

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

Date: 9 October 2013

Public Authority: East Devon District Council
Address: Council Offices
Knowle
Sidmouth
Devon
EX10 8HL

Decision (including any steps ordered)

1. The complainant has requested correspondence between the council and a developer regarding pre planning advice which was requested. The council has applied Regulation 12(5)(f) to the information.
2. The Commissioner's decision is that the council correctly applied the exception in Regulation 12(5)(f). His decision is also that the public interest in exception being maintained does outweigh the public interest in the information being disclosed.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 7 March 2013 the complainant wrote to the council and requested information in the following terms:

"The Freedom of Information Act and the Environmental Information Regulations apply to pre-application consultations and therefore I believe that I am entitled to know (a) whether there was a pre-application consultation and (b) if there was a pre-application consultation then to be provided with copies of all minutes of meetings, advice given and details of any fees paid (c) copies of all

correspondence relating to this this property concerning planning. If you do hold any information then please can I pop into the office and review it. Please accept this email as a formal request under the Freedom of Information Act and the Environmental Information Regulations."

5. The council responded on 27 March 2013. It stated that the information was exempt under Regulation 12(5)(f) (voluntary supply) and Regulation 13.
6. Following an internal review the council wrote to the complainant on 17 April 2013. It stated that it upheld its initial decision.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The Commissioner considers that the complainant's complaint is whether the council correctly applied the exceptions or whether the information should have been disclosed to her.

Reasons for decision

Regulation 12(5)(f) of the Regulations states that information can be withheld where its disclosure would have an adverse affect upon:

(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;

9. The council has submitted its arguments in favour of the exception applying.

Was the information supplied on a voluntary basis

10. The Commissioner is satisfied that the information was submitted on a voluntary basis. It was issued to the council as a pre planning advice request. The authority would not have had the right to require the organisation to provide this to it as no formal application had been made by the developer at that time. Requests for pre planning advice are provided voluntarily by a developer in order identify issues early enough to take these into account in any formal planning applications.

Is the council entitle to disclose the information other than under the Regulations?

11. As part of a pre planning request for advice the Commissioner is satisfied that the developer would have submitted the request with the expectation that that information would not be disclosed more widely by the council. Pre-planning advice requests are not planning applications and are not subject to the normal formal reporting of plans as planning applications are. The Commissioner is therefore satisfied that the council would not be able to disclose this information other than in response to a request under the Regulations or the Act.

Did the developer consent to the disclosure of the information?

12. The council confirmed that in response to the request it asked the developer whether the information could be disclosed. The developer however did not consent to the information being disclosed. The Commissioner is therefore satisfied that this criterion has been met.
13. The complainant raised an issue with the Commissioner stating that she did not believe that the council should have contacted the developer and told him about the request, The Regulations are clear however that consent is a valid issue to be considered in response to the application of this exception and the council acted appropriately by seeking the consent of the developer.

Would a disclosure of the information have an adverse affect upon the interests of the developer?

14. Subsequent to the request being received and responded to by the council the developer submitted a planning application to the council which has received a number of objections from interested parties. The general consensus of the objectors is that the development will cause significant damage to the area around the planned properties. This will include damage to hedgerows and established 'Devon bank'.

15. Additionally four oak trees had already been cut down on the area of the development. The objectors consider that if the development goes ahead a number of other trees will be likely to be damaged and potentially destroyed.
16. The Commissioner accepts that due to the nature of the development any planning application which was submitted was likely to attract a number of strong objections due to the rural character of the village and the landscape surrounding the proposed site.
17. The request was made by the complainant prior to the formal planning application being submitted. A disclosure of this information would therefore have acted against the interests of the developer. It would have been likely to have raised tensions in the area and resulted in objectors speaking out against the developer as it would have revealed his intentions to develop the area at a time when that was not a certainty.
18. It is always possible that following the receipt of advice a developer takes a decision that no formal application should be made. In effect disclosing the information at the time of the request would have potentially raised tensions in the area whereas the developer may have taken a decision not to submit a formal application. At the time that the request was responded to the council would not have had the formal planning application submitted.
19. A disclosure of the advice would therefore have provided potential objectors with information which would be subsequently used to formulate objections against the developer's plans at a time when no formal planning application had been submitted. The developer may then have faced significant objections to plans which he may have decided not to formally submit. This would clearly have had an adverse effect upon his interests. If, as was the case, the developer was continuing to consider his options as regards the land, further delays and costs may have been incurred as interested parties sought to prevent any development occurring prior to the planning application being submitted.
20. Once formal planning applications are submitted the public has a right to raise objections and have their arguments heard. In the initial stages of preplanning there is less of a reason for this to occur as no formal plans have been submitted. The Commissioner is therefore satisfied that a disclosure of the information prior to the formal planning applications being submitted was likely to have an adverse effect upon the interests of the developer.

21. The Commissioner is therefore satisfied that all of the criteria for Regulation 12(5)(f) have been met by the council.
22. Regulation 12(1) requires the authority to carry out a public interest test to ascertain whether the information should be disclosed in spite of the exception being engaged. The test is whether the public interest in the exception being maintained outweighs the public interest in the information being disclosed. If it does not then the information should be disclosed in spite of the exception being engaged.
23. Regulation 12(2) also provides a specific presumption in favour of the information being disclosed.

The public interest in the exception being maintained

24. The central public interest in the exception being maintained is that individuals and organisations should be able to seek advice from their planning authorities on a confidential basis for ideas that they have for potential future developments free from the public eye initially. A pre planning advice request is a way for developers to 'test the waters' as regards particular types of developments in particular areas. They can also receive advice as to what the issues would be likely to be prior to drawing up formal plans for approval, thereby saving time and money themselves, but also time and costs to the council by lowering the issues that a formal application might raise.
25. The public has a right to object to planning issues once formal planning applications are submitted for approval. They therefore do have a forum in which to register their objections to planning applications, and these will be taken into account when planning applications are being considered.
26. Prior to that time however developers should be able to seek informal advice from authorities without disclosing their development plans to their neighbours or to their competitors. In many cases pre planning applications may result in no formal applications being submitted, or significantly different plans being submitted. A disclosure of the information prior to the formal applications being received may therefore result in objections being received to plans which are never formally submitted. This would waste both council time dealing with the objections, as well as potentially causing concerns to neighbours or neighbouring properties and, potentially, for some developments affecting house values in the . A disclosure of pre planning advice requests would also potentially alert commercial competitors to early development plans within the area.

27. The council argues that if pre planning advice is disclosed on a regular basis then developers may decide not to engage with councils in the future at such an early stage. This would have the effect of increasing the costs of planning applications as the developers may submit inappropriate plans which would have been identified earlier had advice been sought. This could slow the planning process down as far as the council is concerned, increasing costs and delaying planning decisions being taken.
28. The complainant has pointed to guidance published by the Local Government Association (the 'LGA') created by the Planning Advisory Service which suggests that in order to increase transparency on pre-planning advice provided by planning authorities, pre-planning advice should be recorded and published unless there is a reason for the information to remain confidential. This is in order to demonstrate probity in planning decisions, and particularly in councillor's involvement in pre planning discussions. The advice in question 'Probity in Planning for Councillors and Officer' was published by the LGA in April 2013.
29. The Commissioner considers that the complainant's argument does hold weight, but he considers that the circumstances prior to a planning application formally being submitted are different to the time where the full planning application has been submitted and the documents published for objections to be made. At the time of the complainant's request that was not the case.
30. The Commissioner is required to make a decision on a request based upon the circumstances of the case at the time that the request is received, or at the latest at the time that a review of the decision is carried out by the authority. In this case the initial request was sent by the complainant on 13 March 2013, and the decision reviewed on 17 April 2013. The formal application was not received until 30 May 2013.
31. The Commissioner considers that the most appropriate time for pre planning information to be published on a development of this type was likely to be at the time that the formal planning documents were published. In this way the interests of the potential applicant are protected prior to the formal application being submitted, whilst the subsequent disclosure of the pre-planning advice would ensure that the public is assured of the probity of council employees and councillor's prior to the decision on the application taking place.
32. He notes in passing that the council has said that it will publish the advice once a decision has been taken on the planning application. It said that at that point the arguments for the exception applying are

weakened as the interests of the developer are less likely to be affected by a disclosure of the information.

The public interest in the information being disclosed

33. The central public interest in the information being disclosed is to create transparency about the advice provided by the council to the developer. As noted above a disclosure will also provide assurances of probity in planning decisions where planning applications are subsequently submitted.
34. The complainant considers seeing the advice might shed light as to why the developer cut down 4 oak trees on the land which is the subject of a current planning application. The complainant and others consider that this has significantly damaged the landscape of the area, as well as causing damage to the environment and the rural 'leafy' character of the village in this area. A number of objectors to the planning application which was subsequently submitted have raised this as an issue of concern. In their view it would not be appropriate for the developer to obtain planning approval due to the destruction of the trees.
35. The Commissioner does not know whether a destruction of the trees prior to the application being submitted is a relevant consideration for the authority to take into account when making its planning decision. He is also not aware of any evidence to suggest that the destruction of the trees was unlawful. The council planning portal shows no record of any enforcement being taken against the property owner or any other party for the destruction of the trees specifically. The council has registered an enforcement complaint about a destruction of Devon Bank and hedgerow on the property, however the council's enforcement record shows its decision that no further action would be taken over this by the council.
36. Although the planning application had not been submitted at the time of the request it was more than possible that a planning application would be submitted and this was therefore a relevant consideration at the time of the request. The Commissioner is satisfied that this falls within one of the central reasons for the introduction of the Regulations. Damage has been caused to the environment, potentially because of an intended future planning application, and there is a strong public interest in shedding light shed on whether the council's advice had anything to do with that.

Conclusions

37. The Commissioner accepts that there are strong arguments in favour of the information being withheld. At the time of the request no formal planning application had been submitted and the Commissioner is not aware of any evidence to suggest that the actions of the developer in cutting down the trees was unlawful, even if they were unpopular with other residents.
38. The council has however said that it will disclose the information it holds once the planning decision has been taken. Its actions will be transparent once the planning decision has been made. The Commissioner notes however that this does not necessarily accord with the LGA guidance which suggests that pre planning advice should be disclosed in order to assure the public of the probity councillors and officers' actions.
39. The Commissioner is restricted to considering the circumstances of the case at the time that the request was received and the review was carried out. At that time no formal planning application had been submitted to the council and as outlined above there are strong reasons why pre planning discussions should not be disclosed prior to a formal application being submitted. These do however need to be considered on a case by case basis and decisions made based upon the circumstances in each individual case.
40. The Commissioner notes that even without access to the pre planning advice residents did have the opportunity to object to the formal planning application and to voice their objections to the destruction of the trees during the formal planning consultation period. The Commissioner does not therefore consider that a failure to disclose the advice has significantly affected the ability to object to the formal planning application in this respect, or to voice concerns about the destruction of the trees if that is relevant to the planning decision.
41. After considering the above, the Commissioner considers that the public interest in the exception being maintained outweighs the public interest in the information being disclosed.

Right of appeal

42. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

43. 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.
44. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF