

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

Date: 18 October 2019

Public Authority: Yorkshire Dales National Park Authority
Address: Yoredale
Bainbridge
Leyburn
North Yorkshire
DL8 3EL

Decision (including any steps ordered)

1. The complainant has requested information about a complaint that was made to the Yorkshire Dales National Park Authority (YDNPA) regarding the siting of a domestic oil tank.
2. The YDNPA initially withheld all the information captured by the request under the exceptions provided by regulation 12(5)(d) – confidentiality of proceedings, and regulation 12(5)(f) – voluntary supply of information. During the course of the Commissioner’s investigation the YDNPA disclosed a significant proportion of the information and explained that some of the remaining information consisted of correspondence between itself and the complainant (i.e. the person making the request and subsequent complaint about the handling of his request). The complainant has confirmed that he is not interested in accessing copies of his own correspondence. The other information which the YDNPA continued to withhold comprises of correspondence between itself and the informant, (i.e. the individual who complained about the siting of the oil tank). The YDNPA continued to withhold this information under the exceptions provided by regulations 12(5)(d) and (f).
3. The Commissioner’s decision is that YDNPA is entitled to rely on regulation 12(5)(d) to withhold the correspondence between itself and the informant.

4. The Commissioner does not require the public authority to take any further action in this matter.

Request and response

5. On 24 March 2019 the complainant emailed the YDNPA and made a request for information in the following terms:

“We are now in a position where it is necessary for us to have a copy of the complaint against us with regard to positioning of our oil tank, redacted or not. I would be grateful if you could also forward any subsequent documentation you may have regarding this unfounded complaint.”

6. On 27 March 2019 the YDNPA responded. It refused to provide the requested information, citing the exceptions provided by regulation 12(5)(d) – confidentiality of proceedings, and regulation 12(5)(f) – voluntary supply of information as the basis for doing so.
7. The complainant requested an internal review on 27 March 2019. The YDNPA sent him the outcome of the review on 4 April 2019. It upheld its original decision.
8. At the outset of the investigation a member of the Commissioner’s staff contacted the complainant by telephone. The complainant explained that the main focus of his concern was the original letter from the informant reporting the alleged breach of planning legislation to the YDNPA. However he also had an interest in accessing any records regarding how the alleged breach was investigated and any records of site visits by the YDNPA.
9. The YDNPA provided the Commissioner with a copy of the entire enforcement file relating to the alleged breach and was happy to discuss the sensitivity of the information within it. As a consequence of these discussions, YDNPA volunteered to disclose some of the information relating to its investigation into the allegations. This included the closure report, general progress sheets and notes of a site visit. Since the complainant is not concerned about copies of his own correspondence with the authority, the only information that remains in dispute is the correspondence between the YDNPA and the informant. The authority continued to withhold this information under regulations 12(5)(d) and (f).
10. Before discussing the case in any more detail it is helpful to clarify the terminology used in this notice. When investigating the allegations relating to the siting of the oil tank the YDNPA used the term ‘complainant’ to describe the person who made them aware of the

potential breach. However the Commissioner also uses the term to describe person who requested the withheld information and subsequently complained to her about how the request was dealt with. Therefore to try and avoid confusion the Commissioner will use the term 'informant' to describe the person who made the allegations to the YDNPA about the potential planning breach. The term 'complainant' will be applied to the person who has complained about how their request for information about those allegations has been handled.

Scope of the case

11. The complainant contacted the Commissioner in April 2019 to complain about the way his request for information had been handled at which time his concerns about access to the requested information were initially considered to determine whether the complainant had any right of access to the information under the data protection legislation.
12. The complainant considers that the details provided by the informant, including a copy of the original allegation, should be disclosed, as otherwise the system could encourage the making of malicious complaints. The complainant has advised the Commissioner that he would be prepared to accept a redacted version of the allegations that did not identify the informant.
13. The Commissioner considers that the matter to be decided is whether the YDNPA is entitled to rely on either of the exceptions cited to withhold the correspondence between itself and the informant. If one of those exceptions is engaged and the public interest favours maintaining the exception, the Commissioner will not go on to look at the application of the other exception.
14. The Commissioner will start by looking at the application of regulation 12(5)(d) – the confidentiality of proceedings. The YDNPA has explained that this is the principal exception it wishes to rely on.

Reasons for decision

15. The EIR provide a right of access to environmental information. That right of access is, of course, subject to a number of exceptions, which allow a public authority to withhold information. The definition of environmental information includes (at regulation 2(1)(c)) information on measures, such as policies, legislation, plans ... and activities affecting or likely to affect the elements of the environment. The consideration of whether the siting of an oil tank breaches planning

control is a measure effecting the environment. The right of access to this information should therefore be considered under the EIR.

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

16. 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 public authority, or any other public authority, where such confidentiality is provided by law.
17. It is important to recognise that the test for applying the exception is whether a disclosure to the world at large would undermine the confidentiality of the proceedings in question. Therefore although some information may have been revealed to one of the parties involved in the proceedings, the Commissioner will consider the impact of disclosing the withheld information to the general public.
18. The term 'proceedings' is not defined in the Regulations but the Commissioner interprets it to include situations where an authority is exercising its statutory decision making powers. In this case the YDNPA has identified its function in respect of planning control as being the relevant proceedings. It has described breaches in development management as an integral part of its statutory planning function. The Commissioner accepts that the investigation of alleged breaches of planning control, which could, if found to be proven, lead to decisions on whether to commence enforcement action, has the necessary formality to constitute a proceeding for the purposes of regulation 12(5)(d).
19. The second condition that has to be satisfied when applying regulation 12(5)(d) is that the confidentiality of the proceedings in question has to be protected by law. The information still being withheld is that provided by the informant and the YDNPA has argued that this element of the proceedings is protected by a common law duty of confidence, in other words, the person supplying details of the alleged breach, did so in the expectation that the information they provided would be treated in confidence.
20. For information to be protected by the common law duty of confidence it must have the necessary quality of confidence, it must have been provided in circumstances that give rise to an expectation that it would be treated in confidence and an unauthorised use of the information must be detrimental to the confider.
21. Consideration of whether the details provided by the informant has the necessary quality of confidence itself involves two elements. Firstly the information must be more than trivial and secondly the information must not be publicly available or otherwise accessible. The first element is satisfied; the issue to which the information relates, i.e. an alleged breach of planning control with the potential for this to result in legal

sanctions, is certainly not a trivial one. The Commissioner has also viewed the withheld information and is satisfied that its contents are not trivial.

22. In respect of the second element of the quality of confidence, the Commissioner is satisfied that the exact details of the correspondence from the informant is not available by other means. That is not to say the individual whose property is the subject of the alleged planning breach hasn't been told of the nature of the allegation. Clearly, as part of the investigation into the allegation, the property owner is advised that a complaint has been received and that it relates to the siting of their oil tank. However, although the owner of the property has been made aware of the complaint, the details have not been made available to the general public and, as already discussed, the test for applying the exception is whether a disclosure of information to the world at large would breach the confidentiality of the proceedings in question. Furthermore, having viewed the withheld information, the Commissioner is satisfied that it contains other details that the property owner is not privy to and which could risk identifying the informant. Therefore the Commissioner is satisfied that the information has the necessary quality of confidence.
23. The Commissioner will now go on to look at whether the informant contacted the YDNPA in the expectation that their correspondence would remain confidential. Obviously anyone who raises a concern over a potential planning breach does so in the hope that the planning authority would take whatever action was required to address the alleged breach. Therefore they would expect the property owner to be made aware of the complaint. However they would not expect their identity to be revealed, or anything that would risk speculation as to their identity. The Commissioner considers that as a general rule members of the public who alert planning authorities to potential breaches do so with the expectation that they are doing so in confidence.
24. The Commissioner notes at this point that the complainant has asked for a redacted version of the original allegations. However having studied the information in question the Commissioner is satisfied that it would not be possible to provide additional information from the informant's correspondence without it leading to speculation as to their identity. The YDNPA has already advised the complainant, as the property owner, that it has received an allegation about the siting of the oil tank and has therefore already provided him with the information it is able to without risking revealing the informant's identity.
25. The general expectation of confidentiality that the public have when alerting planning authorities to potential breaches can be reinforced by any reassurances that are contained in information the public authority

makes available to the public, for example in their published planning policies. The YDNPA has provided the Commissioner with two documents, the first is titled 'Planning Advice – Planning enforcement' and the other is the 'Yorkshire Dales National Park Authority's planning enforcement policy'. Both of these are available from its website at <https://www.yorkshiredales.org.uk/living-and-working/planning/enforcement>. Both these documents make it clear to anyone who wishes to report unlawful development that their details will not be made available to the property owner. It follows that there would also be no expectation of such details being made available more widely. The Commissioner is therefore satisfied that the informant would have reported the potential breach in the reasonable expectation that their details would remain confidential and that the YDNPA received the information on the understanding that it should be treated as being confidential.

26. Having established that the information has the necessary quality of confidence and was imparted in circumstances that would give rise to a duty of confidence, it is now necessary to consider whether an unauthorised use of the information would be detrimental to the confider, i.e. the informant in this case. The Commissioner recognises that people can be uncomfortable about reporting planning breaches, and they may be concerned about the ramifications if they were identified as the source of an allegation. The Commissioner would stress that there is no suggestion here that the property owner in this particular case would respond inappropriately. However it is likely that in most cases an informant will have some concern over being identified, not just to the property owner, but to the world at large, as would be the case with a disclosure under the EIR. The Commissioner is therefore satisfied that disclosing the information would be detrimental to the informant.
27. In light of the above the Commissioner is satisfied that the reporting of potential breaches in planning control is protected by the common law duty of confidence. The final consideration when applying the exception provided by regulation 12(5)(d) is that the confidentiality of those proceedings would be adversely affected by disclosing the withheld information. The term 'would be' is taken to mean that it is more probable than not that disclosing the information would harm the confidentiality of the proceedings in question; in this case the confidentiality of the planning enforcement proceedings.
28. The Commissioner is satisfied that disclosing the correspondence from the informant would undermine the confidentiality of that element of the proceedings. The receipt of intelligence from the public regarding possible breaches of planning control is an important part of the enforcement process. The Commissioner accepts that disclosing the confidential correspondence from the informant would adversely affect

the confidentiality of the YDNPA's proceedings in respect of planning enforcement. The Commissioner finds that the exception provided by regulation 12(5)(d) is engaged.

Public interest test

29. As with all the exceptions under the EIR, regulation 12(5)(d) is subject to the public interest test as set out in regulation 12(1). The public interest test means that even though an exception is engaged the information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exception is greater than the public interest in disclosure. When considering this test the public authority and the Commissioner is required to apply a presumption in favour of disclosure.
30. The YDNPA has argued that it needs to maintain the public's absolute confidence that information they provide when reporting breaches of development management will be treated in confidence and will not be disclosed. The YDNPA relies on this relationship to ensure effective awareness of breaches of planning.
31. The Commissioner recognises the importance to the YDNPA in the public providing it with intelligence on potential breaches of planning control. It is clearly not possible for it to continually patrol every nook and cranny of its area to pick up on unlawful activity. It therefore has to rely on the public feeling free to report problems. As already discussed members of the public would, understandably, have concerns if they thought they would be identified as the source of such reports. If they did not trust the YDNPA to keep the information they provided confidential they would be deterred from reporting their concerns. This would seriously undermine the ability of the YDNPA to enforce planning control. The Commissioner gives significant weight to this argument.
32. In line with the Commissioner's guidance on the exception 'Confidentiality of proceedings (regulation 12(5)(d))', the YDNPA has argued that there will always be a general public interest in protecting confidential information. Breaching an obligation of confidence undermines the relationship of trust between confider and confidant. For this reason the grounds on which confidences can be breached are normally limited. Therefore the Commissioner accepts that in addition to the argument set out in the preceding paragraph, there will always be some inherent public interest in maintaining the exception provided by regulation 12(5)(d).
33. The complainant has provided arguments in favour of disclosing the requested information. He has stressed on a number of occasions that although he is seeking a copy of the actual correspondence containing the allegation of a breach of planning control, he is prepared to accept a

redacted version of the correspondence which would not identify the informant. Unfortunately the Commissioner does not consider it is possible to disclose any additional information without risking the informant being identified.

34. Nevertheless the complainant argues that protecting the informant disadvantages the property owner. He believes that protecting the informant makes the process of reporting alleged breaches open to abuse, even that it encourages malicious complaints.
35. The Commissioner acknowledges that there is the possibility that some people may try and make mischief, safe in the knowledge that they can retain their anonymity. However, simply because an allegation is made does not mean that the YDNPA accepts the alleged breach has occurred. Upon receipt of the complaint, the property owner is informed of the nature of the complaint and the matter is investigated. Where an allegation turns out to be unfounded the case is closed with no further action taken. Therefore the investigation by the YDNPA does safeguard the interests of the property owner.
36. The Commissioner recognises that this does not necessarily remove the discomfort one might feel at being targeted by what they regard as a spurious complaint, or the distress that might be caused by the uncertainty generated whilst the matter is being resolved.
37. The Commissioner also recognises that there would be a public interest in disclosing information if it revealed failings in the investigation into an allegation, or even wrong doing, for example if there was any suggestion of undue influence being bought to bear on the investigation or its outcome. However, having reviewed the enforcement file the Commissioner has not detected anything which leads her to think these factors apply in this case.
38. The YDNPA has argued that there is little or no public interest in disclosing the informant's correspondence outside the interests of the property owner. It does not consider the disclosure would add to the public's understanding of the planning enforcement process.
39. In weighing the competing public interest arguments the Commissioner finds that although the complainant's argument that disclosing correspondence from the informant could discourage malicious allegations is not without merit, there is a far greater public interest in ensuring that the public are not discouraged from reporting potential breaches. If this source of intelligence dried up, the effectiveness of the YDNPA's planning enforcement function would be undermined. Added to which is the inherent public interest in preserving the duty of confidentiality. The Commissioner concludes that, even after taking into account the assumption in favour of disclosure, the public interest in

disclosure is outweighed by the public interest in preserving the exception. YDNPA is entitled to rely on regulation 12(5)(b) to withhold the correspondence from the informant.

Right of appeal

40. 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@justice.gov.uk

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

41. 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.
42. 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

Rob Mechan
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