

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

Decision notice

Date: 9 July 2014

Public Authority: Department of Communities and Local Government (DCLG)

Address: Knowledge and Information Access
Zone 4/E2
Eland house
Bressenden Place
London
SW1E 5DU

Decision (including any steps ordered)

1. The complainant requested information relating to a planning application which the Secretary of State at the DCLG decided not to 'call in'. The complainant requested a copy of the report submitted to the Secretary of State advising him on the matters to be considered. The DCLG refused the request on the grounds that Regulation 12(4)(e) was applicable.
2. The Commissioner's decision is that the DCLG has correctly applied the exception to the information.
 - The Commissioner does not require the DCLG to take any steps.

Request and response

3. On 12 July 2013 the complainant wrote to the council and requested information in the following terms:

"To help us understand why the Secretary of State did not see this application as being in conflict with national policies on important matters, I would be grateful if you could provide to me a copy of the report submitted to him advising on the matters to be considered."

4. The DCLG responded on 8 August 2013. It provided some information however it withheld other information on the grounds that stated it was exempt under Regulation 12(4)(e) (internal communications). It also withheld some information on the grounds that Regulation 12(3) was applicable.
5. Following an internal review the council wrote to the complainant on 1 November 2013. It provided a small amount of further information however it upheld its decision that Regulation 12(4)(e) applied to the remainder. The disclosures it made were of factual detail. It specifically withheld any advice which had been provided to Ministers.

Scope of the case

6. The complainant contacted the Commissioner to complain about the way his request for information had been handled on 20 December 2013.
7. The Commissioner considers that the complainant's complaint is the application of Regulation 12(4)(e) to the information. The complainant has not raised the issue of the application of Regulation 12(3) (personal data) with the Commissioner however and so the application of this exception has not been considered further.
8. On a further point the complainant complained that due to the response being provided under the EIR the opportunity for him to see obtain evidence upon which to judge the likelihood of any judicial review being successful was not given to him. He said that the rules for judicial review stipulate a 6 week period within which to start an action. By considering the request under the EIR the DCLG did not provide the information he had requested within a period which allowed him to properly consider whether taking beginning the judicial review action was too risky or not. Ultimately, this led to the CPRE deciding that without the information beginning judicial review action was too risky.

9. Whilst the Commissioner recognises the complainant's concerns as regards this it is not a matter which the Commissioner can address. The request was a request for environmental information and the DCLG were therefore required to consider it under the EIR, whether the complainant had stipulated that the request was made under FOI or EIR or not. The time periods for responding to an EIR request are stipulated in the EIR, and therefore the Commissioner is not able to consider this as an argument other than to find that the DCLG met the requirement for responding within 20 working days under Regulation 5(2) in this instance.

Reasons for decision

10. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.

Is the information internal communications?

11. The first question to consider is whether the information is a 'communication' for the purposes of the Regulations. The Commissioner considers that the concept of a communication in this context is broad and will encompass any information someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others may consult it. The Commissioner is satisfied that the withheld information is a report produced by a planning inspector at the DCLG which was passed to the Ministers for a decision as to whether to 'call in' the application. The Commissioner is therefore satisfied that it is a communication for the purposes of the exception in this instance.
12. There is no definition of what is meant by 'internal' contained in the EIR. In this case the report was passed between an officer at the DCLG and the Secretary of State (the SoS) at the DCLG. The Commissioner is therefore satisfied that the report was an internal communication. The Commissioner's decision is therefore that the exception in Regulation 12(4)(e) is engaged.
13. Where the exception in Regulation 12(4)(e) is engaged it is subject to a public interest test required by Regulation 12(1). The test is whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
14. When carrying out the test the Commissioner must take into account a presumption towards the disclosure of the information which is required by Regulation 12(2).

The public interest test

The public interest in maintaining the exception

15. In essence the public interest considerations relating to the Regulation 12(4)(e) relate to the protection of thinking space and the ability to have full and frank discussions without fear that the information will be disclosed.
16. The specific concern in this case is that a disclosure of the information would affect the frankness with which officials can provide advice to Ministers. The argument is that this would inhibit discussions and deliberation and consequently undermine and degrade the decision making process.
17. The DCLG argues that the circumstances at the time of the request demonstrate that it was essential that Ministers be able to rely on the free and frank advice of officials as part of the decision making process. It said that officials and Ministers have to be able to consider the evidence and Ministers have to be able to consider official's advice on each issue and form a view on each. In order to do so they require thinking space and the ability to converse fully and frankly.
18. In general once a decision has been taken the private thinking space which is required is diminished and the sensitivity of the information is reduced. The Commissioner recognises that the SoS had made his decision not to call in the application and so this decision had been taken at the time of the request. This part of the process had been completed at that time. The DCLG however pointed out that information of this sort is more sensitive when the issues surrounding the decision making are still 'live' and that they are still live in this case.
 - The planning process in this case is on-going and is now back with the local authority, Dover District Council for a decision.
 - The DCLG also highlighted there is always the possibility of a further request for call in being received by the DCLG on the basis that new evidence or information had been found. Therefore although the decision had been taken and the reasons for not calling it in had been provided the issue was still 'live' until such time as planning decision had been taken and any appeals made. At the time of the request the planning application had yet to be taken by the council.
 - In addition to the ongoing planning decision process at the council the DCLG pointed out that at the time that the request was responded to there was a possibility of a legal challenge by made by Judicial Review.

19. The DCLG pointed out that it is the decision of the SoS which would be challenged rather than the advice which the SoS received. The reasons for the Secretary of State's decision not to call in the application were set out in a non-intervention letter, which has been made publicly available. The letter sets out the Secretary of State's decision on each of the issues raised in the application for call-in, and explains why he reached his decision.
20. The DCLG argues that it is the decision of the SoS that is relevant as it is him who is responsible and accountable for the decision rather than his officials. As regards any appeal it is the Secretary of State's decision rather than any internal considerations that carry legal weight.
21. The DCLG also argues that there is nothing substantive in the withheld information in this case which would add to the public understanding of the reasoning behind the decision and therefore increase the public interest in its disclosure. Therefore the DCLG contends that the public interest in a transparent planning process is satisfied by the information already available.
22. The DCLG also pointed out that following a pre-action protocol letter leading towards a potential judicial review action, treasury solicitors wrote a response which provided further information about the SoS's decision. To an extent however this disclosure of further information is irrelevant as the disclosure of this information was to the complainant's representative's only and was not done under the EIR – it was not therefore a public disclosure of information as would occur under the Regulations.
23. The Commissioner notes that there is clearly a public interest in allowing officials to fully advise Ministers of the circumstances of a case prior to the SoS reaching a decision on an application. If that information is disclosed at too early a point in time the advice could in some cases be used as a means to challenge the decision via judicial review, or could be used as a means of challenging the planning decision.
24. If Ministers and their advisors could not be confident of the privacy of such advice, and there was any potential for disclosure leading to more challenges being received and more media and public pressure then it is likely that such advice would become more restrictive and less full and frank. Delays due to actions of this nature would be costly and delay the final planning decision, whoever that decision was ultimately taken by. This pressure would fetter future discussions to some extent and impinge upon the thinking space which is currently in place.
25. The factual details which are provided to the SoS form the basis of his decision. There is therefore a public interest in that factual detail being

provided, and this the DCLG has disclosed in this instance. Regardless of any advice which is provided to the SoS the actual reasons which he took into account when making the decision have been disclosed in the non-intervention decision letter.

26. The DCLG argues that it is this information that the public can satisfy themselves that all of the relevant information was provided and taken into account by the SoS when the decision was made, and that it was clear that the factors were given with the appropriate level of importance or weight when they were considered.

The public interest in the information being disclosed

27. The central public interest in the information being disclosed relates to retaining the openness and transparency of planning decisions which will ultimately affect an entire community. In this case the application is controversial as it is to develop in an area designated as an area of outstanding natural beauty (an AONB). The development is significant including residential properties, a hotel and a tourist information centre. The development will create a significant amount of residential properties in the area, and provide employment for a number of people. It is therefore a controversial application with cogent arguments on both sides. There will always be a difference of opinion about the application.
28. There is a national need for more housing, and the development would create employment opportunities as well as furthering the area as a tourist site due to the inclusion of the hotel and the information centre. Weighing against this is the environmental damage that would be caused by the development in the AONB.
29. The Commissioner notes that in such situation there is a strong argument that the planning decision and the process leading to that decision should be as open and transparent as possible. If all parties are fully informed of the issues and the final decision taken openly, and fully explained, the reasons for the decision will be known and fully understood by the public who are affected. It is also the case that the better informed the public are the more inclined, or the better ability they will have to actively participate in the decision.
30. The CPRE has also raised the issue that the information was withheld at a time when it was considering taking the decision to judicial review. It argued that under the duty of candour which is required in response to the initial stages of judicial reviews there is an onus on the DCLG to disclose relevant information. The Commissioner cannot take such an issue into account in his decision however as he must follow the requirements of the EIR. Arguments relating to whether the DCLG followed proper procedures as regards the potential judicial review

action are not relevant to the Commissioner's decision as regards the application of the Regulations.

31. The complainant believes that it is important that the advice provided to the SoS is disclosed because it considers that the Minister may not have followed the planning inspectors advice when reaching his decision. It pointed to previous planning decisions where this had been raised as an issue in judicial review proceedings. The Commissioner notes however that in that case highlighted by the CPRE the judge subsequently decided that the SoS had clearly made his decision on based upon the relevant facts and therefore dismissed the appeal.
32. It is important to note that the requested information does not directly relate to the issue of whether the development should be built or not. Following the Secretary of State's decision it is likely that that final decision will be taken by the local planning authority. The Secretary of State's decision relates to whether the planning application should be decided locally, or whether it should be called in and decided at central government level. The ultimate decision of the SoS was that the decision should be decided at local level rather than by the Secretary of state – in effect a decision that there was no requirement for the department to become involved in local matters. This accords with the government's localism policies, and to an extent strengthens the ability of the local community to be more involved in the decision.
33. Many of the arguments supporting greater openness rest in the planning decision itself. They are therefore distanced from the public interest in this information being disclosed to an extent. This therefore weakens the public interest arguments in favour of disclosure in this case to an extent as a decision not to call in the application does not on the face of it affect a decision on planning approval on the application itself. It only effects who will make that decision.
34. The obvious counter argument is that where decisions are taken locally they are may place too great a weight onto local factors such as employment rates, the local economy or local housing needs on the counter side preserving green space and the standard of living. National issues such as preserving green space in the country as a whole or on the need for greater numbers of houses may then have less weight placed upon them by decision makers who might place more weight on local requirements over others.

Conclusions

35. The Commissioner has considered the above. He recognises that both sides' arguments have merit, and the question of balancing the factors to determine whether the information should be disclosed is not an easy one in this case.
36. He notes that the planning decision is still live, and that a disclosure of the withheld information could reduce the thinking space which the DCLG currently has. This could detrimentally affect decision making in the future and/or potentially lead to less full and frank advice being provided to Ministers in the future.
37. He also notes that the reasons for the Secretary of State's decision are provided in the non-intervention decision letter which was issued. It is the SoS's decision which matters and has legal standing.
38. On the counter side the CPRE arguments do have merit in that it wishes to see the advice laid before the Secretary of State, and the public as a whole would be better informed of the decisions taken by him if they are fully aware of the information he had before him when he reached his decision.
39. On balance however the Commissioner considers that the weight of the public interest lies in maintaining the exception in this instance.

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: 0116 249 4253

Email: GRC@hmcts.gsi.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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF