

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

Date: 7 November 2022

Public Authority: Lichfield District Council
Address: District Council House
Frog Lane
Lichfield
Staffordshire
WS13 6YU

Decision (including any steps ordered)

1. The complainant has requested information from Lichfield District Council regarding pre-application planning advice, in respect of some land at Leyfields and Netherstowe.
2. The Commissioner's decision is that the withheld information is exempt from disclosure on the basis of Regulation 12(4)(e) (internal communications) of the EIR and that, whilst the council did not refer to Regulation 12(4)(a) (information not held), on the balance of probabilities, the council does not hold any further information in scope of the request. However, the Commissioner finds that Lichfield District Council breached Regulation 14 of the EIR by failing to provide an adequate refusal notice until the internal review stage, which was outside of the necessary time limit.
3. The Commissioner does not require any steps.

Request and response

4. On 19 July 2021 the complainant wrote to Lichfield District Council ("the council") and requested information in the following terms:

"Please take this email as a request under the Environmental Information Regulations 2004 for publication of pre-application planning advice in respect of the land at Leyfields and Netherstowe. This information is easily obtainable by means of consultations with [redacted] (the officer named in the planning application made by the agent for Bromford Housing Group.)"
5. The council responded on 11 August 2021. It refused to provide the requested information which it confirmed as being the pre-application planning advice for planning applications 20/01121/FULM and 20/01120/FUL . It cited the exception at regulation 12(5)(f) (interests of the person who provided the information to the public authority) of the EIR.
6. The complainant requested an internal review on 13 August 2021.
7. The council wrote to the complainant with the outcome of an internal review on 7 October 2021 and revised it's position. It stated that the Development Management Team were asked to give views on a potential development and that this was given verbally, therefore no recorded information is held in this respect. However it advised that it is withholding an internal email exchanged between a council officer and the Development Management Team, for the purposes of obtaining advice, on the basis of regulation 12(4)(e) (internal communications), of the EIR.

Scope of the case

8. The complainant contacted the Commissioner on 7 October 2021 to complain about the way the request for information had been handled. Specifically disputing the engagement of regulation 12(4)(e) to withhold information, and stating that the council should hold further information which is in scope of the request. The complainant was also dissatisfied with the way that the council dealt with his request, and the revised position following the internal review.
9. The scope of the case is to determine whether the council is correct to rely upon 12(4)(e) to withhold information, and whether it holds further information that is within the scope of the request. The Commissioner

will also consider whether the council made any procedural breaches in its handling of the request.

Reasons for decision

Regulation 12(4)(e) – Internal Communications

10. The council has applied this exemption to an internal email requesting advice, between a council officer and the Development Management Team.
11. The council explained that the Development Management team were asked to look at the areas, cited in the request, and give their views on potential development. That request for advice was made verbally by a council officer to the Development Management Team and was not recorded. The Development Management Team provided the advice in an email.
12. The council states that as the email was sent from one council officer to another, the information falls under the definition of internal communication and is therefore exempt under regulation 12(4)(e). The council confirmed that the communication had stayed within the public authority.
13. Regulation 12(4)(e) of the EIR provides an exception from disclosure to the extent that the requested information comprises internal communications. The exception is class-based, which means that it is engaged if the information in question falls within its scope. There is no requirement to consider prejudice or adverse effect at this stage.
14. The Commissioner has reviewed the withheld information and he can confirm that it comprises of an email between two council employees. The Commissioner is therefore satisfied that the withheld information falls under the description of "internal communications".
15. Accordingly, the Commissioner is satisfied that the exception at Regulation 12(4)(e) is engaged.
16. Regulation 12(1) of the EIR states that disclosure of environmental information may be refused if (a) an exception to disclosure applies and (b) if in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information. Regulation 2(2) further states that the public authority must apply a presumption in favour of disclosure when considering the public interest.

The public interest in favour of disclosure

17. The council states that it recognises there is public interest in transparency of its dealings relating to public open spaces.
18. The complainant states that this is a controversial case. Disclosure of the information is in the public interest because the council were required to pay compensation to a housing association.
19. The complainant provided copies of press articles which report that the council had to pay significant compensation to the housing association. This was after the deal was axed due to the public backlash and opposition when it emerged that the sale was agreed without the correct consultation taking place.
20. A public report¹ for the Leader of the Council dated 12 January 2021 states that the cabinet provided approval, subject to planning consent, to dispose of the land at Leyfields, and Netherstowe, Lichfield, to Bromford Housing Association, for the provision of affordable housing. Following Cabinet approval, the council entered into a conditional contract to dispose of the sites to the housing association. However it identified that the council should have given notices of its intention by advertising in a newspaper circulating in the area for two weeks, and consider any objections to the proposed disposal.
21. The report states that the consultation process should have been done before the contract was entered into with Bromford, However once the omission was identified, it was immediately addressed. The report shows that there were 61 objections raised relating to the disposal of one or both of the sites.

Public interest in maintaining the exception

22. The council considers that disclosure of communications between officers in the council regarding the development matters would impair the effective working of the council. The council contends that officers should be free to communicate their views internally and without fear that discussions may be disclosed to the world at large. It states that such disclosures would inhibit internal discussions.
23. The council states that there is little public interest in disclosing the pre-application planning advice. This is because the planning decision was taken through the relevant committee process, for which information was made available.

¹ [\(Public Pack\)Urgent Item - Disposal of Public Open Space - Land at Leyfields and Netherstowe, Lichfield Agenda Supplement for Cabinet, 12/01/2021 18:00 \(lichfielddc.gov.uk\)](#)

24. It states that because the application was abandoned, there is limited public interest in this case.
25. Furthermore, it states that no formal request was made by a potential applicant, to the Development Management team for their views. Formal means the submission of a request for advice, payment of a fee and then the provision of advice. In this case no such request was made therefore no formal advice was given to any potential applicant.

Balance of the public interest

26. The Commissioner's guidance² on this exception explains that although a wide range of internal information will be caught by the exception, public interest arguments should be focussed on the protection of internal deliberation and decision-making processes. This reflects the underlying rationale for the exception being that it protects a public authority's need for a "private thinking space".
27. With regard to attributing weight to the public interest arguments in favour of maintaining the exception, the Commissioner accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. The safe space arguments may carry significant weight in some cases. In particular, the Commissioner considers that the need for a safe space will be strongest when the issue is still live.
28. The Commissioner has carefully considered the arguments put forward by the complainant and by the council. He recognises the legitimate public interest in disclosing information that would inform the public about decisions concerning activities that may have an impact (whether positive or negative) on the environment. Accordingly he is mindful that access rights under the EIR are designed to support public access to environmental information, public participation in decision making and access to justice.
29. The withheld information is internally provided advice in relation to a potential development. However this was never formalised as the application was abandoned.
30. The applicant has expressed a public interest in the subject matter of this request, because the council is reported as being required to pay compensation to the applicant. This was because the deal was axed due

² [Regulation 12\(4\)\(e\) – internal communications | ICO](#)

to the public backlash that the sale had been agreed without the correct consultation taking place at the relevant time.

31. The Commissioner agrees that there is a strong public interest in matters concerning the public purse. However, having viewed the withheld information, he does not consider that it would provide further understanding regarding the matter of the consultation process and any compensation payments.
32. The Commissioner is also conscious that the application which is the subject of the withheld information has now been abandoned. This reduces the weight of any safe space considerations for withholding the information.
33. The Commissioner considers that the weight of the arguments are finely balanced in this case, with neither being particularly compelling. However, considering the lack of relevance of the withheld information in relation to the stated public interest the Commissioner's conclusion is, that the public interest in the maintenance of the exception outweighs the public interest in favour of disclosure of the requested information.
34. 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).
35. As covered above, the Commissioner has concluded that the public interest in maintaining the exception at regulation 12(4)(e) outweighs the public interest in disclosure of the information. 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 12(4)(a) – information held/not held

36. 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.
37. Regulation 12(4)(a) of the EIR allows a public authority to refuse to provide the requested information if it does not hold it at the time of the request being received.

38. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
39. The EIR concerns recorded information only. It does not require a public authority to answer general questions, provide opinions or explanations. Neither does the EIR define what information should be held by a public authority, it is only concerned with enabling access to information that is held.
40. The council has confirmed that it did not receive a formal request for pre-application advice by a potential applicant, to the Development Management Team for their views. Formal means the submission of a request for advice, payment of a fee and then the provision of advice. In this case no such request was made therefore no formal advice was given to any potential applicant.
41. The only recorded information held by the council in this regard, relates to an email sent by the Development Management Team to a council officer in response to a verbal request. This information has already been considered above.
42. On the balance of probabilities the Commissioner is satisfied that no further information within the scope of the request is held by the council.
43. The council has complied with its obligations under Regulation 12(4)(a) of the EIR in this case.

Regulation 14 of the EIR – Refusal to disclose information

44. Regulation 5(1) of the EIR states that, subject to any exceptions, environmental information must be made available on request. Regulation 5(2) requires that the information be made available promptly, and in any event no later than 20 working days after the date of receipt of the request. Where no information is held, Regulation 14(2) requires a refusal notice to be issued within that time.
45. Regulation 14 of the EIR requires that where a public authority refuses to disclose information under an exception, this is stated in writing within 20 working days.
46. The request was made on the 9 July 2021 and the council's initial response was provided on 11 August 2021 which is within the time limit. However the council changed its response in the review dated 7 October 2021.

47. The Commissioner therefore concludes that the council failed to issue an adequate refusal notice within required timescales and thus breached Regulation 14 of the EIR.
48. No steps are required.

Right of appeal

49. 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

50. 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.
51. 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

Janet Wilson
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