

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

Date: 24 March 2022

Public Authority: Royal Borough of Kingston upon Thames
Address: Guildhall
Surrey
KT1 1EU

Decision (including any steps ordered)

1. The complainant requested details of pre-planning advice provided on a particular redevelopment scheme for Surrey County Council's County Hall. The Royal Borough of Kingston upon Thames ("the Royal Borough") relied on numerous exceptions before finally settling on Regulation 12(5)(d) of the EIR (confidentiality of proceedings) to withhold the requested information.
2. The Commissioner's decision is that the Royal Borough has not demonstrated that Regulation 12(5)(d) of the EIR is engaged and is therefore not entitled to rely on the exception.
3. The Commissioner requires the Royal Borough to take the following steps to ensure compliance with the legislation.
 - Disclose the email of 6 February 2020 with appropriate personal data redactions
4. The Royal Borough 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 15 February 2021 the complainant requested information of the following description:

“County Hall, Penrhyn Rd, Kingston upon Thames KT1 2DN
Bittoms Cark Park, 47 The Bittoms. Kingston upon Thames, England
KT1 2AB

“Pre-application advice given to Surrey County Council in the past 6 months in relation to development proposals for either of the above properties.”
6. On 2 March 2021, the Royal Borough responded. It refused to provide the requested information and relied on “Regulation 12(4)(e) and (f)¹” of the EIR to withhold the information.
7. The complainant requested an internal review on 8 March 2021. The Royal Borough sent the outcome of its internal review on 26 March 2021. It revised its position, withdrew its reliance on Regulation 12(4)(e) and now instead relied on Regulation 12(5)(e) (commercial confidentiality) and Regulation 12(5)(f) of the EIR (voluntary supply) to withhold the requested information.

Scope of the case

8. The complainant contacted the Commissioner on 21 March 2021 to complain about the way his request for information had been handled.
9. The Commissioner commenced his investigation on 20 January 2022 with a letter to the Royal Borough inviting it to reconsider its original stance in light of the passage of time and, if it still wished to maintain its original stance, provide a submission setting out why it was entitled to rely on the exceptions it relied upon in its internal review.
10. On 3 March 2022, the Royal Borough issued a fresh response to the complainant. It noted that a considerable amount of time had elapsed

¹ Regulation 12(4)(e) of the EIR relates to internal communications. Regulation 12(4) does not have a sub-subsection (f). It is not clear from the context whether this was an erroneous reference to Regulation 12(5)(f) – an exception which the Royal Borough subsequently relied on – but, given the evolution of the case, nothing turns on this.

since it had completed its internal review. In particular, it considered that, at the time of the internal review, the application process was still "live." The response, referring to the exceptions relied upon at the internal review stage, stated that:

"Upon review, it is my opinion that Regulation 12(5)(e) and 12(5) [sic] are not the correct regulations to apply. Under the circumstances, the correct exception under the EIR is Regulation 12(5)(d), confidentiality of proceedings."

11. The Royal Borough did not provide a detailed submission to the Commissioner explaining why Regulation 12(5)(d) would apply, but its response did provide a short justification for the use of the exception. Given that this is the fourth different exception that the Royal Borough has relied upon since it first responded to the request over a year ago, the Commissioner considered that it would be unfair to the complainant to allow a further extension of time – although he (the Commissioner) did ask for copies of the withheld information.
12. The Commissioner considers that the scope of his investigation is to determine whether the Royal Borough is entitled to rely on Regulation 12(5)(d) of the EIR.

Reasons for decision

Is the requested information environmental?

13. 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);*
14. As it is information relating to planning, the Commissioner believes that the requested information is likely to be information on a measure, affecting the elements of the environment. For procedural reasons, he has therefore assessed this case under the EIR.

Information within scope

15. In responding to the Commissioner's investigation, the Royal Borough provided copies of the information that it wished to withhold. These primarily consisted of information provided to the Royal Borough by the Council in support of its application. The Commissioner does not consider that such information falls within the scope of the request.
16. The request asked specifically for the "advice **given to** Surrey County Council." It did not ask for any of the other correspondence or anything provided by Surrey County Council ("the Council"). Most of the information the Royal Borough identified as being "withheld" was provided by the Council and therefore was not "given to" the Council. The agenda for the meeting between the Council and the Royal Borough and the Royal Borough's internal briefing note do not fall within scope as they do not constitute "advice" and were also not "given to" the Council.
17. Particularly given the findings set out below, the Commissioner considers that it is imperative that only such information falling within the scope of the request be considered.
18. The only information that the Commissioner has identified as falling within the scope of the request is the Royal Borough's email to the Council's agent on 6 February 2020. The earlier emails in that chain do not fall within scope.

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

19. Regulation 12(5) of the EIR states that:

“For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;”

20. The term ‘proceedings’ is not defined in the EIR. However, the Commissioner in his guidance on this exception has said that he considers that:

“...the word implies some formality, i.e. it does not cover an authority’s every action, decision or meeting. It will include, but is 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 proceedings.

“In each of these cases the proceedings are a means to formally consider an issue and reach a decision. ‘Proceedings’ could include, for example, the consideration of a planning application by a planning authority, or an internal disciplinary hearing in a public authority; both of these have a degree of formality.”²

21. In the Commissioner’s view the term ‘proceedings’ should be taken to mean a formal means to consider an issue and reach a decision. Proceedings should be governed by formal rules.

22. The Commissioner notes that the Royal Borough’s website states that it runs a pre-application advice service – for which it charges a fee. There is no requirement for a person intending to make a planning application to seek pre-application advice, but there is a clear advantage to doing

² https://ico.org.uk/media/for-organisations/documents/1626/eir_confidentiality_of_proceedings.pdf

so – particularly when contemplating a large development project.³ The Commissioner has previously accepted that such services meet the criteria for “formal proceedings.”⁴

23. Next the Commissioner must consider whether those proceedings are subject to a duty of confidence provided for in law.
24. The proceedings do not have to have to be subject to a statutory duty of confidence to engage Regulation 12(5)(d) – it is sufficient that they are subject to a common law duty of confidence.
25. Whilst the Commissioner has been unable to locate the specific confidentiality disclaimers given to pre-application advice seekers, he accepts that there is general expectation that details of the pre-application plans and advice will be kept confidential – at least until a formal planning application is submitted. He accepts that such information is not trivial and therefore it is subject to the common law duty of confidence.
26. Finally, having determined that the information relates to a set of formal proceedings whose confidentiality is protected by law, the Commissioner must next consider whether that confidentiality would be adversely affected by disclosure of the withheld information. In his view, it would not.
27. Turning first to the specific proceedings involving the Council, the Commissioner notes that this request was submitted on 15 February 2021. On 26 January 2021, the Council’s cabinet considered and agreed a recommendation that an offer for County Hall should be accepted, with a targeted completion date of 26 March 2021. The Council’s cabinet also agreed to a recommendation that delegated authority should be given for Council bosses to find a purchaser of Bittoms car park on an “existing use basis.”⁵

³ <https://www.kingston.gov.uk/applications/pre-application-advice>

⁴ See, for example <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2173203/fer0696769.pdf>

⁵ <https://mycouncil.surreycc.gov.uk/documents/g7760/Decisions%20Tuesday%2026-Jan-2021%2014.00%20Cabinet.pdf?T=2>

28. A report was presented to the Council's cabinet, explaining the reasons why a sale was preferable. The report noted that the Council had proposed a hybrid planning scheme:

"for a mixed-use development of circa 453 residential units across the County Hall Campus and Bittoms car park with ancillary community space in the 1893 part of the main building."

29. The report further stated that:

"Whilst it is possible that continuing to obtain a residential led mixed-use planning consent for the site may achieve a greater capital receipt, the time and cost of obtaining planning permission would be extensive and likely to involve undertaking a planning appeal to the Secretary of State **in the likely event of [the Royal Borough] refusing our planning application.**"

30. The Commissioner considers that the Council's decision and accompanying report placed three important facts into the public domain. Firstly, it confirms the broad outline of what the Council was intending to seek planning permission for. Secondly, it confirms that the Council's view, having presumably considered the Royal Borough's pre-application advice, that the planning permission it was seeking was "likely" to be refused. Thirdly, it confirms that, not only had the Council agreed **in principle** to sell County Hall, but that the terms of a **specific** sale had been agreed.
31. In the Commissioner's view, disclosure of the withheld information would not have a considerable adverse affect on this specific pre-application process. The Royal Borough has argued that the proceedings were still "live" at the point it completed its internal review. Depending on the exact timing of the review, that may still have been true in theory (the Council could still have submitted a formal application), but in practice it was not a proper reflection of the state of proceedings. The Council had accepted an offer to sell the building and was in the process of working toward legal completion. The chances of it submitting the same scheme for formal planning approval was negligible. In all but name, the proceedings had concluded and were obsolete.
32. Equally, in stating its view that an application was likely to be refused, the Council has made public its own assessment of what the content of the advice the Royal Borough provided was.
33. The Commissioner will not disclose how closely (or not) this view accords with the actual information being withheld. However, he notes that the report presented to the Council's cabinet represents the thinking of its officials – who are under a duty to provide an accurate

and comprehensive overview of the situation to Council members. If the Council was concerned about the confidentiality of the pre-application process it would presumably not have made this statement in public documents. The Commissioner notes that the Royal Borough has given no indication that the Council has objected to disclosure of any of the withheld information.

34. Whilst the Council had only agreed to sell County Hall at this point, not Bittoms car park, it is clear from the report that it was envisaging selling this asset as well, rather than submitting a formal planning application. Any formal planning application the Council did decide to submit would have been different in character as it would only deal with the car park as a single entity – rather than as part of a wider development including County Hall.
35. The Royal Borough's response also indicated that it had concerns that disclosure would adversely affect the pre-application advice service more generally. It noted that there is a clear benefit to both applicants and planning authorities in operating such a service – as it leads to fewer unsuitable schemes being proposed. Disclosure would set a precedent that could lead to a loss of confidence that pre-application submissions would be dealt with confidentially. That in turn would lead to an increase in applications for full planning approval that had not sought pre-application advice and hence an increase in unsuitable applications.
36. The Commissioner considers that the effects of disclosure in this case would be limited.
37. Firstly, the Commissioner notes that any person dealing with a public authority should be aware of the possibility (however unlikely) that their correspondence might be vulnerable to an information request – particularly when the "person" in question is itself a public authority. If the Council had an expectation that the Royal Borough would not, under any circumstances, disclose the correspondence, that was an unreasonable expectation.
38. Secondly, the exact circumstances of this case are unusual and will not occur frequently. The applicant in this case (the Council) is another public authority. At the point the request was responded to, there was no realistic prospect of the Council submitting any planning application to the Royal Borough at all – let alone one closely-based on the pre-application advice. Finally, the Council has publicly confirmed that, in its view and having had regard to the pre-application advice received, any formal planning application would have been likely to be refused by the Royal Borough. That combination of factors will occur rarely and the Commissioner does not consider that such an extreme example should

deter the vast majority of would-be applicants from seeking pre-application advice with an expectation of confidence.

39. The Commissioner is therefore satisfied that the Royal Borough has not demonstrated that Regulation 12(5)(d) of the EIR is engaged. The Royal Borough is thus not entitled to rely on that exception.
40. As the Royal Borough appears to have withdrawn reliance on all other exceptions, the Commissioner would normally order full disclosure of the withheld information. However, having viewed the withheld information, the Commissioner considers that there is a small amount of personal data (mainly contact information) whose disclosure would add little to public understanding of the process, but would be unfair to the individuals involved. This information may be redacted.

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.

Signed

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF