

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 3 April 2019

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

Decision (including any steps ordered)

1. The complainant has requested information on pre-planning discussions regarding Blackborough House between the developer and the council. The council referred the complainant to its website for some information however, it withheld other information under the exemptions in Regulation 12(5)(e) (commercial confidentiality) and Regulation 12(4)(d) (material in the course of completion). During the course of the Commissioner's investigation the council disclosed further information to the complainant, whilst still withholding other information. It also informed the Commissioner that it had changed its opinion and decided to apply Regulation 12(5)(f) (interests of the person who provided the information) in place of the other two exceptions in place of the two exceptions previously quoted.
2. The Commissioner's decision is that the council was not correct to apply Regulation 12(5)(f) to withhold the information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the withheld information to the complainant.

4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 13 April 2018 the complainant wrote to the council and requested information in the following terms:

"I am requesting the following information:

1. *Access to formal correspondence and meeting notes arising from pre-application consultations between [name redacted by the ICO] (the Applicant) and/or his representatives/agents and Mid-Devon District Council Planning Department in relation to Planning Applications 17/01904/MFUL and 17/01905/LBC.*
2. *Access to financial viability reports relating to Planning Applications 17/01904/MFUL and 17/01905/LBC.*
3. *Access to the enabling development financial viability reports relating to Planning Applications 17/01904/MFUL and 17/01905/LBC.*

When considering my request, I would ask that you take the following into account:

- *I would ask that the Environmental Information Regulations should be applied in this case as the applications concerned impact on elements of the environment such as soil, land and landscape, biological diversity, noise, waste (including discharges and other releases into the environment), the state of human health and safety (including the contamination of the food chain) (The Environmental Information Regulations 2004, legislation.gov.uk).*
- *I understand that the Applicant has declined to release financial viability information. I would ask that, if an exemption from disclosure is being considered under the Act due to prejudice to commercial interests, it be remembered that there must be an identified, significant negative consequence of disclosure, a link between disclosure and the negative consequence and at least a real possibility of the negative consequence occurring (guidance from the Information Commissioner's Office).*
- *The lack of financial viability information is detrimental to the ability of members of the community and other interested parties*

to comment on the applications. Application of the public interest test would indicate that the public interest is best served by disclosure to ensure that the planning process is open and transparent.

- *Some of the information is already in the public domain on the planning portal (correspondence/reports on the agreed extension of time)."*
6. The council responded on 24 April 2018 and said that there was no pre-planning advice undertaken for the relevant planning applications. It provided a link to its planning portal for the information it had published.
 7. The complainant wrote back to the council on 2 May 2018 asking for an internal review. She pointed out that the developer had said that there had been pre-planning discussions with the council and provided further arguments regarding the disclosure of financial information to the council which she wished it to take into consideration.
 8. Following an internal review the council wrote to the complainant on 28 June 2018. It said that it was mistaken to state that no pre-planning discussions had taken place, but that this would now be published. It confirmed its position that some information was being withheld under Regulations 12(5)(e) and Regulation 12(4)(d) however.
 9. The council also disclosed further information in December 2018.

Scope of the case

10. The complainant contacted the Commissioner 3 July 2018 to complain about the way her request for information had been handled. She believes that the council was wrong to apply the exceptions and that the public interest rests in the disclosure of the information.
11. During the course of the Commissioner's investigation the council the council wrote to the Commissioner and said that, whilst it still considered that Regulation 12(5)(e) and 12(4)(d) were applicable, it considered that Regulation 12(5)(f) was 'more applicable' to withhold the information. It did not therefore provide arguments to the Commissioner regarding the original exceptions. Instead, it provided arguments relating only to the application of Regulation 12(5)(f).
12. During the course of the Commissioner's investigation, the council disclosed further information via its website. It essentially disclosed the majority of the information, withholding only some personal data and financial information relating to the development. It asked the Commissioner to clarify with the complainant whether she was now

content with the level of disclosure in response to her request. The complainant confirmed that she wished the Commissioner to consider the application of the exemption to any financial viability information and enabling development financial viability information which had been withheld.

13. The Commissioner telephoned the council on 18 March 2019 and provided a view that the exemption in Regulation 12(5)(f) was not likely to be upheld for the reasons outlined below. She therefore offered the council the opportunity to provide further information in support of the position that the other exceptions were applicable.
14. The council responded on 26 March 2019 confirming that in light of the Commissioner's arguments it had asked the relevant parties for further information. It considered this necessary in order to provide sustainable arguments in support of the other exemptions. This had not been received, and it confirmed that it did not consider that providing it with further time would change this position. It therefore declined to provide further arguments in support of the exceptions to the Commissioner. The Commissioner therefore considers that the council withdrew its reliance upon the exceptions in Regulations 12(4)(e) and 12(5)(e) as it provided no arguments to support the application of these exceptions when provided with the opportunity to do so.
15. The Commissioner therefore considers that the complaint is that the council was wrong to apply Regulation 12(5)(f) to withhold this information from disclosure. She has not however considered the personal data withheld by the council further as this was not pursued by the complainant.

Reasons for decision

16. Regulation 12(5)(f) provides 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;'

17. The purpose of this exception is to protect the voluntary supply to public authorities of information that might not otherwise be made available to them. 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 the information.
18. With regard to engaging the exception, as recognised by the First-Tier Tribunal (Information Rights), a four stage test has to be considered, namely:
 - Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?
 - Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?
 - Has the person supplying the information consented to its disclosure?
 - Would disclosure adversely affect the interests of the person who provided the information to the public authority?

Were the developers or their agents under, or could they have been put under, any legal obligation to supply the information to the public authority?

19. The Council states that the applicant/agents who provided this information to the council were under no legal obligation to any public authority to provide the information.
20. Pre-planning advice is a service offered by the council to developers at a cost. The council argues that these discussions benefit both the developer and the council in that the developer has an early steer as to the issues which may become relevant when a formal application is submitted. They also benefit the council in that it is able to gain early oversight and provide advice on applications which may be submitted in the future.

21. Pre-planning discussions are not however a requirement of the planning application process, nor are they a statutory function of the council. Whether developers enter into such discussions and provide information in support of this is therefore purely a result of whether the developer decides to make use of the councils pre-planning advice service.
22. Having considered these arguments the Commissioner is satisfied that the information was provided to the council on a voluntary basis. The council could not have put the developer under a legal obligation to provide the information to it as no planning application had been formally submitted at the time that it was provided to the council.

Did the agents supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?

23. The Council states that, as the Local Planning Authority, it is not entitled to disclose the withheld information apart from in response to information access requests where no valid exemption applies.
24. It clarified that the legislation which governs the planning application and enforcement processes does not require the Local Planning Authority to disclose the withheld information.
25. The Commissioner accepts that the council's argument is correct in this respect.

Have the applicant/agents consented to disclosure of the information?

26. The Council has sent the Commissioner emails from the developer and from his agent stating that they do not consent to the disclosure of the information.
27. The applicant stated that they were willing for some information to be disclosed but wished the financial information to be withheld. The developer said to the council however that:

"We obviously cannot object if you are legally obliged to provide such information."

28. This confirmation by the developer led to further information being disclosed by the council during the course of the Commissioner's investigation of the complaint. The complainant however maintained that she wished access the financial information which was withheld.

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

29. 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 third party's interests which is real, actual and of substance, and to explain why disclosure would, on the balance of probabilities, directly cause harm.
30. 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, the 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 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.
31. The complainant argues that:

"Whilst we understand that disclosure of such information as potential occupancy rates, investors for the hotel etc may have a genuinely adverse effect commercially, we would argue that the financial viability of the Enabling Development (ED) and the correspondence does not fall into the same category. [Redacted] is a private company with one director, there are consequently no shareholders, there is no competition for the site, there are no contracts that the Applicant is tendering for."
32. The council said that users of its pre-planning advice service may not always subsequently file a formal planning application, or may alter their proposals before doing so. It re-iterated that there is no statutory requirement to make any advice which is provided in this way public.
33. The council therefore argues that users of the pre-planning advice service expect that any advice received during this pre-application process will remain private and confidential. For this reason, the council considers that applicants for pre-planning advice hold a reasonable expectation that pre-application advice will remain private and confidential. It said that its guidelines state to prospective service users that:

"Aside from Consultation with main consultees, a pre-application submission will not be subject to any publicity with the general public until the planning application is received. If you provide any commercially sensitive or confidential information this should be clearly stated."

34. It argues therefore that whilst applicants for pre-planning advice are likely to be aware that planning applications are subject to public scrutiny, they will not to expect such scrutiny at the pre-planning application stage.
35. The developer's agent argues that a disclosure of the information would harm the developer's interests as its disclosure could jeopardise possible future investment in the project. They did not expand upon this statement however. They did not explain why a disclosure of the information would cause this effect. Similarly the council did not provide further details as to why this might be the case. It said that it had asked the developer and his agent to provide further evidence of the harm that might be caused but this had not been forthcoming.
36. The council argues that: *"The entire contents of this folder is considered to be excepted under regulation 12(5)(f) on the basis that the information was provided on a voluntary, confidential basis and we stated that it would not be revealed unless and until an actual valid application was received in our policy, it is not the convention to reveal it, the applicant and architect believe there would be actual harm if it were revealed and have not given their permission."*
37. However the request for information was made on the 13 April 2018. The planning application for the development were signed on 17 November 2017 and the council's planning portal indicates that this was added to its site on 23 January 2018. It appears therefore that a valid planning application had already been received and information published on the council's website by the time that the request for information was received.
38. In respect of this the council did say that whilst its policy had previously been to publish information once a formal application had been received,

"Our policy previously was that the pre-planning advice would only be published once an actual planning application was received; it was also the practice that financial documents received as part of the pre-application correspondence were always treated as confidential and never published."

39. The primary information which remains withheld is financial information relating to the pre-planning discussions. This includes assessments of a number of options open to the developer, and demonstrates the developers preferred option. The withheld information relates to the financial costs etc of the project as well as the potential profits of the development.
40. The Commissioner has considered these arguments. She recognises that pre-planning information shared with a local authority may change and be amended as a pre-development plan moves towards the finished application. As further advice and discussions take place, preferred options may change and plans will develop and be amended as the developer moves towards an application which is amenable to the developer and also best meets planning policy guidelines. Amendments may also take into account factors such as market increases in costs and further investment opportunities arising as time passes. However, in this case the formal applications had already been made and information already published regarding the application at the time that the request was received by the council.
41. The Commissioner has also taken into account that the developer failed to provide further information as to why a disclosure of the financial information would prejudice its interests. They did not provide a clear explanation identifying why a disclosure of the information would harm the interests of the developer by harming potential future investment.
42. The Commissioner notes the argument that a disclosure of financial information, including costs appraisals could potentially dissuade investors from becoming involved. She would however expect that investors interested in the project would ask questions and research the project before agreeing to invest.
43. Although neither the council nor the developer provided arguments to this effect, the Commissioner notes that the developer's commercial interests may be affected if it disclosed information on the costs it has budgeted prior to contracts being sought for work to be carried out. In essence, a disclosure of the costs which the developer has budgeted for a particular task identifies the capital available to the developer in order to complete that task. Contractors contacted to carry out this work may take into account the available budget for the task when negotiating their price. Alternatively they may seek to renegotiate their price if they are already contracted to carry out the work if they become aware that the developer's budget for the task far exceeded the prices they have agreed.

44. Overall the Commissioner accepts that the developer's interests would be harmed by a disclosure of this information at the time that the request was received. However she considers that the developers and the council's arguments in this respect are poorly outlined and that they lack specific detail.
45. Based on the above however the Commissioner is satisfied that a disclosure of the pre-planning information would adversely affect interests of the developer. She has therefore decided that the council was correct to apply the exception in Regulation 12(5)(f) to this information.

The public interest

46. Regulation 12(5)(f) is subject to a public interest test set 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.

The public interest in the information being disclosed

47. The central public interest in the disclosure of the information relates to creating greater transparency on information relating to a planning application which will ultimately have an effect upon the environment.
48. The plan relates to the redevelopment of a derelict property which the council describes as '*a derelict Grade II listed building in an AONB (an area of outstanding natural beauty); it has been neglected for over 100 years and is close to the point of collapse, the grounds have been used as a scrap yard for cars for around 70 years*'.
49. The plans envisage a major redevelopment of the property for commercial purposes, and to carry out some additional 'enabling development', essentially building a number of additional properties in order to facilitate the costs of renovating the main building and make the project viable. Overall the development is likely to have an effect upon the area surrounding the building as well as the building and in its grounds. The building is in an area designated as an AONB, and the surrounding area is rural, small villages.

50. The Commissioner understands that people living in the surrounding area have raised concerns about the proposals for a number of reasons, including the impact upon the surrounding environment. A point noted in the local media is the additional traffic which will potentially be generated by the development. As such the Commissioner recognises a strong public interest in the information being disclosed. However, as a pre-planning financial forecasts, the information would have been subject to change as plans surrounding the development were amended.

51. In her request for review the complainant outlined other issues which the organisation representing the community had with the application:

"There is considerable concern in the community about the viability of the project, that further ED [enabling development] will be required to raise the necessary finance to renovate the heritage asset; that the houses will simply become holiday lets rather than being occupied by long-term residents; that other sources of funding have not been sought (ED should be an option of last resort); that the houses will be built and the special purpose company will go into liquidation before any renovation takes place, the lack of affordable housing that is needed in a rural community."

52. In a letter to the Chief Planning Officer she also pointed out that Historic England expect a greater degree of financial transparency over planning applications which require enabling development.

53. Historic England define enabling development as *"development that would usually be considered harmful but is considered acceptable because the resulting benefits outweigh the harm"*.¹

54. Paragraph 3.5.1 of Historic England's guidance on enabling development states:

3.5.1 *Enabling development is often seen as being an alternative to public funding; but arguably, it is more akin to a type of public funding. The idea of the community losing one asset to acquire a greater one is analogous to that of individuals paying taxes to acquire the right to public goods and services – including the conservation of the historic environment. The essential difference is that the community pays in kind which is converted to cash, rather than cash*

¹ <https://historicengland.org.uk/images-books/publications/enabling-development-and-the-conservation-of-significant-places/>

itself. On this premise alone, enabling development should be subject to the same degree of financial scrutiny, transparency and accountability as cash grants from public funds, or indeed all financial and quasi-financial decisions made by public authorities. The exercise of due diligence is essential.²

55. This does not in itself mean that all information which is held should be disclosed to the public, however the public interest arguments in favour of disclosure do hold much more weight as a result. In disclosing the information the public will have access to the information which the developer had when deciding that enabling development was the only viable option open to it. The public can then be satisfied that the requirements for enabling development are met by the application, with oversight over the other potential options which were considered by the developer which may not have required this.

The public interest in the exception being maintained

56. The council has submitted arguments demonstrating that its own interests may be damaged by the disclosure of the information. The Commissioner is not however able to take these arguments into account as the nature of the exception is to seek to protect the interests of those who voluntarily submit information to a public authority, in this case, the developer. It is the developer's interests which are of concern.
57. The Commissioner can take into account that if developers lose trust in the pre-application process, they may feel inhibited when providing sensitive commercial information to the council which would enable an informed early view to be provided to them by council planning officers. Thus they may lose an important opportunity to identify any issues with their plans which could otherwise have been quickly resolved through the pre-application process, to the benefit of both the developer and the council.
58. The Commissioner also notes that as the developers did not expect the information they were submitting to be disclosed beyond the council they may have included sensitive financial information which they would not wish to be disclosed more widely. Clearly its argument regarding potential future investors falls within the scope of this argument.

² <https://historicengland.org.uk/images-books/publications/enabling-development-and-the-conservation-of-significant-places/enablingwebv220080915124334/>

59. The Commissioner notes that the expectations of the developer should be tempered by knowledge of the fact that the council, as a public authority, is under a duty to comply with the information access legislation such as the FOI Act and the EIR. However, the notification of the intended confidentiality of documents which are submitted as part of pre-application discussions would have re-assured the developer that sensitive financial information disclosed to the council would be retained in confidence. A subsequent disclosure of this information would undermine this understanding, and potentially deter developers from submitting such information in the future. As noted above, this would be detrimental to the interests of developers as advice could not then be provided to the developer by the council from a fully informed position.
60. The developer's expectations would however be tempered by the fact that he was applying for enabling development. As noted above, this raises the prospect that a greater level of transparency and higher levels of scrutiny are likely to be needed on information which is provided. Although this would be on the application as submitted by the developer, the viability of different options provided by the developer as possible alternative development on the land is an important consideration given that enabling development should only be used as an option where it is necessary in order for the project to go ahead.
61. There is a public interest in allowing as detailed information as possible to be shared with the council in order that the best possible advice can be provided, any potential issues can be clarified with the developer as early as possible, and in order for the council to be able to properly establish the case for enabling development to take place.

Conclusions

62. The information is pre-application information, and therefore was subject to change prior to the final application being submitted. As noted above, the final application was submitted prior to the complainant making her request for information, and so arguments surrounding 'thinking space' and the potential for issuing information which might subsequently mislead, or give an inaccurate impression of the final plans to the public are weakened.
63. The Commissioner notes that some community groups in the surrounding area have concerns about the proposed development, although the council argues that there are also those who support the renovation project.

64. The Commissioner also notes that the council and the developer failed to expand upon their arguments that a disclosure of the information would cause harm to the developer's interests. She accepts that that argument is likely to have a degree of merit, and has she considers that a disclosure of the costs assessment document might harm the developer's commercial interests when they come to negotiate any contracts which the building work requires if planning permission is granted. Nevertheless, the extent, and the likelihood of the perceived harm occurring was not fully explained to the Commissioner by either party. The Commissioner is not therefore able to place a great deal of weight on the exception being maintained because of this.
65. The Commissioner has also borne in mind that this is not a 'public' development. It is a private, commercial development. The council has had a greater degree of access to the financial information for the project due to the nature of the development proposed and the financial arguments being employed by the developer regarding enabling development works. She considers however that the nature of the development in question calls for greater level of transparency over the financial decisions which led to the enabling development part of the application being considered, as per the guidance issued by Historic England.
66. In essence, disclosing details of the pre-application financial information will highlight the financial calculations and forecasts which led to the form of the final application which was submitted to the council – it will provide details of costs plans, alternative options considered and associated financial forecasts related to this. These are important considerations when considering whether the final form of the application, with the enabling development, is appropriate.
67. The information would provide the public with a high degree of oversight as to the overall viability of the project, and more importantly, it would demonstrate why the enabling development is necessary in order for the listed building to be brought back into use. This is an important consideration for the public given that the final application includes proposals which potentially fail to comply with planning guidelines (insofar as the enabling development is concerned), and the sight lies within an area designated as an AONB. Development is only considered to be an enabling development where policy guidelines will not be adhered to and the development and restoration project will not occur if the enabling development is not agreed.

68. This increases the public interest in greater transparency in the financial aspects of the project. If the enabling development is required in order to allow the development to take place then there is a much greater expectation on the developer to be able to demonstrate why that is the case, particularly given the site in question.
69. The Commissioner has therefore decided that the public interest rests in the disclosure of this information. The council was not therefore correct to withhold the information under Regulation 12(5)(f).

Right of appeal

70. 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@hmcts.gsi.gov.uk

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

71. 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.
72. 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

Andrew White
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