

Environmental Information Regulations 2004 (EIR) Decision notice

Date: 2 November 2022

Public Authority: Gwynedd Council
Address: Shirehall Street
Caernarfon
Gwynedd
LL55 1SH

Decision (including any steps ordered)

1. The complainant has requested information relating to an application to build on a nearby flood plain.
2. The Commissioner's decision is that Gwynedd Council (the Council) has correctly cited regulation 12(5)(b) in response to the request.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 8 October 2021, the complainant wrote to the Council and requested information in the following terms:

"A copy of all information held by Gwynedd Council that dates between January 1st 2018 and the present time in relation to an application made on 6th March 2018 for "prior notification of agricultural or forestry development - proposed road. Town and Country Planning General Permitted Development Order 1995 Schedule 2, parts 6 & 7", for a property identified as Hafodydd, Borth-y-Gest (Easting: 256577, Northing: 337842) The application Number is believed to have been C18/0181/44/YA The request also asks for copies of any assessments held by Gwynedd Council in relation to flood risks in the Natural

Resources Wales defined flood plain in Borth-y-Gest of which this site is part."

The purpose of this Freedom of Information request is to obtain a copy of all correspondence, assessments and reports etc that relate the application and the development and objections raised subsequently.

PLEASE COULD YOU SUPPLY THE FOLLOWING

1. Please confirm whether or not a planning application has been submitted for this site and if so provide a copy of any planning application that has been made on this site or its reference number.
 2. A copy of all representations made by residents and Cyng Selwyn Griffiths in relation to this site subsequent to 28th March 2018, and the responses from Gwynedd Council.
 3. A copy of any correspondence between Gwynedd Council and Natural Resources Wales about this site and its flooding risk and impact
 4. A copy of any flood risk assessments made since 2004, and held in respect of this site or in respect of the flood plain of which it is part.
 5. A copy of the agreement quoted by the applicant allegedly from a Mr Alun Williams of Gwynedd Council quoted in the 6th March 2018 "prior notification statement".
 6. A copy of correspondence held by Gwynedd Council relating to flooding events near this site subsequent to 28th March 2018, including the floods to Glanaber Garage, which adjoins the site, since 28th March 2018."
5. The Council responded under FOIA on 23 November 2021 and provided some information within the scope of the request, but redacted names and email addresses under section 40(2) FOIA.
 6. In their request for internal review, the complainant clarified their request as follows:

"CLARIFICATION OF INFORMATION REQUEST

It may help conclude this 'Request for Information' if you would answer specifically the following:

1. Can you confirm whether or not any planning or development

application or notice has been submitted or made in respect of this site since 28th March 2018?

2. Can you confirm whether or not a [name redacted] of Gwynedd Council made an agreement with the applicant in relation to this site, as the submitter of the 6th March 2018 application alleges? If so please provide details of the agreement.
3. Please provide a copy of all correspondence written by Cyngor Gwynedd and its officials in respect of this site since 28th March 2018. I am advised that such documents written by Cyngor Gwynedd and its officials would not be considered the personal data of any third-party individual, but could include some redactions.
4. Is Cyngor Gwynedd aware of any registration under 'The Environmental Permitting (England and Wales) Regulations 2016' for storage or use of waste on the site for construction improvement works, or maintenance? If so please provide details? "
7. The Council wrote to the complainant on 9 June 2022. It stated that the request should have been considered under the EIR and provided information with regard to parts 1, 2 and 4. However, if refused to provide information relating to part 3 of the request citing regulation 12(5)(b) as its basis for doing so.

Reasons for decision

Regulation 12(5)(b) – the course of justice

8. Regulation 12(5)(b) of EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –
 - the course of justice, ability of a person to receive a fair trial or
 - the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
9. The Council stated its Planning Service is currently actively considering taking enforcement action under the Town and Country Planning ACT 1990 Part VII. The request relates to copies of all correspondence by Gwynedd Council officers since 28th March 2018. That correspondence will include communications with the site owners and occupiers in relation to the activities on site which are now the subject of the enforcement investigation.

10. It further stated that the matter was consistently considered to be a potential enforcement issue and was initially investigated on that basis. That position has, not essentially, changed and enforcement action is being considered. Consequently the Council had to consider all correspondence in relation to the site in that context.
11. The Council also explained that it is engaged in correspondence with the applicant seeking to regularise and resolve an alleged breach of planning control. The aim of such correspondence in a planning context is to seek resolution of the matter and avoid the need for formal action. This would involve inviting the applicant to explain the actions and context to establish the proposed nature of the development.
12. It went on to explain that the matter can proceed a number of ways including; submission of an application which would be in the public domain, confirmation of Permitted Development rights, or enforcement.
13. But the aim of such correspondence is to seek a resolution of the matters. As such disclosure of these discussions or the possibility of disclosure could hamper the Council's ability to have a candid discussion with the applicant and resolve the matter.
14. The Council therefore considered that disclosure of such correspondence will mean that interaction with the applicant is likely to be constrained as their position and response would be in the public domain, potentially on an on-going basis.

Public interest test

15. The Council argued that there is also a public interest in seeking to regularise possible breaches of planning control without recourse to formal enforcement steps which can take time and involve appeals and prosecutions in their ultimate guise. Dialogue is acknowledged and expected to be a key part of resolving enforcement issues. If it transpires that such discussions cannot be held in confidence then this could serve to discourage others in similar situations in engaging with the Council.
16. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019):

"If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced

and (2) to inform any decision that may be taken under the regulations” (paragraph 19).

17. The Commissioner acknowledges the complainant’s valid and real concerns about the possibility of flooding several nearby homes, should development be approved.
18. In general, where an investigation is on-going and, where that investigation could lead to litigation, it cannot be in the public interest to disclose information that is relevant to that investigation.
19. If the withheld information were to be put into the public domain, it may dissuade future applicants from engaging with the Council on similar matters. The consequence of this would be that the Council may be forced to take enforcement action, and this would be at a cost to the public purse. The Commissioner considers this would be against the public interest.
20. The Commissioner has carefully considered the competing arguments for and against disclosure in this case, and has concluded that it would be inappropriate for the Commissioner to order disclosure of the requested information in these circumstances.
21. Therefore he has concluded that the Council is entitled to rely on regulation 12(5)(b) of the EIR to withhold the requested information. The Commissioner also finds that the public interest in maintaining the exception outweighs the public interest in disclosure of the withheld information
22. In this case the Commissioner considers that the balance of the public interests lies in maintaining the exception, rather than being equally balanced.

Right of appeal

23. 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

24. 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.
25. 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

Susan Duffy
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF