

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 23 January 2017

Public Authority: South Downs National Park Authority
Address: South Downs Centre
North Street
Midhurst
West Sussex
GU29 9DH

Decision (including any steps ordered)

1. The complainant requested information in relation to a request submitted to the South Downs National Park Authority for pre-application planning advice. The South Downs National Park Authority withheld the information in its entirety under Regulations 12(5)(d), 12(5)(e) and 12(5)(f) of the EIR.
2. The Commissioner's decision is that the South Downs National Park Authority has not successfully engaged the exemptions under Regulations 12(5)(d), 12(5)(e) and 12(5)(f) of the EIR.
3. The Commissioner requires the South Downs National Park Authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information
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.

Background

5. The South Downs National Park Authority (SDNPA) is responsible for keeping the South Downs a special place. The SDNPA is also the planning authority for the National Park. The Authority is a public body, funded by government, and run by a Board of 27 [Members](#).

6. The SDNPA's website gives details of its pre pre-planning application advice service and benefits.¹ It also makes it clear that;

'... we are a transparent organisation and, unlike many other planning authorities, will publish all pre-application details and responses on our Public Access System unless you are able to give adequate reasons why the enquiry is commercially sensitive.'

Request and response

7. On 25 June 2016 the complainant wrote to the South Downs National Park Authority (SDNPA) and requested information in the following terms:

"Application SDNP/16/02125/PRE

My request relates to the information on the above application and is under the Environmental Info Regs.

I would like: -

1. The 'adequate reasons' relating to 'commercial sensitivity' provided by the applicant to justify the decision not to publish details of the application on the Authority's Public Access System".

2. All correspondence, plans, file notes, external and internal memoranda relating to the application".

8. The SDNPA responded on 6 July 2016. It stated it was withholding the requested information under Regulation 12(5)(e) of the EIR on the basis that it was commercially confidential.
9. On 7 July 2016 the complainant requested an internal review.
10. Following an internal review the SDNPA wrote to the complainant on 22 July 2016. It stated that it was upholding its original decision to withhold the information under Regulation 12(5)(e) but in addition wished to place reliance on Regulations 12(5)(d) and 12(5)(f) of the EIR.

¹ <https://www.southdowns.gov.uk/planning/making-an-application/pre-application/>

Scope of the case

11. The complainant contacted the Commissioner on 4 August and 3 September 2016 to complain about the way his request for information had been handled. In particular, the SDNPA's decision to withhold the requested information in its entirety.

Chronology

12. The Commissioner contacted the SDNPA on 30 September 2016. She requested a copy of the withheld information, any further arguments it wished to raise in respect of the application of Regulations 12(5)(d), 12(5)(e) and 12(5)(f) of the EIR and evidence from the prospective developer seeking pre-planning advice as to 'why' it considered its application was 'commercially sensitive'.
13. The SDNPA responded on 13 October 2016 with a copy of the withheld information, an extract from the relevant section of the National Planning Policy Framework (paragraphs 186-196) relating to pre-planning advice² and an email from the prospective developer regarding why it considered its pre-planning application commercially sensitive. For the sake of completeness the SDNPA also provided the Commissioner with a copy of its internal review response which it said set out in detail its arguments in relation to why the EIR exceptions applied.
14. The Commissioner responded to the SDNPA on 21 October 2016. She referred to the email from the prospective developer which stated that its proposals were 'commercially sensitive' and disclosure of these 'could be detrimental'. The Commissioner said she was not persuaded that these comments were sufficient to engage the relevant Regulations under the EIR as they did not explain why disclosure would affect the developer's interests. She therefore invited the SDNPA to approach the prospective developer for its further comments and at the same time suggested it might like to consider disclosing a redacted version of the withheld information.
15. The SDNPA responded on 9 November 2016. It provided a further email from the prospective developer which stated it wanted the pre-application advice treated sensitively and not published while the land

² <http://planningguidance.communities.gov.uk/blog/policy/achieving-sustainable-development/decision-taking/>

discussions were taking place. It said that to do so 'could be prejudicial to the land discussions'. It also said it wanted to seek pre-application advice without prejudicing the commercially sensitive nature of its proposals. The SDNPA stated that as it had not denied the existence of the pre-application advice, it would not be satisfactory or beneficial to the requestor to disclose the requested information with the commercially sensitive information redacted.

Reasons for decision

16. The SDNPA has withheld the requested information in its entirety under exceptions in Regulations 12(5)(d), 12(5)(e) 12(5)(f) of the EIR. The Commissioner will now deal with each exception in turn.

Regulation 12(5)(d) – confidentiality of proceedings

17. Regulation 12(5)(d) provides 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.
18. In its internal review response dated 22 July 2016, the SDNPA stated its finding was that there was a common law duty of confidence engaging Regulation 12(5)(d) of the EIR. It went on to state that the public interest in maintaining the efficient operation of the preliminary planning process outweighed any public interest in disclosure as should the application be forthcoming in due course the requested information would be disclosed at that stage. When requested by the Commissioner on 30 September 2016, the SDNPA said it did not wish to raise any additional arguments.
19. The Commissioner will now consider the application of Regulation 12(5)(d) of the EIR to the requested information.
20. The term 'proceedings' is not defined in the EIR. However, the Commissioner in his guidance on this exception has said that he considers that:

"...the word implies some formality, i.e. it does not cover an authority's every action, decision or meeting. It will include, but is 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.*³

21. In the Commissioner's view the term 'proceedings' should be taken to mean a formal means to consider an issue and reach a decision. Proceedings should be governed by formal rules.
22. In this case the Commissioner is satisfied that the SDNPA's chargeable procedure for dealing with pre-application planning enquiries as set out on its website is a formal process falling within the definition of Regulation 12(5)(d) of the EIR.
23. In deciding whether the exception is engaged, the next thing to consider is whether the confidentiality of the proceedings is provided for in law. That confidentiality must be provided for in statute or derived from common law. In this case the SDNPA have said that the information is subject to the common law duty of confidence.
24. For information to be subject to the common law duty of confidence a public authority will need to demonstrate that the information has the necessary quality of confidence and that it was shared in circumstances importing an obligation of confidence. Information will have the necessary quality of confidence if it is not in the public domain and so long as it is not trivial.
25. With regard to the obligation of confidence, the SDNPA has simply stated that the information was imparted under a common law obligation of confidence. On this point, the Commissioner is not persuaded by this argument that the requested information was provided in confidence. The SDNPA's 'Request for Pre-application Advice (non-householder) completed and signed by the developer states that it operates 'a transparent service, whereby pre-planning details and responses, although not actively publicised will be placed on the planning register. This is unless the applicant gives reasons why the enquiry is commercially sensitive'.
26. The Commissioner has noted from the SDNPA's website under the heading 'getting pre-application advice' that it is a 'transparent organisation and that unlike many other planning authorities, will publish all pre-application details and responses on (its) Public Access

³ https://ico.org.uk/media/for-organisations/documents/1626/eir_confidentiality_of_proceedings.pdf

System unless (the applicants) are able to provide adequate reasons why the enquiry is commercially sensitive'.

27. In the absence of detailed arguments from the SDNPA regarding the question of confidentiality, the Commissioner is not persuaded that Regulation 12(5)(d) of the EIR is engaged.

Regulation 12(5)(e) – Confidentiality of commercial or industrial information

28. Regulation 12(5)(e) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect "the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest".

29. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She has considered how each of the following conditions apply to the facts of this case:

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is the confidentiality provided to protect a legitimate economic interest?
- Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

30. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity either of the public authority concerned or a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.

31. The SDNPA has not stated why it believes the requested information is commercial. However, it has provided the Commissioner with a copy of this information from which it is apparent that it relates to a commercial proposal for development of a specific piece of land.

32. Having considered the requested information the Commissioner has concluded that it is commercial in nature and satisfies this element of the exception.

Is the information subject to confidentiality provided by law?

33. In considering this matter the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.
34. In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
35. The Commissioner considers that confidence can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties, and any previous or standard practice regarding the status of information.
36. The SDNPA has simply stated that the requested information is 'considered confidential'.
37. The Commissioner notes that the information is not trivial in nature and understands that it has not been placed in the public domain. However, the Commissioner has not been persuaded by the SDNPA's very limited arguments that the requested information was imparted in circumstances to create an obligation of confidence. The SDNPA's 'Request for Pre-application Advice (non-householder) form completed and signed by the developer states that it operates 'a transparent service, whereby pre-application details and responses, although not actively publicised will be placed on the online register. This is unless the applicant gives reasons why the enquiry is commercially sensitive'. The letter from the developer to which this application form was attached did not make any express reference to the matter being confidential.
38. The Commissioner has also noted from the SDNPA's website under the heading 'getting pre-application advice' that it is a 'transparent organisation and that unlike many other planning authorities, will publish all pre-application details and responses on (its) Public Access System unless (the applicants) are able to provide adequate reasons why the enquiry is commercially sensitive'.
39. Having considered the nature of the information and the SDNPA's very limited arguments the Commissioner is not persuaded that the requested information was imparted in circumstances to create a duty of confidence.
40. The Commissioner has therefore concluded that Regulation 12(5)(e) of the EIR is not engaged.

Regulation 12(5)(f) – interests of the person who provided the information to the public authority

41. Regulation 12(5)(f) 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'*

42. In the Commissioner's view, 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.

43. With regards to engaging the exception, as recognised by the First-tier Tribunal (Information Rights), a four stage test has to be considered, namely:

- Would disclosure adversely affect the interests of the person who provided the information to the public authority?
- 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?⁴

⁴ [John Kuschnir v Information Commissioner and Shropshire Council \(EA/2011/0273; 25 April 2012\)](#)

Adverse effects on the interests of the person who voluntarily provided the information

44. As with all the exceptions in Regulation 12(5), the threshold necessary to justify non-disclosure because of adverse effect is a high one. The effect must be on the interests of the person who voluntarily provided the information and it must be adverse.
45. In considering whether there would be an adverse effect in the context of this exception, a public authority needs to identify harm to the third party's interests which is real, actual and of substance (i.e. more than trivial), and to explain why disclosure **would**, on the balance of probabilities, directly cause the harm.
46. 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.

The SDNPA's position

47. The Commissioner asked the SDNPA to explain why it considered this exception to be engaged by contacting the prospective developer for evidence as to the adverse effect disclosure would have.
48. The SDNPA acknowledged it was already in the public domain that an application for pre-planning advice had been made.⁵ It also made the point that the pre-application advice would become publically available should a planning application be received subsequently.
49. The Commissioner has noted from the SDNPA's website that 'it is a transparent organisation and, unlike many other planning authorities, will publish all pre-application details and responses on (its) Public Access System unless (the proposed developer is) able to give adequate reasons why the enquiry is commercially sensitive.
50. At the Commissioner's suggestion the SDNPA contacted the prospective developer for evidence of the adverse effect of disclosure on the prospective developer. The initial response from the prospective developer was that the requested information was 'commercially sensitive' and disclosure 'could be detrimental'. When the Commissioner asked for an explanation as to why, the prospective developer explained subsequently that it 'could be prejudicial to the land discussions'.

The Commissioner's position

51. The Commissioner has seen a copy of all the recorded information falling within the scope of the complainant's request and is satisfied that it was provided voluntarily to the SDNPA by the prospective developer. Moreover, the Commissioner agrees with the SDNPA's assessment that it was not obliged to disclose the requested information apart from under its own policy of transparency subject to 'commercially sensitivity' or under the EIR. The Commissioner is therefore satisfied that that the second and third criteria of Regulation 12(5)(f) as set out above are met.
52. The Commissioner will now consider as to whether the first and fourth criteria have been met.

⁵ <http://s3.spanglefish.com/s/23938/documents/2016-minutes-etc/2016-parish-council/2016-05-12-council-minutesrev.pdf>

53. Dealing with the first criterion regarding the adverse effects on the interests of the developer who voluntarily provided the information, the Commissioner has not been persuaded by the arguments and evidence put forward by the SDNPA.
54. The only arguments and evidence put forward by the SDNPA are that disclosure 'could be detrimental' to the developer and 'could' prejudice 'the land discussions'. The Commissioner is not satisfied that these arguments are sufficient to engage Regulation 12(5)(f) which requires a public authority to point to specific harm caused by disclosure and also explain as to why that would be more probable than not.
55. As the Commissioner is satisfied that the SDNPA has not established that disclosure would have an adverse effect on the developer, she has not gone on to consider the fourth criterion as to whether the developer has consented to the disclosure of the requested information.

Right of appeal

56. 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

57. 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.
58. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Reference: FS50640768



Signed

Rachael Cragg
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF