

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

Date: 6 August 2020

Public Authority: Wychavon District Council
Address: Civic Centre
Queen Elizabeth Drive
Persnore
Worcestershire
WR10 1PT

Decision (including any steps ordered)

1. The complainant has asked Wychavon District Council ("the Council") for information relating to two development sites, including any pre-application advice given to the promoters of the sites by Worcestershire County Council and Wychavon District Council. In its response to the complainant, the Council advised him that it did not hold any pre-application advice provided by Worcestershire County Council. It did however confirm that it holds other information which was being withheld in reliance on sections 41(1), 43(1) and 40(2) of the FOIA.
2. The Commissioner's decision is that Worcestershire County Council has complied with Regulation 5(1) of the EIR. She accepts that, on the balance of probability, the Council does not hold any pre-application advice given to it by Worcestershire County Council or any technical Highway studies.
3. The Commissioner has also decided that the Council is entitled to withhold the information it does hold relevant to the complainant's request, in reliance on Regulation 12(5)(e) of the EIR.
4. The Commissioner is satisfied that the Council provided the complainant with appropriate advice and assistance under Regulation 9 of the EIR.

5. No further action is required in this matter.

Request and response

6. On 6 November 2019, the complainant wrote to the Council to make a request for recorded information. The information which the complainant seeks is:
 - A list of meetings held with promoters of sites CFS0844sc (Land at Brewers Lane) and CFS0347 (Land rear of 36 Bretforton Road).
 - Wychavon District Council (WDC) pre-application advice in respect of sites CFS0844sc and CFS0347.
 - Worcestershire County Council (WCC) pre-application advice in respect of sites CFS0844sc and CFS0347.
 - Technical highway studies prepared by the promoters of sites CFS0844sc and CFS0347.
 - WCC Highway Authority responses in respect of sites CFS0844sc and CFS0347.
 - Badsey Parish Council responses in respect of sites CFS0844sc and CFS0347.
 - Any further statutory responses in respect of sites CFS0844sc and CFS0347 (utilities / services / drainage / landscape).
7. The Council responded to the complainant on 2 December 2019 by addressing each part of his request.
8. The Council informed the complainant that it had had no meetings in respect of site CFS0844sc, but confirmed that a meeting had taken place concerning site CFS0347.
9. The Council confirmed that site CFS0844sc had not been the subject of pre-application advice but the site CFS0347 had been. The Council informed the complainant that this information was exempt from disclosure in reliance on sections 41(1) and 43(2) of the FOIA.
10. In respect of any pre-application advice which might have been given by WCC, the complainant was advised to submit a request to that public authority.
11. In response to the complainant's request for technical highway studies prepared by the promoters of the two sites, the Council said, "any supporting information... is exempt from disclosure under section 40(2) [of the FOIA]", and that, "disclosure may contravene Data Protection Law".

12. The Council told the complainant that any statutory responses in respect of the two sites are in the public domain as part of the evidence base on its website at: www.swdevelopmentplan.org.
13. The Council informed the complainant that Bardsley Parish Council was yet to make a response in respect of the allocation of the two sites, and it added that further statutory responses were already in the public domain.
14. On 11 December 2019, the complainant wrote to the Council to ask that it provide a direct link to the statutory responses from WCC Highways and Drainage. The Council responded to this request on 13 December by directing the complainant to:

www.swdevelopmentplan.org/wp-content/uploads/2019/11/Bardsley.pdf
15. The Council made clear to the complainant that WCC was not consulted in respect of drainage, but that Severn Trent had been.
16. On 28 February 2020, the complainant wrote to the Council to complain that he had not received the information he has asked for. The complainant noted that [a named officer] had informed him that they had spoken with officers at WDC who confirmed that they will provide any information if they have it.
17. On 13 March 2020, one of the Council's legal advisers responded to the complainant to advise him that she had spoken with the Council's Planning Policy Manager who had been in contact with at Worcestershire County Council, and he had confirmed that the County Council had not provided WDC with any pre-application advice given to the two rival sites. The Council therefore advised the complainant that it does not hold the information he has asked for.
18. On 17 March 2020, the complainant wrote to the Council's Director of Planning and Environment. Referring to his request for information, the complainant noted that the Council had failed to respond to his request within the statutory twenty working day compliance period and that in consequence of this, the Regulation 18 consultation period had closed. The complainant also noted that the County Council had apparently lost documented information relevant to his request which it should have provided to WDC.

Scope of the case

19. The complainant contacted the Commissioner on 3 February 2020 to complain about the way his request for information had been handled.
20. The complainant has identified three areas of complaint which concern the Council's responses to his request for information. These are:
 - The complainant challenges the Council's reliance on sections 41(1) and 43(2) of the FOIA in respect of his request for the pre-application advice given by WDC relating to sites CFS0844sc and CFS0347.
 - In respect of his request for the pre-application advice given by the County Council (WCC), the complainant asserts that no reason was given to him for the non-disclosure of that information.
 - The complainant challenges the Council's reliance on section 40(2) of the FOIA in respect of his request for the highway studies given to the Council by the promoters of the two allocated sites.
21. The Commissioner advised the complainant that the focus of her investigation would be to determine whether Wychavon District Council has handled his request in accordance with the EIR, and specifically whether the Council is entitled to rely on Regulations 13, 12(5)(e) and 12(5)(f) of the EIR as a basis for refusing to provide you with the information it is withholding.

Background information provided by the Council

22. At the date of making its responses to the Commissioner's enquiries, the Council says it is currently in the process of determining suitable sites to allocate in the South Worcestershire Development Plan (SWDP) review so that it can meet the projected housing and employment land requirements up to 2041.
23. This is a statutory process requiring all local planning authorities to review their current local plans within 5 years of their publication. For the South Worcestershire Councils (SWC) the SWDP was published in February 2016.
24. Since May 2018 landowners/landowner's agent or developers have been invited to submit available land for consideration for proposed SWDP allocations. These sites were the subject of a planning appraisal and those that were considered appropriate were included for the first time.
25. The sites chosen for Badsey were CFS0844sc (Land at Brewers Lane) and CFS0347 (land rear of 66 Bretforton Road). The Preferred Options document was approved by each of the SWC and published for the six

weeks statutory consultation period commencing Monday 4 November 2019.

26. The next stage in making the plan requires the SWC to consider the planning merits of all the representations on the Preferred Options along with any new and/or revised technical evidence which might suggest a different portfolio of proposed allocations.
27. On 6 November 2019 the Council received an information request from the complainant asking for information on the two rival sites in Badsey.

Reasons for the Commissioner's decision

28. Having received the Commissioner's enquiry in this matter, the Council has decided the complainant's request should have been dealt with under the provisions of the Environmental Information Regulations ("the EIR") rather than those of the FOIA.
29. In consequence of its review the Council has advised the Commissioner that, where it is withholding recorded information under the terms of the complainant's request, it now relies on the following exceptions to disclosure: Regulation 12 (5) (e) – where the information concerns commercial confidentiality, Regulation 12 (5)(f) – where the information concerns the interests of the party who provided the information to the public authority, and Regulation 12 (5) (d) – where the information concerns the confidentiality of proceedings.
30. The Commissioner agrees with the Council that the request falls to be considered under the EIR.
31. Before deciding whether the Council is entitled to withhold information in reliance on the foregoing exceptions, the Commissioner is obliged to determine the extent to which the Council holds information relevant to the complainant's request.

Regulation 5(1)

32. Regulation 5(1) of the EIR requires a public authority that holds environmental information to make it available on request.
33. The Commissioner has sought to determine whether the Council holds information which the complainant asked for in his request, in particular any pre-application advice given to Wychavon District Council by Worcestershire County Council (WCC) and any technical highway studies.

34. The Commissioner notes that the Council has previously relied on section 40(2) to withhold technical highway studies. Having reviewed this request further, the Council has informed the Commissioner that no technical highway studies were submitted and therefore Regulation 13, the exception to disclosure of third-party personal data does not apply.
35. The Council has assured the Commissioner that it does not hold any pre-application advice provided by Worcestershire Council or any technical highway studies.
36. To determine whether the Council is correct in giving the Commissioner its assurance, the Commissioner must consider the facts of the case, as she understands them, against the balance of probabilities. This is the civil test and it accords with the approach taken by the First Tier Tribunal (Information Rights) when it has considered whether information is held in past cases.
37. The Commissioner has investigated this complaint by asking the Council questions about the searches it has made to locate the information which the complainant has asked for. The Commissioner's investigation also included questions about the possible deletion/destruction of information which might be relevant to the complainant's request.
38. The Council has confirmed to the Commissioner that it has searched its planning system files and has spoken with Worcestershire County Council ("WCC"). WCC has confirmed it did not provide Wychavon District Council with that information.
39. Any information submitted to the Council in respect of a planning application would be held on the Council's DEF system and on Sharepoint. These are used by the team of officers responsible for the South Worcestershire Development Plan review. The Council says that no information is held locally on personal computers.
40. Because all the information would be contained within the same location on the Council's DEF or Sharepoint, it was not necessary for the Council use specific definitive search terms other than the site address.
41. The Council has informed the Commissioner that if the information had been held it would be held on its computer-based systems and that no information relevant to the scope of the complainant's request has been destroyed.
42. The Council says it has a document retention schedule which lists how long information should be kept for. In respect of the development of the South Worcestershire Development Plan, all records are kept indefinitely until it is accepted by the Planning Inspector, the report for the adoption of the Plan has been to full Council, and any high court

challenge period has expired. All documents are submitted through a generic inbox and are deleted from the inbox once the information has been uploaded.

43. Any pre-application advice is uploaded to the Council's DEF system and is kept indefinitely. Such advice remains confidential until a formal application is submitted pursuant to this advice where it will then become a public document.
44. The Council therefore maintains its position that it does not hold any pre-application advice provided by Worcestershire County Council or technical highway studies. The Council says the information has never been held and there are no statutory requirements for pre-planning applications.
45. The Commissioner has considered the Council's representations in this matter and has decided, on the balance of probability, that the Council does not hold any technical highway studies or pre-application advice given to Wychavon District Council by WCC. By informing the complainant of this fact, the Council has complied with the requirement of Regulation 5(1) of the EIR.
46. Because the Council does not hold the pre-application advice, and has informed him of that fact, the Council is under no obligation to provide the complainant with a reason or reasons why it is withholding information it does not hold.
47. The Commissioner notes that the Council response to the complainant of 2 December 2019 advised him that a request should be made to WCC. This suggestion was again made in the Council's response of 13 March 2020, when the Council confirmed that WCC had not provided it with any pre-application advice for the two rival sites.
48. The Commissioner therefore finds that the Council has complied with its duty under Regulation 9 of the EIR to provide the complainant with appropriate advice and assistance. The council clearly set out for the complainant where this information might be located.

Regulation 12(5)(e) - Commercial confidentiality

49. The Council has provided the Commissioner with copies of the information it is withholding from the complainant, comprising of information associated with the pre-application advice given by Wychavon District Council.
50. Regulation 12(5)(e) of the EIR allows a public authority to refuse to disclose recorded information where the disclosure would adversely

affect “the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest”.

51. For the 12(5)(e) exception to be properly applied, the Commissioner considers that the following conditions need to be met:

- The information must be commercial or industrial in nature;
- It must be subject to confidentiality which is provided by law;
- That confidentiality must protect a legitimate economic interest; and;
- The confidentiality be adversely affected by the disclosure of the information.

52. Having examined the withheld information, the Commissioner readily accepts it is commercial in nature. The information clearly relates to the commercial development of sites for housing, where the land is yet to be developed.

53. The Council strongly asserts that the developer provided the information to the Council in support of their application for pre-planning advice and in turn the Council provided that advice as part of its fee-based pre-application service.

54. The withheld information is therefore part of a confidential exchange about future development proposals. It is clearly not trivial, and it has not been placed into the public domain. The Council has assured the Commissioner that the withheld information has only been shared with a limited number of people to ensure that appropriate advice was given.

55. In the Council’s opinion, its assertion of confidentiality is corroborated by the advice given to users of its pre-application service. This advice states:

“The advice given will remain confidential until such time as a formal application is submitted pursuant to this advice where it will then become a public document.”

56. Likewise, the developer had a clear expectation of confidentiality when he submitted his documents to the Council. This is corroborated by the following statement contained in the developer’s documents:

“The contents of this document must not be produced in whole or in part without the express written consent of [redacted].”

57. Having received the complainant’s request, the Council contacted the developer’s agent to ascertain whether the developer still maintained his

expectation of confidentiality. The agent's response to the Council was that their pre-application enquiries must be treated as confidential and that they were submitted on the understanding that they would be treated that way.

58. Further contact with the developer resulted in renewed confirmation of its expectation of confidentiality. The developer stated, " We formally confirm that we maintain our absolute objection to the release of any pre-application material under the FOI process, as the material is commercially sensitive and confidential and its release would have an adverse effect upon the developer and landowner's interests'.
59. The Council points out that the developer has submitted detailed discussions of draft proposals and planning statements that are commercially valuable. It considers that releasing the information into the public domain would provide the developer's opponents with a strategic advantage. Effectively, they would acquire strategic intelligence whilst occupying a position whereby they are able to maintain secrecy in respect of any proposals they have for competing sites.
60. Consequently, the landowner and the developer's economic interests would be adversely affected and likely result in the need for them to spend considerable time and money in countering attacks made against their development proposals from their competitors and opponents.
61. Additionally, releasing the information to any of the developer's competitors would have an adverse economic impact. This is because the competitors would gain insights into the developer's future development proposal, due to the withheld information containing development plans along with bespoke copyrighted drawings of house types. These drawings and plans were provided to the Council in order to demonstrate how policy matters can be addressed as the plan development process evolves.
62. The Council has also alerted the Commissioner to the potential legal action it may face should it disclose the withheld information and it has advised the Commissioner that the developer has already sought legal advice regarding the release of the pre-application information.
63. In the Council's opinion, releasing the withheld information provided on the understanding that it would not be released, would undermine the pre-application process and would be contrary to the common law of confidence.
64. The Council believes that disclosure of the withheld information would likely result in this or future developers no longer wanting to discuss their proposal with the Council at an early stage for fear that the

information they discuss will be disclosed and they would be reluctant to provide information that would impact their business models and in certain instances their on-going confidential discussions with site owners.

65. Likewise, the Council argues that competitors who gain access to potential development proposals and plans would be able to work out likely land values and potentially come in with higher bids. This would undermine the prospective developer's ability to carry out its business effectively.
66. The Commissioner is mindful of the Council's and the developer's expectations of confidentiality, and she acknowledges that the loss of this confidentiality might adversely affect the developer's ability to participate competitively in commercial activity.
67. The Commissioner considers that the withheld information has the necessary quality of confidence because it is not otherwise accessible to the complainant or to the public, and if it is certainly more than trivial.
68. Whilst there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the judge in *Coco v Clark*¹, Megarry J, suggested that the 'reasonable person' test may be a useful one. He explained:

"If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence."
69. Accepting the 'reasonable person' test, together with the non-trivial nature of the withheld information and the very limited distribution of the withheld information, the Commissioner has concluded that the information contained in the two reports has the necessary quality of confidence.
70. The Commissioner is satisfied that the confidentiality owed to the developer is necessary to protect a legitimate economic interest and that disclosure of the withheld information would adversely affect those interests.

¹ *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41.

71. In the Commissioner's view, and on the balance of probabilities, the developer's commercial interests 'would' be harmed by disclosure of the withheld information.
72. In making this determination, the Commissioner is assisted by the Tribunal in determining how "would" needs to be interpreted. She accepts that 'would' means 'more probably than not' and she notes the interpretation guide for the Aarhus Convention which gives the following guidance on legitimate economic interests:
73. "Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors".
74. The Commissioner is in no doubt that the exception to disclosure provided by Regulation 12(5)(e) is engaged and therefore she must now consider whether it is in the public interest for the information to be disclosed.

The public interest

75. The Commissioner recognises the importance of local plans and their development. She accepts that local plans can be contentious and that they will affect the lives of people living in the areas for many years to come. It is important therefore that local authorities are as open and transparent as possible during the development process.
76. Transparency in the process of developing a local plan is something which the Commissioner gives significant weight to. She recognises that transparency assists the public in its understanding of the process and of the decisions the public authority is making.
77. Here, disclosure of the requested information would provide the public with information given to developers, and vice versa, about two planning proposals. It would also make public commercial information which can be used by members of the public to dispute or verify the developer's positions and be used to mount informed challenges to the applications should they be made.
78. Weighing against the above is the fact that the Council is still in the process of determining suitable sites for allocation in the South Worcestershire Development Plan review: It remains an on-going process where submissions for development can still be made and the Commissioner must acknowledge that releasing this commercially sensitive information into the public domain at this time would be financially damaging for the information provider as well as the Council.

79. The Commissioner accepts that developers would be discouraged from disclosing copyrighted and commercially sensitive information to the Council if it is unable to give the assurance of confidentiality in respect of their information. She also accepts that disclosure would potentially leave the Council open to legal action where it has released information that a developer rightly understood was given in confidence.
80. The Commissioner acknowledges the loss of confidence in the Council if developers were to think the Council would disclose their commercially sensitive information to the public. This is especially so where formal planning applications have yet to be made.
81. Pre-application advice is there to assist developers in drawing up formal proposals which are likely to receive planning permission when they are formally submitted. This service ensures that developers are not spending time and money drawing up detailed formal proposals which are not likely to receive permission.
82. Without pre-application advice, planning applications are likely to take longer to determine and may, especially on larger or more complicated sites, need to be resubmitted.
83. The Commissioner has weighed the competing public interest factors associated with the information which the Council is withholding from the complainant. In doing this she has decided that greater weight must be given to those factors which currently favour the Council's application of Regulation 12(5)(e). In this case, the deciding factor is the fact that the proposals have yet to be formally submitted and no decisions have yet been made.
84. The Commissioner is mindful of the fact that transparency and accountability can be had when the applications are made formally and when, as the Council previously stated, the documents will be made public.
85. The Commissioner's decision is that the Council is entitled to withhold the information requested by the complainant in reliance on Regulation 12(5)(e) of the EIR.
86. The effect of the Commissioner's decision is that she is not required to consider the Council's additional reliance on Regulations 12(5)(f) – where disclosure would adversely affect the interests of the information provider, and Regulation 12(5)(d) – where disclosure would adversely affect the confidentiality of the Council's proceedings. This is not to say the Commissioner does not agree with the Council's position in respect of those applications.

Right of appeal

87. 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

88. 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.

89. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF