

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

Date: 8 February 2018

Public Authority: Gateshead Council
Address: Civic Centre
Regent Street
Gateshead
NE8 1HH

Decision (including any steps ordered)

1. The complainant has requested information held by Gateshead Council on pre-application advice requests relating to sites within the Metrogreen area since the publication of the Metrogreen Topic Paper in July 2012. The Commissioner's decision is that Gateshead Council has correctly applied the exception where disclosure would adversely affect the confidentiality of proceedings at regulation 12(5)(d) of the EIR. She does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

2. On 18 January 2017, the following request for information was made:

"Information relating to any pre-application enquiries made to the Council since 1st January 2014 for development proposals within the Metrogreen Policy Area.

The Metrogreen Policy Area is an area of land on the south bank of the River Tyne which is identified in the Council's adopted Core Strategy document under Policy AOC2 as a new residential neighbourhood. I have attached a map of the area for ease of reference. The Council's Planning Department should also be able to assist with this request.

Essentially, we would like view copies of any pre-application forms and supporting documents relating to sites within the Metrogreen area and any associated correspondence/advice from the Council."

3. The council responded on 14 February 2017 under reference number FOI 47228 and refused to provide the requested information citing the exception at regulation 12(5)(f) of the EIR.
4. A further request was then made on 19 April 2017 for the following information:

"...information held by Gateshead Council on pre-application advice requests relating to sites within the Metrogreen area (as defined in Gateshead Core Strategy Policy AOC2) since the publication of the Metrogreen Topic Paper in July 2012. In particular, I request copies of proposal documents presented to Council officers for consideration and also copies of the feedback issued in response."
5. The correspondence in which the request of 19 April 2017 was made said that personal or sensitive information can be redacted if this would prevent disclosure and provided arguments as to why it considers disclosure to be in the public interest.
6. The council responded on 18 May 2017 under reference number FOI 47955 and refused to provide the requested information citing the exception at regulation 12(5)(f) of the EIR.
7. An internal review was requested on 22 May 2017 detailing why it is considered that the public interest lies in disclosure. LSH requested that the request be considered in a strategic level context rather than with regards to site specific discussions or proposals.
8. On 3 July 2017, the council provided its internal review response. It maintained its reliance on the exception at regulation 12(5)(f) of the EIR and also appeared to rely on the exception at regulation 12(5)(e) of the EIR.

Scope of the case

9. The complainant wrote to the Commissioner on 15 August 2017 to complain about the way the requests for information had been handled.
10. The Commissioner informed the complainant that the case will focus on the request made on 19 April 2017 as that request is for the same information as the request made on 18 January 2017 but is wider in terms of timescales. In addition, from the details the complainant

provided, it appears that an internal review of the request dated 18 January 2017 was not requested. The Commissioner explained to the complainant that before accepting complaints, she requires public authorities to be allowed the opportunity to respond to any complaints the requester may have about the way in which their request was dealt with. The Commissioner also explained that she is under no duty to deal with a complaint if she considers that there has been undue delay in bringing it to her attention and that she expects complaints to be submitted to her within three months of a public authority's refusal of, or failure to respond to, an information request. The response to the request dated 18 January 2017 was received on 14 February 2017 but a complaint was not made to the Commissioner until 15 August 2017.

11. During the Commissioner's investigation, the council confirmed that it is relying on the exceptions at regulations 12(5)(e) and 12(5)(f). It also said that it is relying on the exception at regulation 12(5)(d). Although not cited in the initial response or internal review, the Commissioner considers that public authorities have the right to raise exceptions for the first time at internal review or during the Commissioner's investigation.
12. The Commissioner has first considered the application of the exception at regulation 12(5)(d).
13. As the Commissioner has decided that the exception at regulation 12(5)(d) applies in this case, it has not been necessary to consider the application of the exceptions at regulations 12(5)(e) and 12(5)(f).

Reasons for decision

14. Regulation 12(5) states that 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;”
15. The term 'proceedings' is not defined in the EIR. However, the Commissioner in her guidance on this exception¹ has said that she considers that:

¹ https://ico.org.uk/media/for-organisations/documents/1626/eir_confidentiality_of_proceedings.pdf

"...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."

16. 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.
17. In the case, the council said that the chargeable procedures set out in out in the Development Management Plan for dealing with pre-planning applications provide a formal process for dealing with such applications and therefore fall within the definition of Regulation 12(5)(d). It explained that the pre-application advice service for planning applications is not a service it is required statutorily to provide, but do so if applicants wish to have specific advice on their proposal to save them time and money in making an application which may be refused if it does not reference the relevant plans and policies required. It informed the Commissioner that as well as this service the Planning Authority, on its website, has produced specific guides that people can use to obtain advice without going through the more formal preplanning application route and that applicants who make a formal pre planning application have to pay a fee of between £25 -£2000 depending on what type of enquiry it is.
18. Given the above, and having viewed the council's Development Management Plan, the Commissioner is satisfied that the council's chargeable procedure for dealing with pre-application planning enquiries is a formal process falling within the definition of Regulation 12(5)(d) of the EIR.
19. In deciding whether the exception is engaged, the next thing to consider is whether the confidentiality of the proceedings is provided for in law. That confidentiality must be provided for in statute or derived from

common law. In this case the council has said that the information is subject to the common law duty of confidence.

20. In the Commissioner's view, the common law of confidence will apply where the following two conditions are satisfied. First, the information has the necessary quality of confidence. This means that the information must not otherwise be accessible and be of importance to the confider and not trivial. Secondly, the information was communicated in circumstances importing an obligation of confidence. An obligation of confidence can be expressed explicitly or implicitly.
21. The council said that the information is covered by the common law duty of confidence as it meets the test of not being trivial and is not information which is already in the public domain and was provided on the understanding that it would be confidential. It pointed out that the Development Management Plan specifies that the information is confidential and said that it was provided in circumstances where the applicants believed that to be the case. It further explained that it has contacted the applicants and that five out of seven responded stating that the pre-application enquiries must be treated as confidential and that they were submitted on the understanding that they would be treated in that way.
22. The Commissioner notes that the council's Development Management Plan (pre application advice service for planning applications) states:

"We treat all pre-application enquiries confidentially. However, if a request is made under the Freedom of Information Act we may be obliged to reveal the details of your enquiry."

Nevertheless, and in accordance with a previous decision notice which considered the application of regulation 12(5)(d) to pre-application planning advice², the Commissioner accepts that the withheld information has the quality of confidence as it is clearly not of a trivial nature, is not in the public domain, and was communicated in circumstances importing an obligation of confidence.
23. The next step in deciding whether the exception is engaged relates to an adverse effect. The exception is only engaged where disclosing the information would adversely affect that confidentiality. It is not enough

² https://ico.org.uk/media/action-weve-taken/decision-notices/2014/1018960/fer_0532222.pdf paragraphs 53-55

that the confidentiality is provided by law, there must also be an adverse effect on that confidentiality.

24. The Commissioner aforementioned guidance on regulation 12(5)(d) states:

“‘Adversely affect’ means there must be an identifiable harm to or negative impact on the interest identified in the exception. Furthermore, the threshold for establishing adverse effect is a high one, since it is necessary to establish that disclosure would have an adverse effect. ‘Would’ means that it is more probable than not, ie a more than 50% chance that the adverse effect would occur if the information were disclosed”.

25. The interest that is protected by regulation 12(5)(d) is the confidentiality of proceedings, where that confidentiality is provided by law.
26. The council said that releasing pre planning application information would damage the general principle of confidentiality itself. It explained that the developers who submitted preplanning applications did so at some considerable financial cost to themselves not only having to pay a fee to do so but, in some cases, also engaging the services of professional consultants. It said it would undermine the whole process if information was routinely disclosed to the public at large.
27. While the Commissioner is mindful that pre-application advice may be provided within a confidential context, since the introduction of the EIR, authorities should be aware that no information can be subject to a blanket restriction on disclosure. It is the duty of authorities to show in each specific instance that information is being withheld for the reasons identified in the exception being applied.
28. However, in this case, the Commissioner does consider that disclosure would have an adverse effect on the confidentiality of the pre-application proceedings as it would damage the general principle of confidentiality itself and result in harm to the interest the exception is designed to protect.
29. In view of the above, the Commissioner considers that the exception under regulation 12(5)(d) is engaged in respect of the withheld information.

The public interest test

30. As the EIR exceptions to the disclosure of information are subject to the public interest test, the Commissioner has gone on to consider whether

the public interest in maintaining the exception outweighs the public interest in disclosing the information below.

Public interest arguments in favour of disclosing the requested information

31. The council acknowledged that regulation 12(2) of the EIR places great importance on transparency and expressly states that a public authority should apply a presumption in favour of disclosure. It said that disclosure would enable members of the public to understand proposals being made.
32. The complainant said that in addition to the general public interest in improving transparency in, and increasing awareness of, policy formulation and decision making relating to the environment, there is public interest in the disclosure of the specific requested information as follows:

“The implementation of policy AOC2 of the council's Core Strategy, which provides for the development of a *'mixed-use sustainable community'* in the Metrogreen area, has a significant and wide-reaching impact on the public as well as affected landowners and business...progress on the publication of a Supplementary Planning Document (SPD) to support this policy proposal has been delayed on a number of occasions, and the level of information released into the public domain in respect of this has been limited, contrary to the general principles underpinning the Regulations...there is a strong public interest in the disclosure of information which would provide the public with an understanding of the Council's emerging position on how development in the proposed Metrogreen area should come forwards and the likely timescale for this.”

33. In the internal review request, the complainant also stated that the dissemination of information to the public in relation to the delivery of the Metrogreen Area of Change does not appear to be taking place in a transparent and inclusive fashion. The following point was also made:

“In view of the lack of published information in relation to the delivery of the Metrogreen SPD, upon which an adopted Local development Plan is contingent, the disclosure of information is, therefore, clearly in the public interest to ensure that any discussions between Gateshead Council, landowners and developers is being undertaken in a transparent fashion which is consistent with consultation undertaken in the adoption of the Gateshead Core Strategy.”

Public interest arguments in favour of maintaining the exception

34. The council said that there is an inherent public interest in protecting confidential information and that breaching an obligation of confidence undermines the relationship of trust between confider and confidant. It submitted that disclosure would adversely affect the confidentiality of the pre-planning process. It explained that confidentiality is important in assuring a cost effective and efficient planning process and breaching an obligation of confidence would undermine the whole pre planning application process which the government have encouraged Local Planning Authorities in the National Planning Framework to undertake.
35. The council said that the central public interest in the exception being maintained is that individuals and organisations should be able to seek advice about ideas for future development from planning authorities on a confidential basis. It explained that pre-application advice requests are a way for developers to test the waters in relation to particular types of developments in specific areas and that the process provides developers with advice as to what issues are likely to crop up prior to drawing up plans for formal approval. The council said that one benefit of the process is that developers save time and money identifying such issues and averting potential time and expenditure at the formal application stage.
36. The council also said that the pre planning application stage also saves public money by enabling the council to eliminate any planning problems before the formal application stage is engaged. It said that should pre planning advice be routinely disclosed developers would be less likely to engage with the process and would be more likely to submit inappropriate plans which would need resubmission and an outcome of that would be an increase in the time and expenditure needed to deal with planning applications to the detriment of both developers and the council.
37. It was explained that the National Planning Policy Framework encourages the importance of pre-application engagement. Paragraphs 188 to 192 specifically mention that early engagement has significant potential to improve the efficiency and effectiveness of the planning application system for all parties and good quality pre-application discussions enables better coordination between public and private resources and improved outcomes for the community. The Framework encourages Local Planning Authorities to have a key role in encouraging other parties to take maximum advantage of the pre-application stage. A Planning Authority cannot require that a developer engages with them before submitting a planning application, but they should encourage take-up of any pre-application services they do offer. The council said that there is a very strong public interest in developers being able to

engage in confidential discussions openly with the Planning Authority and they should be able to do that in confidence so that full and frank discussions can occur which meet the overall National Planning Policy Framework and do not undermine it.

38. The council further submitted that releasing pre planning application information may make developers reluctant to provide as much information about their proposals; it would result in a lack of frankness in proposals and it would undermine the whole process if that information was routinely disclosed to the public at large.
39. Another argument made by the council is that disclosure would result in increased costs to the Planning Authority in having to consider objections to pre planning enquiries, when there is no statutory basis to be able to object at the pre planning stage, and additional costs to the developers by having to deal directly with objectors at the pre planning stage when they are not required to consult at that stage.
40. The council also said that the complainants in this case are engaged by one of the landowners in the Metrogreen area, and are seeking to obtain information for their own purposes to enable them to undermine the preplanning application process and minimise any financial contributions they would have to make to a pre planning application if they can see what advice has been given to other developers who have had to pay for that service. It said that it is not in the wider public interest to undermine the National Planning Framework, which requires a Planning Authority to actively encourage pre planning negotiations to ensure an effective and efficient planning service, just to meet the private interests of a landowner.

Balance of the public interest arguments

41. In considering the public interest arguments the Commissioner notes that the Information Tribunal in *Ofcom v the ICO and T-Mobile* found that "for a factor to carry weight in favour of the maintenance of an exception it must be one that arises naturally from the nature of the exception. It is a factor in favour of maintaining that exception, not any matter that may generally be said to justify withholding information from release to the public, regardless of content"³. On appeal to the High Court Lord Justice Laws confirmed the Tribunal's approach as lawful, commenting (at paragraph 47) that "the Tribunal's view set out

³ Appeal no. EA/2006/0078, para 58

at paragraph 58 was indeed reasonable; but more than that... it accords with the statutory scheme".

42. As stated in the aforementioned guidance on regulation 12(5)(d), public interest arguments for the exception will relate to the need to protect the confidentiality of proceedings. There is always a general public interest in protecting confidential information. Breaching an obligation of confidence undermines the relationship of trust between confider and confidant, regardless of whether the obligation is based on statute or common law. The fact that the confidentiality is 'provided by law' also implies that there is a public interest in protecting it. Therefore where the exception is engaged there is always some inherent public interest in maintaining it.
43. The Commissioner is of the opinion that the arguments presented in favour of maintaining the exception at paragraphs 34 and 35 do arise naturally from the nature of the exception and has therefore given them due weight. She also considers that the arguments presented at paragraphs 36-38 are indirectly relevant to the exception as they are concerned with the importance of pre-application engagement and how that works best when carried out in confidence.
44. Although the argument at paragraph 39 relates to increased costs, rather than confidentiality directly, the Commissioner has given this argument some weight when considering where the balance of the public interest lies in this case because such costs would be avoidable if confidentiality was maintained.
45. Given that the information access regime operates on an applicant blind basis, it is not appropriate to take into account arguments relating to the specific complainant. The interests to be balanced are 'public' interests, not 'private' interests. However, the Commissioner does consider that disclosure could have the effect claimed, that being to undermine the preplanning application process and minimise any financial contributions, for all interested developers, not just the complainants in this case.
46. The Commissioner asked the council to comment on the complainant's specific arguments as to why the public interest lies in disclosure. The council provided background that it considers to be pertinent. It informed the Commissioner that the complainant applied for planning permission for a car showroom which was refused as it did not fit with the wider planning objectives. The planning decision was appealed and reviewed by the Planning Inspector who did not find in the complainants favour. The council said that the issues which are being raised have already been raised with the planning inspectorate. It pointed out that

planning decisions are open to public consultation and are very transparent.

47. The council also provided the Commissioner with links to information on its website⁴. It said that the complainants were one of the organisations who responded to the consultation options feedback report and therefore they have not been kept in the dark as they have been as involved as everyone else has in the consultation process.
48. In relation to any delay on the publication of a supplementary planning document, the council said that there has been a delay in preparing documents but not on the anticipated "start date" of housing development which was 2020. It explained that there was a delay related to the consultation feedback report on the options report but that was brought to its attention and was published in January 2017. It also said that its Local Development Scheme⁵ sets out its timetable and that all previous Local Development Plans are on the web site so delays can be tracked.
49. The council said that information regarding the implementation of AOC2 is available through planning decisions, planning policy formulation and regeneration initiatives. It said that information regarding the Core Strategy is publicly available as follows:

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<http://www.gateshead.gov.uk/Building%20and%20Development/PlanningpolicyandLDF/LocalPlan/Part-4-Metrogreen.aspx>

<http://www.gateshead.gov.uk/Building%20and%20Development/PlanningpolicyandLDF/LocalPlan/EvidenceLibrary/Planning-for-the-Future-Primary-Evidence/MetroGreen-Flood-Management-Plan.aspx>

<http://www.gateshead.gov.uk/Building%20and%20Development/PlanningpolicyandLDF/LocalPlan/Core-Strategy-and-Urban-Core-Plan/Evidence-library.aspx>

<http://www.gateshead.gov.uk/Building%20and%20Development/PlanningpolicyandLDF/LocalPlan/Core-Strategy-and-Urban-Core-Plan/Evidence-library.aspx>

<http://www.gateshead.gov.uk/Building%20and%20Development/PlanningpolicyandLDF/LocalPlan/SustainabilityAppraisal.aspx>

<http://www.gateshead.gov.uk/Building%20and%20Development/Community-Infrastructure-Levy/CIL-Document-Library.aspx>

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<http://www.gateshead.gov.uk/Building%20and%20Development/PlanningpolicyandLDF/LocalPlan/LocalDevelopmentScheme.aspx>

<http://www.gateshead.gov.uk/Building%20and%20Development/PlanningpolicyandLDF/LocalPlan/Core-Strategy-and-Urban-Core-Plan/GatesheadandNewcastleJointDocuments.aspx> &
<http://www.gateshead.gov.uk/Building%20and%20Development/PlanningpolicyandLDF/LocalPlan/Core-Strategy-and-Urban-Core-Plan/Evidence-library.aspx>

50. In response to the Commissioner's enquiry as to whether information in the public domain allows people to monitor progress of the supplementary planning document towards adoption and provide an understanding of the council's emerging stance on how the development should come forward and the likely timescale, the council said that the Local Development Strategy⁶ & MetroGreen web page and consultation⁷ provide an understanding of the council's stance on how the development should come forward and that this is set out in policy AOC2 which has been examined and discussed in public hearings and that timescales were discussed in a recent appeal.
51. The Commissioner enquired as to whether discussions between the council, landowners and developers are being undertaken in a transparent fashion consistent with consultation undertaken in the adoption of the core strategy. In response, the council informed the Commissioner that consultation with landowners has happened via the Scoping Report and Options Report and the responses are set out in the feedback report. It said that letters have recently been sent to all landowners and one to one meetings are being arranged with key landowners (including the landowner connected to this case). It explained that future consultation will be undertaken in line with its Statement of Community Involvement⁸ and that as part of the examination on the MetroGreen AAP, the Inspector will examine its consultation approach.

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<http://www.gateshead.gov.uk/Building%20and%20Development/PlanningpolicyandLDF/LocalPlan/LocalDevelopmentScheme.aspx>

7

<http://www.gateshead.gov.uk/Building%20and%20Development/PlanningpolicyandLDF/LocalPlan/HaveYourSayOnPlanningPolicy.aspx>

8

<http://www.gateshead.gov.uk/Building%20and%20Development/PlanningpolicyandLDF/LocalPlan/StatementofCommunityInvolvement.aspx>

52. The Commissioner also asked the council whether it considers that any lack of implementation of policy AOC2 has wide ranging implications in relation to the delivery of the objectives of the adopted local development plan. The council said that it does not accept that it is not implementing AOC2. It explained that, as exemplified by the recent appeal decision, it is preparing the Area Action Plan. It accepted that there have been delays but said that the delivery of development timescales are still on track (i.e. housing development commencing in 2020). It said that this was touched on in the recent appeal and accepted by the planning Inspector.
53. The council also said that the timing of this request is a crucial factor as the final proposals for the site are not yet determined and are currently out for consultation with all landowners including the present complainant. It explained that at each key stage, such as the evidence base and draft plan, a report is prepared for the council's cabinet so that elected members can consider and make a decision on the proposals and that cabinet reports are published on its website and are available for everyone to see. It said that this enables anyone who wants to access them to see the plans to and enables elected members who are publicly elected individuals, and who represent the public's interests, to make decisions in the public interest. The council said that this therefore strikes the right balance in the public interest.
54. The Commissioner understands that once the formal planning process is engaged all interested parties have the opportunity to scrutinise and comment on proposals based on the information provided as part of the formal process. Applications are determined by a planning committee at which developers, objectors and planning officers are able to make representations. The Commissioner considers that this provides adequate protection for objectors to voice concerns and apply scrutiny to the planning process and understands that appeals can be made to the Planning Inspectorate.
55. The Commissioner acknowledges that there is a public interest in transparency in this case to enable members of the public to understand proposals being made at the pre-application planning stage and, more generally, in transparency regarding the overall development scheme. However, she considers that the council's responses to her enquiries relating to the complainant's assertions regarding delay, implementation of policy, the ability to monitor progress, and consultation being undertaken in a transparent fashion, appear to be adequate. The Commissioner also considers that the information already in the public domain, as referred to above, goes some way to meeting the wider public interest in transparency of the overall scheme.

56. Far greater weight, however, 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. Disclosing the specific information requested in this case may discourage full engagement with the pre-application process for fear of the public dissemination of such information.
57. Therefore, taking all of the above into account, the Commissioner considers that the public interest in this case lies in maintaining the exception. Her conclusion is that the exception to the duty to disclose environmental information at regulation 12(5)(d) applies to the requested information.

Right of appeal

58. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

59. 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.
60. 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
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Wycliffe House
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