is one of the general principles behind the EIR, he does not consider that, in this case, disclosure of the withheld information would assist in furthering this principle, at least not to the extent that any public benefit would outweigh the public interest in protecting the interests of the information provider.
38. The Commissioner also considers that the fact that the planning application in question is live and undecided enhances the severity of harm which would be done to the Provider's interests. Disclosure would invite scrutiny of its commercial position and other factors prior to these being formally tested by the Council as planning authority, unfairly exposing it to potential undermining by rival operators.
39. Having considered the public interest arguments the Commissioner finds the public interest in protecting the Provider's interests to be the stronger argument in this case.
40. 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)."¹

41. 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.
42. As he has decided that the Council correctly withheld the information under regulation 12(5)(f) he has not gone on to consider its application of regulation 12(5)(e) to the same information.

1

https://assets.publishing.service.gov.uk/media/5d9dc592e5274a595bf5dabf/SGIA_44_2019ji.pdf

Right of appeal

43. 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

44. 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.
45. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Christopher Williams
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