

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

Date: 18 April 2024

Public Authority: Northumberland County Council
Address: County Hall
Morpeth
Northumberland
NE61 2EF

Decision (including any steps ordered)

1. The complainant requested pre-application planning advice relating to a specific property. Northumberland County Council (the "Council") withheld the information under the exception for the confidentiality of proceedings (regulation 12(5)(d)).
2. The Commissioner's decision is that the Council correctly withheld the requested information under regulation 12(5)(d).
3. The Commissioner does not require further steps.

Request and response

4. On 30 November 2023, the complainant wrote to Northumberland County Council (the "Council") and requested the following information:

"In respect of planning application [redacted] I request all details about pre-planning advice given by NCC prior to submission of these applications. Again, as the cases are no longer live, I believe information should now be released to me."
5. The Council responded on 22 December 2023. It confirmed that it was withholding the information under the exception for the confidentiality of proceedings (regulation 12(5)(d)).
6. Following an internal review the Council wrote to the complainant on 2 February 2024. It stated that it was maintaining its position.

Scope of the case

7. On 2 February 2024 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner has considered whether the Council correctly withheld the requested information.

Reasons for decision

Is the requested information environmental?

9. Regulation 2(1) of the EIR defines environmental information as being information on:
 - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
10. The Commissioner acknowledges that the requested information relates to decisions taken in respect of planning matters. He is, therefore, satisfied that, as reflected in numerous previous decision notices, the information can be considered to be a measure as defined in regulation 2(1)(c). He has, therefore, assessed the request under the EIR.

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

11. Regulation 12(5)(d) of EIR says 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.
12. The engagement of the exception rests on three conditions being met.
13. First, the confidentiality referred to by a public authority must specifically relate to the confidentiality of proceedings. In his guidance 'Confidentiality of proceedings (regulation 12(5)(d))', the Commissioner interprets 'proceedings' as possessing a certain level of formality. They will include but are 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 proceedings¹.

14. The information withheld under this exception relates to a pre-application advice process offered by the Council. The Commissioner has previously acknowledged in a range of decisions² that such a process represents a 'proceeding' for the purposes of the exception.
15. The Commissioner is therefore satisfied that regulation 12(5)(d) of EIR is engaged because the information relates to the Council's pre-application advice process
16. Second, this confidentiality must be provided by law. The Council has explained that it considers the information to meet the threshold for the common law of confidentiality. This is because the information is not trivial and was submitted to it voluntarily as part of the pre-application advice process.
17. Having considered the context in which the information has come to be held, the Commissioner is satisfied that this information is subject to the common law of confidentiality.
18. Third, it must be demonstrated that disclosure would have an adverse effect on the confidentiality of the proceedings.
19. The Council has explained that, if applicants enter into a process they understand to be confidential, and the Council publishes that information to the world at large, there will be significant damage to the relationship that applicant has with the council, as well as future relationships that Council may have with that applicant or others.
20. The Council has argued that, if applicants do not feel they can trust the Council, this would significantly undermine this process of a confidential pre-application opinion, and would undermine the ability to have a full and frank discussion regarding the planning application at hand. It explained that applicants are aware that once a planning application is

¹ https://ico.org.uk/media/for-organisations/documents/1626/eir_confidentiality_of_proceedings.pdf

² See, for example: <https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4028767/ic-264856-g0v2.pdf> ; <https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4028093/ic-261144-d2h6.pdf> ; <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4027925/ic-253477-s4d1.pdf>

made, this is made publicly available on the Council's Public Access Portal.

21. In this case, the Commissioner considers that disclosure would have an adverse effect on the confidentiality of the pre-application process as it would damage the general principle of confidentiality itself and result in harm to the interest the exception is designed to protect.
22. In the Commissioner's view disclosing the specific information requested in this case would discourage full engagement with the pre-application process, both from the specific applicant in this and others, for fear of the public dissemination of such information.
23. On this basis, the Commissioner has decided that disclosure would have an adverse effect on the confidentiality of proceedings. Regulation 12(5)(d) has therefore been found to be engaged.
24. In reaching his conclusions in this matter the Commissioner has referred to a decision notice issued in relation to a previous request the complainant submitted to the Council for the same information. He considers that the conclusions reached in that notice are transposable here³.
25. The Commissioner must next consider the balance of the public interest. In doing so, he has taken into account the EIR's express presumption in favour of disclosure and the general public interest in transparency and accountability.

Public interest in disclosure

26. The complainant has argued that at the time of their previous request (see paragraph 24 above) the rationale for the decision was based on the fact that one of the planning cases was still "live" and subject to a planning appeal. The complainant has argued that, as the matter is no longer live there can no longer be any adverse effect on the process.
27. The complainant has also argued that there is a public interest in being able to assess whether pre-application advice provided by the Council is correct.
28. The Council has acknowledged that there is a general public interest in transparency around decisions made in respect of planning applications.

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4027541/ic-236187-n5r0.pdf>

Public interest in maintaining the exception

29. The Council has argued that undermining the confidential process would adversely impact on the trust in the pre-application process as a whole and would be at odds with the reasons behind why the service is provided, namely, to enable residents to discuss their proposals privately and consider their options ahead of any public planning application submissions.
30. The Council has confirmed that there is limited public interest in the information as the pre-application process does not provide a formal decision and it does not guarantee the outcome of any future application. The public interest in transparency and accountability in these matters, therefore, are provided via the formal planning application process.

Balance of the public interest

31. The Commissioner accepts 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, where the exception is engaged, the Commissioner accepts that there will always be some inherent public interest in maintaining it.
32. The Commissioner recognises that the confidential pre-application process is a service that saves public money by enabling the Council advise on how to eliminate any planning problems before the formal application stage commences. If pre-application advice was to be routinely published, the Commissioner recognises that applicants would be deterred from seeking advice and would be more likely to submit inappropriate formal applications which would need resubmission, increasing the time, effort and expenditure required to deal with planning applications to the detriment of both applicants, the Council and the wider public.
33. The Commissioner recognises that the complainant has a specific personal interest in the information and he acknowledges that there is a broad public interest in disclosing information that provides transparency around decisions made in respect of planning matters.
34. However, the Commissioner is conscious that the pre-application process is not one which is designed to provide interested parties, including the public, to comment on proposals by applicants. In contrast, once a planning application has been submitted the planning process

provides precisely such a role and opportunity. In the Commissioner's view such transparency, and more specifically this route of engagement in the planning process for interested third parties at a later stage in the process, but still prior to a local authority's decision on a particular application, arguably reduces the public interest in disclosure of information about pre-planning.

35. The complainant has also argued that, as the planning matters associated with the pre-application advice are no longer live, disclosure is less likely to be damaging.
36. The Commissioner accepts that, as a general rule, information can become less sensitive over time, particularly when it no longer relates to live considerations. However, he has accepted that disclosure of the information would breach confidentiality and a direct result would be damage to the integrity of and effectiveness of the pre-application process and to the Council's ability to use its resources in the interests of the broader public. The Commissioner considers these factors represent strong public interest reasons for withholding the information that are not diminished by the passage of time.
37. The Commissioner further notes that the planning applications associated with the pre-application advice relate to the residential dwelling of the applicant. The Commissioner accepts that, were it the case that the information related to a larger development with the potential to affect the wider community, there might be a broader public interest in making the information available. As it relates to a single property and the interest in the information is likely to be of interest only to those in neighbouring properties he considers that the public interest weighting in favour of disclosure is minimal. He does not consider that it is the purpose of the EIR to facilitate personal interests except where these correspond with wider public interest. The remedy for addressing such matters in this context is via the planning process.
38. The Commissioner has also accepted that the public interest in disclosing pre-application advice is marginal (as any advice is superseded by decisions published as part of any subsequent formal planning process). In view of this, he has concluded that the balance in favour of withholding the information in this case is greater than the public interest in disclosure.
39. 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)⁴.

40. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(5)(d) was applied correctly.

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https://assets.publishing.service.gov.uk/media/5d9dc592e5274a595bf5dabf/SGIA_44_2019ji.pdf

Right of appeal

41. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

42. 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.
43. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Christopher Williams
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