

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 7 August 2023

**Public Authority:** New Forest District Council  
**Address:** Appletree Court  
Beaulieu Road  
Lyndhurst  
Hampshire  
SO43 7PA

#### **Decision (including any steps ordered)**

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1. The complainant requested pre-planning advice relating to a strategic site. New Forest District Council (the Council) refused the request under regulation 12(5)(d) of the EIR, confidentiality of proceedings.
2. The Commissioner's decision is that the Council was entitled to withhold the requested information under regulation 12(5)(d).
3. The Commissioner does not require further steps.

#### **Request and response**

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4. On 8 January 2023, the complainant wrote to the Council and requested information in the following terms:

"Please will you also provide a copy of the pre-application advice provided by your Council in respect of this site in 2020. Now the application is registered and in accordance with PAS advice such material should no longer be treated as confidential. Please treat this as a request under Freedom of Information provisions if necessary."

5. The Council responded on 3 February 2023, refusing the request under regulation 12(5)(d) of the EIR.
6. Following an internal review, the Council upheld its original response.

## **Reasons for decision**

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### **Regulation 12(5)(d) – Confidentiality of proceedings**

7. Regulation 12(5)(d) of the EIR says that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that, or any other public authority where such confidentiality is provided by law.
8. The engagement of the exception rests on three conditions being met.
9. First, the confidentiality referred to by a public authority must specifically relate to the confidentiality of proceedings.
10. In his guidance, the Commissioner interprets 'proceedings' as possessing a certain level of formality. They will include but are 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.
11. The information withheld under this exception relates to a pre-planning application advice process offered by the Council. The Commissioner has previously acknowledged in a range of decisions (eg [IC-115533-Y4T64](#), [IC-206377-X4X45](#), [IC-199853-D6D1](#)) that such a process represents a 'proceeding' for the purposes of this exception.
12. Second, this confidentiality must be provided by law. The Council stated that the information requested is subject to the common law duty of confidentiality because it is information of a nature that is not trivial, it is not information which is already in the public domain and it was provided on the understanding that it would be confidential.
13. Having considered the context in which the information has come to be held, the Commissioner is satisfied that this information is subject to the common law duty of confidentiality.
14. Third, it must be demonstrated that disclosure would have an adverse effect on the confidentiality of the proceedings.

15. The Council has explained that parties who submit information to it as part of the pre-application advice process will do so in the expectation that it is confidential, and that the publication of the information would therefore undermine this expectation.
16. The Council stated that as this application relates to a 'strategic site', in accordance with its guidance relating to pre-planning advice for strategic sites, the process is confidential.
17. 'Strategic site', refers to 18 sites identified by the Council capable of accommodating 100 or more homes, not already being met by sites with planning permission or already allocated for housing development. The Commissioner accepts this explanation from the Council.
18. On this basis, the Commissioner has decided that disclosure would have an adverse effect on the confidentiality of proceedings. Regulation 12(5)(d) has therefore been found to be engaged.

### **Public interest test**

19. The Commissioner must next consider the balance of the public interest. In doing so, he has taken into account the presumption in favour of disclosure set in regulation 12(2) and the public interest in transparency and accountability.
20. The complainant has argued that it is in the public interest to be able to see how advice provided, as part of the pre-application process, has been followed.
21. The Council accepts that there is an argument that disclosure of the requested information may increase public understanding.
22. However, it confirmed that an applicant does not need to follow any pre-application advice provided when submitting any formal planning application. Nor is the decision maker for any subsequent formal planning application bound by any pre-application advice.
23. The Commissioner recognises that there is public interest in the disclosure of advice provided during the pre-application process. However, the Council must be able to provide a robust pre-application advice process to prospective planning applicants on a confidential basis. There is a public interest in the confidentiality of the process in order that applicants, and the Council, can look into the issues involved in a full and frank way prior to a planning application being formally submitted.

24. The Council stated that dealing with planning applications which do not go through this pre-application advice process can result in an increase in the time and expenditure needed to deal with formal planning applications to the detriment of both applicants and the Council. It is therefore in the public interest that prospective developers engage in the pre-application process as this can save public money by eliminating potential issues before the formal application stage is engaged.
25. The information being requested consists of pre-application advice provided by the Council to a prospective developer in relation to a 'strategic site' consisting of residential dwellings and associated access. It contains both general and specific advice relating to the development of 'strategic sites', part of which falls within the area of a National Park.
26. The Commissioner notes that there is a high level of interest from the public when such a development falls within a National Park and also notes that such planning applications may result in a higher number of objections than in other geographical areas.
27. In determining the balance of public interest, the Commissioner considers a key factor is how far the information being requested would add to the public's understanding of the formal planning application.
28. In this case the Council have confirmed that the pre-application advice provided was based on incomplete and draft information from the developer, and that this was not representative of the subsequent formal planning application. The Commissioner therefore considers that disclosing the pre-application advice in this case would not greatly add to public understanding about this planning matter.
29. The Commissioner considers that greater weight is placed on the ability to carry out the pre-application planning advice process effectively. As stated above, confidentiality is needed to ensure the process is at its most effective.
30. The Commissioner has therefore decided that, in all the circumstances, the public interest in maintaining the application of regulation 12(5)(d) outweighs the public interest in disclosure. The Council was not, therefore, obliged to disclose this information.

## Right of appeal

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31. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

32. 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.
33. 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 .....**

**Ben Tomes**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**