

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

Date: 29 March 2019

Public Authority: City of York Council

Address: West Offices
Station Rise
York
YO1 6GA

Decision (including any steps ordered)

1. The complainant has asked City of York Council to confirm what 'rules' members of the planning committee adhere to with regard to discussing planning applications. The Commissioner has satisfied herself that the Council holds no such 'rules', not least because the complainant already knew that fact when he made his request, and that the Council was entitled to refuse his request in reliance on Regulation 12(4)(b) of the EIR. The Commissioner has also decided that the Council has contravened Regulation 11 of the EIR by failing to review its decision to apply Regulation 12(4)(b).
2. The Commissioner requires no further action in this matter.

Request and response

3. On 28 May 2018, the complainant wrote to City of York Council and requested information in the following terms:

"Please confirm what 'rules' member of the planning committee adhere to, specifically with regard to discussing applications with local residents / affected members of the public."

4. The complainant advised the Council that, "[a named councillor] made reference to these 'rules' during email correspondence in 2016 but such rules do not appear in the Council's Code of Conduct or any legislation,

indeed it seems that such a 'rule' would contradict both the Localism Act and your own Code of Conduct".

5. The Council responded to the complainant's request on 14 June 2018, advising him that, "This information is exempt under section 12(4)(b) because you have previously been provided with the code of Conduct containing guidance provided by the council regarding planning committee members..." and, "This is in addition to a significant amount of other information relating to the Planning Applications in the Grove".
6. The Council informed the complainant that it "does not issue guidance or rules stating Councillors must enter into discussion with people about planning applications, the EIR and Freedom of information Act (FOIA) are not appropriate routes to pursue your dissatisfaction and you are aware of the appropriate route of pursuing this with the Ombudsman...".
7. The Council's refusal notice advised the complainant that further correspondence or requests related to this matter will not be acknowledged or responded to.
8. On 14 July 2018, the complainant wrote to the Council and asked it to carry out an internal review of its handling of his request.
9. The Commissioner understands that the Council has not provided the complainant with the results of any internal review it has carried out.

Scope of the case

10. The complainant contacted the Commissioner on 24 June 2018 to complain about the way his request for information had been handled. The complainant advised the Commissioner that there is substantial evidence to suggest that a named councillor intentionally lied to him by stating that the rules prevented him from discussing a planning application. The complainant asserts that this is not true and that he would like to determine why the councillor made this false and inaccurate statement.
11. The Commissioner advised the complainant that her investigation would be focussed on whether City of York Council is entitled to withhold information from him in reliance on Regulation 12(4)(b) of the EIR.

Reasons for decision

12. The Council has explained to the Commissioner why it considers the complainant's requests falls to be considered under the provisions of the

EIR. It says, "The request was for a copy of the 'rules' members of the planning committee must adhere to, specifically with regard to discussing applications with local residents/affected members of the public". It added, "Any rules related to Councillors speaking to members of the public about the consideration of planning applications, would be an administrative measure affecting the elements falling under the EIR".

13. In this case the Council argues that the elements affected by planning applications would include the air, water, soil, land, energy, noise and waste emissions including emissions related to traffic flow and levels, and it points out that any rules relating to consideration of planning applications would inevitably have an impact on the decisions being made.
14. The Commissioner accepts the Council's rationale and therefore her decision in the complainant's matter is made with reference to the provisions of the EIR rather than to those of the FOIA.
15. The first question for the Commissioner to determine is, 'does the Council hold the information which the complainant has asked for?' This question is relevant to the provisions of Regulation 5(1) of the EIR.
16. Under Regulation 5(1) of the EIR a public authority is required to 'make available on request' information which is environmental information.
17. In this case the complainant has asked the Council to confirm the 'rules' members of the planning committee must adhere to in respect of planning applications and specifically with relating to discussing those applications with local residents and members of the public.
18. To provide background to his request and his subsequent complaint to the Commissioner, the complainant has provided the Commissioner with a copy of an email sent to him by [a named councillor] on 3 February 2016. The email begins: "Sorry not to be able to discuss, but I make a rule not to offer any opinion for or against any recommendation prior to the planning application being heard", and it ends by advising the complainant that he should, "contact [his] local representative to enquire into [his] questions providing they do not sit on planning as they are bound by the same rules".
19. The Council's interpretation of the councillor's email is that the councillor said he makes a "rule for himself" not to speak to people, and his comment about the "same rules others are bound by" relates to avoiding judgement. The Council asserts that the councillor did not say there was a rule that councillors must not talk to members of the public and that the complainant was aware of this at the time he submitted his request.

20. The Council has provided the Commissioner with a link to the actual guidance provided to its councillors. This guidance is publicly available and the Council assures the Commissioner that the complainant was fully aware of this at the time of his request. The Guidance can be found at:

<http://modgov.york.gov.uk/ecSDDisplay.aspx?NAME=Section%205E%20Code%20of%20Good%20Practice%20for%20Councillors%20i&ID=2097&RPID=16049658>

21. The Council has also provided the Commissioner with information concerning how this particular case arose. It says, "... the applicant had made a complaint which had been investigated by the Local Government and Social Care Ombudsman. Two of the points of this complaint were that the Council:

a) Wrongly advised councillors who sat on the planning committee they could not discuss planning applications with residents

b) Failed to inform councillors the relevant guidance encourages dialogue with residents about contentious planning applications and how to avoid allegations of predetermination".

22. The Ombudsman concluded:

"... the fact that no councillors were prepared to speak to [the complainant] suggests, at the very least, that on the balance of probabilities, the Council's own guidance is insufficiently clear in stating that it is preferable that they should do so."

23. The Council asserts that it was therefore clear to the complainant that the Council does not have any rules about Councillors speaking to members of the public about planning cases.

24. The council goes on to say that, whilst the Ombudsman initially concluded the Council does not have rules preventing Councillors from speaking to members of the public, the fact it did not have rules encouraging them to enter into discussions was a fault.

25. The Council therefore maintains the position that there are no 'rules' which members of the planning committee must adhere to in respect of them discussing planning applications with members of the public. It assures the Commissioner that the only rules which are relevant to the complainant's request are contained in the guidance referred to in paragraph 22 above. Those 'rules' relate to avoiding prejudgement.

26. The Council argues that the complainant was fully aware of this at the time of his request and that his request was made for the purpose of pursuing a complaint, which according to the Council, was that it did not (and do not) instruct councillors to speak to members of the public about planning applications.
27. The Council has explained why it considers the complainant's request is manifestly unreasonable and therefore subject to its application of Regulation 12(4)(b) of the EIR.
28. It has referred the Commissioner to her guidance on this exception which says that a request can be manifestly unreasonable, not just because it is considered vexatious, but also because it would cause an unreasonable diversion of resources. The Council acknowledges that an application of Regulation 12(4)(b) is subject to consideration of the public interest test.
29. It acknowledges that the public interest lies in the public being able to understand the decision making process for planning applications, their ability to effectively participate in that process and be able to hold the council to account.
30. Here, the Council has referred the Commissioner to the response made to the complainant following his request. That response advised the complainant that, "...spending further time responding to this request would divert officers from completing their usual duties with no further benefit to progress public understanding, ability to participate in democracy, or hold the Council to account and there is an appropriate route providing comprehensive independent scrutiny of the council's actions and information provided which you have exercised your right to pursue."
31. The Council argues that spending further time responding to the complainant's request would divert its officers from completing their usual duties where it is clear that there are no 'rules' which members of the planning committee must adhere to regarding discussing applications with members of the public, and where the Code of Good Practice for Councillors who are involved in the Planning Process includes guidance about discussions.
32. The Council's representations to the Commissioner in support of its application of Regulation 12(4)(b) set out its arguments in respect of the public interest test. These arguments are predicated on the fact that the Council does not hold any recorded information about 'rules' other than those contained in the Code of Practice.
33. In view of the Council's assertion that the complainant knew there were no 'rules' before he made his request, and because the Council's

response under the EIR is to the world at large and not restricted to the complainant, the Council was minded to have regard to the potential harmful effect of informing the public that there are no 'rules'. It says to have done so, "...would have been significantly likely to cause concern to the public, who did not know the context of the request, that no guidance was available".

34. The Council asserts that it would have needed to spend time explaining the rules about avoiding prejudgement and the guidance about discussions in order to avoid creating misleading concerns. Additionally, had the Council provided the complainant with a further copy of the guidance, it argues that, "...given the nature and context of the request, the Council would have again needed to spend time explaining the above".
35. On the grounds that the complainant already knows there are no 'rules', the Council considers the purpose of his request is not a matter of public interest. In the Council's opinion that purpose relates to the complainant's dissatisfaction that the Council does not issue rules stating Councillors must enter into discussion with people about planning applications. It points out that the complainant has exercised his right to refer a complaint for independent scrutiny regarding the Council's position in respect of the absence of 'rules' about discussions with members of the public, and further, that the Ombudsman did not find at any point that the council had issued any rules in this regard.
36. The Council consider it would not be of any value in terms of the public interest to provide the complainant with a further copy and explanation of the guidance to Councillors. In its view, this would not benefit public understanding, further its ability to participate in democracy or hold the Council to account. Its adds, "The time required to provide an explanation about the context of a response, which would have been required for the public to understand the context and ensure it had any public interest value, was considered disproportionate and this remains the case".
37. The Commissioner accepts that the Council could have provided an explanation of why no 'rules' are held and to have provided the information contained in the guidance. She also acknowledges that this would need to be understood in the context of the complainant's request. However, in the absence of any wider public interest in these matters, providing that context and explanation would have diverted officers from their usual duties and is not a requirement of the EIR.
38. The Commissioner agrees with the Council that providing the necessary context would not have added significantly to the public's ability to

understand the decision making process or in its ability to participate effectively in it.

39. The Commissioner considers that the diversion of Council resources necessary to respond to the complainant's is contrary to the public interest in that it does represent an unnecessary diversion of the Council's time and resources.
40. The Commissioner accepts the Ombudsman's decision in respect of the Council not having 'rules' of the type the complainant asks for in his request. Not accepting the Ombudsman's decision has resulted in a request the complainant is entitled to make but equally the Council is entitled to refuse that request in reliance on Regulation 12(4)(b) of the EIR.
41. The Commissioner has noted the contents of the email which the complainant has drawn to her attention. She agrees with the Council's interpretation of that email at paragraph 21 where the councillor uses a common turn of phrase to decline to speak with the complainant. The councillor makes clear that he, himself, makes a rule not to offer any opinion for or against any recommendation. The Commissioner points out that the councillor authored his email on of his own volition and not on behalf of the Council.
42. The Commissioner's decision is that the Council is entitled to rely on Regulation 12(4)(b) of the EIR in respect of his request.

Regulation 11

43. Turning her attention to the failure of the Council to respond to the points raised by the complainant in support of his request, the Commissioner notes the Council had informed the complainant that it considered it was not necessary or appropriate for the Council to review its decision. The Council has explained why it took that decision. The Council has told the Commissioner that its Complaints and Feedback Manager, responsible for both complaints and information governance, had been involved in the complaint responses, providing information to the Ombudsman and addressing the complainant's requests through the EIR. In view of this, the Council considered that further review would not have led to a different outcome and would have delayed the applicant in their ability to seek further independent review through the Commissioner.
44. The Council has informed the Commissioner that it "...recognises the right of applicants to seek a review through the council and of the council's obligation to conduct an appropriate review. However the Council also has no desire to use this as a barrier or delay to

independent review, where it is known that further internal consideration will not lead to a different outcome.

45. Notwithstanding the Council's position, the Commissioner is obliged to draw its attention to the provision of Regulation 11 of the EIR which require the Council to consider the complainants representations and to make an appropriate response. In view of this, the Commissioner has decided that the Council has contravened Regulation 11 by failing to meet its requirements.

- 46. Right of appeal
- 47. 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

- 48. 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.
- 49. 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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