

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

Date: 12 April 2021

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

Decision (including any steps ordered)

1. The complainant has requested information regarding a planning application viability appraisal.
2. The Commissioner's decision is that Northumberland County Council incorrectly withheld the viability appraisal document on the basis of regulation 12(5)(e); however, it correctly engaged regulation 12(4)(e) to withhold some other information relating to the viability appraisal. The Commissioner does not consider that the council holds any further information in scope of the request. However, she finds that in responding outside of statutory timescales, it failed to comply with the requirements of regulation 5(2).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the viability appraisal.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 19 April 2020, the complainant wrote to Northumberland County Council ('the council') and requested information in the following terms [numbering added by the ICO]:

Under the Freedom of Information Act, I should like to request a copy of the [1] 'confidential development viability appraisal' document, which played an instrumental part in the granting of planning permission for application 16/00078/OUT. This document was said to make a case for the 150 houses that were deemed necessary in order to fund the TRSA element of the development which promised 352 jobs.

It is now evident that any confidentiality that may have been attributed to this document no longer applies. The Reserved Matters applications that have been submitted for the housing (19/01362/REM) and the TRSA (18/03394/REM) have two totally independent developers. As the link between these two elements of the outline planning consent has been severed, it is now incumbent on Northumberland County Council to make this document available for public scrutiny.

Further, under the Freedom of Information Act, I should like to request [2] copies of any emails or minutes of meetings in which the appraisal document was discussed, together with the names of the personnel involved."

6. The council responded on 7 July 2020. It stated that it was withholding the requested information on the basis of regulation 12(5)(f).
7. On 8 July 2020, the complainant wrote to the council to ask it to clarify its response and to respond to request [2].
8. On 27 July 2020, the council provided the complainant with the outcome of an internal review. It stated it had made a typographical error within the refusal notice, which incorrectly referred to regulation 12(5)(f). It advised that the information was withheld on the basis of regulation 12(5)(e), and that the internal review upheld this position.
9. Additionally, the council accepted that it had not addressed the complainant's request item [2]. It advised that the information was withheld on the basis of regulation 12(5)(e) and regulation 12(4)(e).
10. On 2 August 2020, the complainant wrote to the council to assert that the viability appraisal document ('the Viability Appraisal') should be made available for public scrutiny. They argued that the outline planning application (16/00078/OUT) was now split into its component parts

(19/01362/REM and 18/03394/REM); that the link between the housing development and the TRSA (Trunk Road Service Area) and Innovation Centre was severed; and therefore, there is no longer any legitimate economic interest to protect.

Scope of the case

11. The complainant wrote to the Commissioner on 2 August 2020 to complain about the way their request for information had been handled. Specifically, to dispute the application of 12(5)(e) and 12(4)(e) to withhold information. Furthermore, the complainant stated they were dissatisfied with the length of time it took the council to respond to the requests; its failure to respond to request item [2] initially; and the error in its refusal notice in citing the incorrect exception.
12. The Commissioner considers the scope of the case is to establish whether the council has engaged the exceptions at regulations 12(5)(e) and 12(4)(e). She will also consider if it made any procedural errors in the handling of the request.

Background

13. The council provided some background information about the planning application, in order to explain the large scale and complexity of the project.
14. The outline planning application was received in January 2016, being for a mixed use development comprising of a trunk road service area incorporating: a hotel, a restaurant/public house, a petrol station including retail, food and supporting facilities, employment (in the form of an innovation centre), residential housing of up to 150 units, open space, sustainable drainage systems, allotments and landscaping, a countryside park including car parking, a foul pumping station, and the creation of new access off Morpeth Northern By-Pass.
15. Due to the large scale of the application, there are 409 associated documents which are available online, including public comment, and consultee comments.
16. The planning application was permitted in November 2016.

Reasons for decision

Regulation 12(5)(e)

17. Regulation 12(5)(e) of the EIR provides that:

"...a public authority may refuse to disclose information to the extent that its disclosure would adversely affect... the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;"

18. The Commissioner's published guidance on this exception explains that in order for this exception to be applicable, there are a number of conditions that need to be met. These are:

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is the confidentiality provided to protect a legitimate economic interest?
- Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

19. In her guidance on regulation 12(5)(e) the Commissioner considers that *"for information to be commercial in nature, it will need to relate to a commercial activity, either of the public authority or a third party.¹"* The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.

20. The information withheld under regulation 12(5)(e) comprises:

- The Viability Appraisal. The purpose of the appraisal is to assess whether a site is financially viable by looking at whether the value generated is more than the cost of developing it. The withheld information includes details of revenues, costs and profits for the development and is therefore commercial information.
- Information in scope of [2]. This information has been assessed in terms of regulation 12(4)(e), it is not therefore included in this section.

¹ https://ico.org.uk/media/for-organisations/documents/2021/2619007/12-5-e-confidentiality-of-commercial-and-industrial-information_31122020-version-13.pdf

21. Having reviewed the withheld information the Commissioner is satisfied that the Viability Appraisal is commercial in nature and that the first condition has been met.

Is the information subject to confidentiality provided by law?

22. In the Commissioner's view, ascertaining whether or not the information has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
23. In considering this matter the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.
24. The Commissioner considers that confidence can be explicit or implied and may depend on the nature of the information itself, the relationship between the parties, and any previous or standard practice regarding the status of information.
25. The council states that confidentiality has been strongly asserted by the authors of the Viability Appraisal, from the outset, and by their client's ('the Land-owner') solicitors, on an ongoing basis. The Commissioner notes that Viability Appraisal is marked "*Commercially Sensitive, Not for FOI.*"
26. The council has provided the Commissioner with the arguments submitted by the Land-owner's solicitors which originated in 2017. The council states that in 2020, in response to this information request, the Land-owner's solicitors advised that the arguments remained valid. The solicitors argue that the information contains confidential advice on profits which may be achieved from the development in different circumstances, the release of which would be likely to prejudice the Land-owner's commercial interests.
27. Taking account of the nature of the information previously discussed, the Commissioner agrees that it is not trivial in nature. Furthermore, she acknowledges that it was provided to the council with the expectation that it would be handled in confidence and has not been shared widely.
28. The Commissioner is therefore satisfied that the information is subject to the confidentiality provided by law, and therefore the second condition has been met.

Is the confidentiality provided to protect a legitimate economic interest?

29. In her guidance on regulation 12(5)(e), the Commissioner defines that legitimate economic interests "*could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income.*"
30. The council asserts that once disclosed, the information would be available to any party who wanted it including any who conceivably could use it to harm the Land-owner's interests. However, the council states that it is not clear itself about the form and extent such a harm would take. The council also states that it considers that the impact of disclosure would lessen over time but it could not be confident that no harm would be incurred.
31. In responding to the Commissioner's questions on the matter the council made this statement "*As to whether disclosure would harm those interests – The Council can't independently reasonably conclude that disclosure would cause harm to [redacted]. The Council are currently faced with the unequivocal assertion by the solicitors that disclosure would make their client "suffer significant loss", even five years on.*"
32. The council referred the Commissioner to the letters it has received from the Land-owner's solicitors.
33. The solicitors assert in a letter dated 2020 that the objections it set out originally to the council, in correspondence dated 2017, regarding the release of Viability Appraisal, remain current and valid. The solicitors continue to anticipate that significant losses would be incurred in the event that the information is released.
34. The Commissioner finds that the letter dated 2020 does not provide a link between disclosure of the information in 2020, and any adverse affect on the identified economic interest. She has therefore proceeded to review the details of the earlier letter of 2017.
35. The solicitors letter dated 2017 asserts that commercial interests would be prejudiced if the information, which includes the likely profits from the development of the site in different scenarios, was made public, because:
 - Negotiations, that were ongoing with housebuilders at this time (2017), could be prejudiced in such a way to reduce the value of the residential elements of the scheme thus reducing value dramatically or making them unsaleable.

- The information could be used to undermine the integrity of the planning process and disrupt the commercial negotiations.
 - Due to the opposition to the application, the information could be used by opponents of the development to generate adverse publicity. The adverse publicity would artificially impair the value of the application site.
 - If the information were disclosed it would be without their client's consent who would suffer detriment as a result, giving rise to a potentially substantial damages claim against the council.
 - If potential purchasers of parts of the application site became aware of the basis of the negotiations, in particular the anticipated profit margins, then this would have a negative impact upon competitiveness and negotiating positions.
36. The complainant argued that there is case law establishing that viability appraisals should be made public in full and unredacted. The complainant highlighted two judgments from the planning court which established the right of the public to have access to unredacted viability appraisals used in planning applications.²
37. The council advised the Commissioner that at the date of the planning decision, it was the default position amongst the majority of Local Planning Authorities that viability assessments were treated as confidential. The council has subsequently changed its position to make viability assessments available to the public.
38. The council also advised that it had made all endeavours on behalf of the local residents to release the information. However, without gaining the explicit permission which it has sought, due to the confidentiality agreement it is not in a position to do so.
39. The Commissioner is sympathetic with council's predicament that disclosure may give rise to a damages claim. However, during the course of the investigation, the Commissioner has made it clear that, in terms of the EIR, more substantial arguments were required regarding the harm that would be caused as a result of disclosure of the information at the date of the request.

² <https://localgovernmentlawyer.co.uk/planning/318-planning-features/44051-access-to-viability-assessments-holborn-studios-2>

40. The Commissioner considers that although public authorities should take account of the views of third parties, it is still the council's responsibility to decide whether or not the exception applies. The council can only withhold information if it is satisfied that the arguments for withholding the information are justified in terms of the EIR.
41. The Commissioner observes that council has stated that it can't independently conclude that harm would be caused by disclosure, but that it is faced with the "*unequivocal assertion by the solicitors that disclosure would make their client "suffer significant loss"*". The representations from the third party were completely unconvincing and the Commissioner is not persuaded that the council has presented satisfactory arguments linking the disclosure of the information in 2020, to any of the described harms.
42. In her guidance on regulation 12(5)(e), the Commissioner outlines that public authorities need to consider the sensitivity of the information at the date of the request and the nature of any harm that would be caused by disclosure. The timing of the request and whether the commercial information is still current are likely to be key factors. Broader arguments that the confidentiality provision was originally intended to protect legitimate economic interests at the time it was imposed will not be sufficient if disclosure would not actually impact on those interests at the time of the request.
43. In *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd (EA/2010/0106, 4 January 2011)*, a request was made for a viability report for a new development submitted as part of a planning application. The council and the developer asserted that disclosure could harm the developer's interests, but did not accept that they needed to demonstrate that harm would result. The Tribunal found that the exception was not engaged, saying that "*statements by interested parties that harm might or could be caused are insufficient [...] The use of words such as 'could' or 'may' do not in our view provide evidence of harm or prejudice to the required standard of proof*".
44. In this case, arguments forwarded by the council and from the Land-owner's solicitors, indicate a number of harms that '*could*' happen. One harm is identified that '*would*' happen, that being a negative impact upon competitiveness and negotiating positions. The impact of such a disclosure would normally lessen by the passage of time, however the Commissioner only has the assertions of the Land-owner's solicitors that it has not.

45. The Commissioner is cognisant that the arguments originate from 2017, and despite opportunities to explain further, nothing has been provided to explain how the harms identified would occur in 2020.
46. In this case, the Commissioner considers that insufficient evidence has been provided regarding the harm that would result from disclosure.
47. The Commissioner has therefore concluded that the exception at regulation 12(5)(e) is not engaged.
48. The Commissioner requires the council to disclose the Viability Assessment.

Regulation 12(4)(e) Internal communications

49. 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.
50. This is a class-based exception covering a relatively broad range of communications, including email correspondence, and there is no need for the public authority to consider the sensitivity of the information in order for the exception to be engaged. However, it is a qualified exception and, if it is engaged, the public authority is required to carry out a public interest test regarding whether or not the exception should be maintained.
51. The withheld information in scope of [2] comprises of a number of internal emails discussing the council's position regarding the disclosure of the Viability Appraisal document in response to the complainant's request.
52. The council advised that the emails detail the officers' deliberations on the various courses of actions that it could take. It stated that releasing these into the public domain would hinder the council's ability to undertake the proposed actions and inhibit such free and frank discussions in the future.
53. Furthermore, the council contends that the loss of frankness and candour would damage the quality of deliberation and ultimately impede the quality of decision making.
54. Having viewed the withheld information, the Commissioner is satisfied that it comprises of email correspondence exchanged between various council officers.
55. The withheld information falls within the definition of internal communications and so the exception is engaged. The Commissioner will

therefore continue and consider the balance of the public interest in the disclosure of the emails.

Public interest in favour of disclosing the information

56. The complainant has expressed concerns regarding the council's scrutiny of the Viability Appraisal. The information requested in request item [2] would make public any such discussions.
57. The complainant asserts that the original case made by the Land-owner for jobs and housing, upon which the outline planning application was based and agreed, is not upheld in the subsequent detailed applications.
58. The public interest therefore relates to transparency of the basis of council's decision making on the outline planning application.

Public interest in favour of maintaining the exception

59. The council contends that the public interest rests in maintaining the exception for the following reasons:
 - The council needs the ability to consider a range of options in order to arrive at a reasoned view, when attempting to resolve a matter.
 - Disclosure of the internal emails would inhibit free and frank discussions in the future and damage the quality of such deliberation.
 - The provision of the requested information would prejudice this process. Without this ability, decisions risk being taken without a proper debate which could undermine the council's ability to undertake statutory functions.
 - The consequences in releasing information discussing the contents of the viability assessment will have a financial penalty on the council.

The balance of the public interest

60. Regulation 12(4)(e) is a qualified exception. As such, it is subject to the public interest test at regulation 12(1)(b), which states that information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.
61. There is always a public interest in a public authority being transparent regarding how it conducts its business. In addition, regulation 12(2) of

the EIR states that "a public authority shall apply a presumption in favour of disclosure". These factors already lend weight in favour of environmental information being disclosed by the council.

62. The Commissioner recognises the significance of the arguments presented by the complainant for disclosure of information relating to the planning application and specifically discussions about the Viability Appraisal.
63. The council have located a small amount of information that is in scope of [2], however it is only in regard to internal discussions about the information request itself.
64. The Commissioner considers that the withheld information would provide limited value in terms of furthering the public's insight into the decision making regarding the planning application and the Viability Appraisal.
65. Conversely, the Commissioner considers that council officers require a safe space in which to deliberate over aspects of responding to the information request. She agrees that making the debate public could inhibit officers and negatively impact future discussions on such matters.
66. In this case, the Commissioner's view is that the balance of the public interest favours maintaining 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(4)(e) was applied correctly.

Regulation 5(1) – Duty to make environmental information available on request

67. Regulation 5(1) of the EIR states that: "*a public authority that holds environmental information shall make it available on request.*" This is subject to any exceptions that may apply.
68. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held, and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held.
69. The Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency* (EA/2006/0072) in which it was stated that "*there can seldom be absolute certainty that information relevant to a request does not*

remain undiscovered somewhere within a public authority's records". It clarified that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is therefore the test the Commissioner applies in this case.

70. In discussing the application of the balance of probabilities test, the Tribunal stated that, *"We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed."* The Commissioner has therefore taken the above factors into account in determining whether or not further information is held, on the balance of probabilities.

The complainant's view

71. The complainant contends that there is evidence that the council holds further information in scope of [2].
72. The complainant advises that a limited investigation was conducted into the issues surrounding the granting of 16/00078/OUT. The investigation revealed that there had been communication between the Senior Planning Manager overseeing the planning process and the developer's agent.
73. The complainant advises that the investigation highlights that the Senior Planning Manager requested a Viability Appraisal from the developer's agent who responded with a letter setting out 'viability headlines' for the development.
74. Furthermore, the planning report submitted to the members of the Strategic Planning Committee describes the Viability Appraisal as having been closely scrutinised. Therefore, there should be documentary evidence such as minutes, meetings or emails.
75. The complainant cited a number of email correspondences that they stated were known to be held by the council dating from 2016.

The council's response

76. In relation to whether more information is held in scope of [2] the council advised the Commissioner that:
- Searches were carried out on files, folders, and the document management systems relevant to planning applications;
 - The searches included checking for held information with Executive Directors, Directors, Heads of Service, the Senior Planning Officer and everyone who has been involved the application;
 - Much of the reviewed information was out of scope of the request, and did not relate to or mention the Viability Appraisal. For example, the independent report on the council processing of the application, minutes of meetings, all documents on the planning portal, the complaints and objections raised.
 - It advised that the business and statutory purposes for retaining planning information are regarding application records, which are held in perpetuity, and any elements of applications that are still live and not yet determined.
 - The council advised that no information in scope of the request had been explicitly deleted or destroyed.
77. In response to the arguments raised by the complainant, the council advised that the original application was made over 5 years ago. There have been several changes in the council's hierarchy within that time, including the Head of Service who left over 2 years ago and there was no Executive Director of the council at the time of the application. Furthermore, the planning service has undergone a restructure so there have been significant changes within senior manager positions. During this period the council changed its working practice regarding the public release of a viability appraisals, and the council do not enter into any such confidentiality agreements as the previous management had 5 years ago.
78. The council advised that it does not hold the information listed by the complainant. It stated that leaver processes for the council mean that emails in connection with ex-employees would have been permanently deleted. If those officers had not printed information to be retained within planning files or downloaded electronic information and stored it within the document management systems then it would not be held.
79. The council advised that the Director of Planning reviewed the list of documents presented by the complainant and confirmed again that there is no more correspondence on any of the case files.

Conclusion

80. The Commissioner considers that the council has carried out adequate searches for any further information within the scope of the request.
81. The council has confirmed that no information was deleted intentionally in regard to the request. It has also explained about the changing of personnel over the five-year period and how information held in email accounts would be deleted through normal working processes. It identified that there were no specific statutory reasons for holding the information requested.
82. The council has provided a reasonable explanation as to why the information identified by the complainant is not held and the Commissioner finds that she has no firm grounds upon which to dispute this.
83. The Complainant has made their case very strongly to the Commissioner that the council holds further the information, and the Commissioner is sympathetic to their view.
84. However, it has been necessary for the Commissioner to balance this view against the arguments forwarded by the council. The Commissioner has been unable to find any evidence that the information exists.
85. Having considered the council's responses, and in the absence of any firm evidence to the contrary, the Commissioner is satisfied that, on the balance of probabilities, the council does not any further information within the scope of request item [2].

Regulation 5(2)

86. Regulation 5(1) requires a public authority that holds environmental information to make it available on request.
87. Regulation 5(2) requires this information to be provided to the requester within 20 working days following receipt of the request.
88. The complainant made the request for information on 19 April 2020. The council gave a response on 7 July 2020, however, it cited an incorrect exception, which it later stated was a 'typo', and did not answer the full

scope of the request. It corrected this position in the internal review which was communicated on 27 July 2020.

89. The Commissioner therefore finds that, the council failed to provide the response until 27 July 2020, which is outside of the statutory 20 working days.
90. The council has therefore breached regulation 5(2). However, as the response was issued no steps are required.

Right of appeal

91. 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

92. 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.
93. 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

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