

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

Date: 17 August 2021

Public Authority: Swansea Council

Address: freedomofinformation@swansea.gov.uk

Decision (including any steps ordered)

1. The complainant requested access to the pre-application material in respect of a particular pre-planning application and application for Listed Building Consent. Swansea Council refused to provide the information citing regulation 12(5)(f) (the interests of the person who provided the information) of the EIR. Following the Commissioner's investigation, the Council provided some information, but continued to withhold information relevant to the request on the basis of the exception cited. The Commissioner's decision is that Swansea Council has correctly relied on regulation 12(5)(f) to withhold the remaining information. The Commissioner does not require the Council to take any steps.

Request and response

2. On 12 December 2019, the complainant wrote to Swansea Council ('the Council') and requested the following information in respect of pre-application advice and associated correspondence, meeting notes and plans relating to the development of Hillside Nursing and Residential Home, Ffynone Road, Uplands:

"The development is currently the subject of two applications (for planning and listed building consents) ref nos 2019/2730 and 2019/2731..."

I request access to the pre-application material under the terms of the Freedom of Information Act."

3. The Council responded on 17 December 2019 confirming that it held the requested information, but refused to provide it citing regulation 12(5)(f) of the EIR.
4. The complainant submitted a letter dated 22 January 2020 to the Council with detailed objections to its response. These have not been reproduced here, but are referred to later in this notice.
5. Following an internal review the Council wrote to the complainant on 19 February 2020. It enclosed a copy of the pre-application response (issued 24 June 2019) which the developer had consented to. In all other respects, it upheld its original decision to rely on regulation 12(5)(f) of the EIR regarding the remainder of the requested information.

Scope of the case

6. The complainant contacted the Commissioner on 30 March 2020 to complain about the way his request for information had been handled. He provided detailed arguments as to why he disagreed with the Council's reliance on regulation 12(5)(f) which reiterated the arguments in his request for an internal review which the Commissioner has discussed in her analysis of regulation 12(5)(f) later in this notice.
7. During the course of the Commissioner's investigation, the Council disclosed some of the information it had previously withheld to the complainant either in full or redacted format. The redacted information had been withheld on the basis of regulation 13 (third party personal information). The complainant has confirmed to the Commissioner that he is not concerned about the information redacted on this basis.
8. The scope of the Commissioner's investigation is therefore to determine whether the Council was entitled to rely on regulation 12(5)(f) to refuse to disclose the remaining information falling within the scope of the request, as listed above.

Reasons for decision

Regulation 12(5)(f)

9. Regulation 12(5)(f) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(f) the interests of the person who provided the information where that person –

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure.

10. The Commissioner's published guidance on this exception¹ explains that its purpose is to protect the voluntary supply to public authorities of information that might not otherwise be made available to them. In such circumstances a public authority may refuse disclosure when it would adversely affect the interests of the information provider. The wording of the exception makes it clear that the adverse effect has to be to the person or organisation providing the information rather than to the public authority that holds it.
11. With regard to engaging the exception, and as recognised by the Information Tribunal, a four stage test has to be considered as stated below:
 - Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?
 - Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it other than under the EIR?
 - Has the person supplying the information consented to its disclosure?
 - Would disclosure adversely affect the interests of the person who provided the information to the public authority?
12. Where the four stages of the test are satisfied, the exception will be engaged. The public interest test will then determine whether or not the information should be disclosed.

¹ https://ico.org.uk/media/for-organisations/documents/1638/eir_voluntary_supply_of_information_regulation.pdf

Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?

13. The Council explained that there is no formal or legal requirement for a developer to submit a pre-application advice request. These requests are provided voluntarily by developers in order to identify any potential issues early in the planning process so that they can be given consideration before deciding whether to submit a formal planning application. As such, the withheld information was supplied by the developer on a voluntary basis.
14. The complainant on the other hand considers that the information relevant to his request could either be categorised as information received from the third party, or information generated by the Council and he does not consider that the latter category could engage regulation 12(5)(f) as it falls at the first hurdle.
15. He has also argued that although the pre-planning application service is optional, if an applicant chooses this route, they are obliged to supply supporting documentation including plans.

Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it other than under the EIR?

16. The Council confirmed that pre-application advice requests are not planning applications and are therefore not subject to the normal public access requirements and formal reporting of plans in the same way that planning applications are.
17. The Council further explained that it offers a two-tier service:
 - Statutory service where the result is always made publicly available.
 - Non-statutory pre-application process which although does not guarantee absolute confidentiality due to the EIR, it does not publish the outcome of the process and offers the opportunity for an informal meeting with Planning officers to discuss the issues.
18. The Council confirmed that the complainant paid for the non-statutory level of service which requires a higher fee. The Council did not claim or seek any entitlement to disclose the information, such as would be the case with the statutory pre-planning application service, and considers that the developer therefore submitted the request with a reasonable expectation that it would remain confidential. The Council has confirmed

that it would be unable to disclose the information other than in response to a request for information under the EIR.

19. The complainant however, has questioned the Council's non-statutory pre-application service stating that the pre-application request should have been dealt with in accordance with the Town and Country Planning (Pre-Application Services) (Wales) / Regulations 2016. He continued that Regulation 5(1) of the Regulations stipulates that any request for pre-application services in respect of a qualifying application must be made in writing to the local planning authority on a form either published by Welsh Ministers or substantially similar, and be accompanied by any plans or drawings.
20. He added that the Regulations do not provide any basis for offering a 'confidential' service, adding that the wording 'must' is clearly mandatory and he does not see any discretion or opportunity for pre-application requests to be treated in a non-statutory (confidential) way.
21. The Council further informed the Commissioner that the building in question is a prominent building in a Conservation Area and considers it arguably one of the most recognisable buildings in the western suburbs of the city of Swansea, adding that it is a large Grade 2 Listed Victorian stone-built residence overlooking St. James' Park and having a distinctive tower.
22. It confirmed that any alterations to the building are also subject to both Listed Building Consent (LBC) and the overall Conservation Area status of the building's surroundings.
23. The Council explained that when an application for planning permission for a listed building is submitted, the proposed works usually require both planning permission and LBC, which was the case here. The planning application is determined by the Local Planning Authority ('the LPA') and the application for LBC is processed by the LPA. However, before a decision is made on the LBC application, it has to be referred to Cadw, (the Welsh Government's Historic Environment Service). Cadw can refer the application to Welsh Ministers for determination or can refer the matter back to the Council for determination. In this case, the application was referred back to the Council.
24. The Council confirmed that an application for LBC is not an application for planning permission meaning that this too would fall outside of the statutory service. The Council would not therefore be able to disclose the information in respect of the LBC other than in response to a request under the EIR.

Has the person supplying the information consented to its disclosure?

25. The Council further informed the Commissioner that the applicant has not consented to the disclosure of the remaining withheld information.
26. The Commissioner has seen the representations from the third party which confirms that they advised him to submit a Non-Statutory pre-application submission specifically due to the contentious nature of the development and the assurance that it was confidential. The applicant wants the remaining withheld information to remain confidential.

Would disclosure adversely affect the interests of the person who provided the information to the public authority?

27. As with all the exceptions in regulation 12(5), the threshold necessary to justify non-disclosure because of adverse effect, is a high one, and for 12(5)(f), the effect must be on the interests of the person who voluntarily provided the information, and it must be adverse.
28. The Council explained that any alterations to the building have to be carefully negotiated through what at the time of the request, may or may not have received Listed Building Consent. The developer argued that the effect of disclosure during the process of the modification of the plans to meet the likely requirements of LBC would be likely to adversely affect these negotiations.
29. The Council added that even once planning permission or LBC is granted, conditions can still be added where necessary, to make the proposed development acceptable, some of which may require the submission of further details for approval.
30. The Council considers that the adverse effect on the applicant is amplified by the fact that the withheld information consists of the intellectual property of the applicant adding that the drawings do not represent a planning application and if widely circulated, may in fact be used as disinformation to represent alterations to the Grade 2 Listed building that are not now under consideration as a result of the pre-application response.
31. The Council further informed the Commissioner that both applications were the subject of significant objections. The planning application originally had 30 letters of objection and two petitions of objection containing 53 signatures. Following the submission of amended plans, a further seven objections and four petitions of objection, containing 71 signatures were submitted. A local ward member also made a request for committee to determine the application in line with the Council constitution. Objectors addressed the committee.

32. The LBC application originally had 21 letters of objection and a petition containing 15 signatures. Following the submission of amended plans, a further six letters of objection and two petitions containing 21 signatures were submitted.
33. The agent stated that the applicant held a meeting to better inform the local residents prior to submitting the planning application, but was met with anger and objections and was 'shaken' by the experience. He does not therefore want to release any information which could re-ignite objections. He is concerned that the disclosure of plans showing architectural features which are not now going forward for a planning application could be circulated out of context and further inflame opinions amongst campaigners and local residents.
34. The complainant however, considers that the adverse effect stated would not be applicable to at least some of the information, and even where it might apply, it was either too general or not at all applicable given that the date of his request follows the pre-application period and the date of submission of the planning applications.

The Commissioner's position

35. The Commissioner has considered the information provided by both parties and would point out that even in respect of information generated by the Council, if its content is based on information received from a third party, it will effectively be considered to be received from a third party. Regardless of this however, in this particular case, the only information now being withheld is the drawings and photographs produced by the third party.
36. The Commissioner also notes the complainant's comments in relation to being required to provide certain documents when opting for the pre-planning application route. However, as the pre-planning application process is voluntary, she does not accept this argument.
37. The Commissioner also accepts that unlike formal planning applications, there is no statutory requirement in terms of publishing pre-application planning documentation in the same way that certain planning application information has to be made available via a public planning file.
38. Similarly, the Commissioner has no jurisdiction regarding the Council's statutory and non-statutory pre-planning application services and also accepts that a LBC application is not subject to the statutory requirements of disclosure.

39. The Commissioner has also taken into consideration that the third party has not consented to disclosure of the remaining withheld information.
40. In relation to 'adverse effect' the Commissioner's interprets the wording of 'would adversely affect' in regulation 12(5)(f) to set a relatively high threshold in terms of the likelihood which has to be met in order for the exception to be engaged. She does not consider it sufficient that disclosure may or could have some level of adverse effect but rather that disclosure *would* have an adverse effect and the likelihood of this happening must be more substantial than remote.
41. The Commissioner considers that the timing of the request is significant and notes that the request was submitted on 12 December 2019 with the internal review dated 19 February 2020. The request was therefore after the pre-planning application and LBC consent had been approved, but during the full planning application process.
42. She also accepts that disclosing the remaining information relating to the pre-application process would be likely to result in harm, both in terms of time and expenditure to the developer given the controversial nature of the development.
43. Having considered the withheld information and the relevant arguments, the Commissioner is satisfied that disclosure of the withheld information prior to a decision being made regarding the relevant planning application would result in the adverse effects to the developer's interests specified above.
44. Based on the above, the Commissioner has determined that regulation 12(5)(f) is engaged, and must now consider the public interest test.

Public interest arguments in favour of disclosing the information

45. The Council acknowledges there will always be arguments in favour of disclosure to promote accountability and transparency by public authorities for their decisions. This will allow individuals to better understand decisions which affect them.
46. In addition to the above, the complaint has also referred to the presumption in favour of disclosure under regulation 12(2) of the EIR.
47. The complainant has also explained that at the time of his request, the applications were being advertised with public comment invited, and considers that a well informed public are able to make better representations which the planning authority could take into account when making its decision. He believes there is a legitimate public

interest in the subject matter, particularly in terms of its Listed Building and conservation status and furthering the debate.

Public interest arguments in favour of maintaining the exception

48. The Council has stated that the whole purpose of the pre-application planning service is for developers to be able to get advice which smooths the planning process and prevent potential applicants from wasting their time and money in making applications which are not likely to succeed because there are issues which they have not considered. If other organisations involved in the pre-application process took disclosure in this case as an indication that the information they supply to the Council may not remain confidential, this may result in these organisations being reluctant to enter into the pre-planning application process with the Council, which in turn could harm the ability of the Council to conduct the planning process, which would not be in the public interest.
49. The complainant however, does not accept that the disclosure of the requested information would deter applicants from submitting pre-planning applications as they are already aware of the possibility of access to information requests.
50. The Council has also argued that the public will have the opportunity to engage and influence the outcome of the applications through the formal planning application and LBC processes, and the release of this information would not change that opportunity for the public to participate in the decision making process. It considers that the disclosure of the remaining information would have a negligible impact on the ability of the public to effectively engage in this process.
51. The complainant has taken issue with the above argument, and considers that a full and proper understanding of the Council's response cannot be achieved without the plans/drawings on which the response was based.

The balance of the public interest test arguments

52. The Commissioner accepts that there is an inherent public interest in transparency and accountability, particularly in cases like this where the development has generated many objections.
53. The Commissioner is also mindful of the presumption in favour of disclosure under regulation 12(2) of the EIR.
54. The Commissioner acknowledges that the pre-planning application and LBC services enables developers to address any potential issues or

difficulties with their development proposals prior to submitting a formal planning application and LBC application. The Commissioner considers that the ability for developers to submit confidential requests for pre-application advice will arguably save the Council and the developers time, money and resources.

55. Whilst the Commissioner accepts that the withheld information might be of interest to those potentially affected by the proposed development, she does not consider that disclosure would significantly enhance understanding of the actual scope or character of the development or enable informed decisions to be made as to whether to support or object to the development. The pre-application advice was sought at a very early stage in the process and a number of issues were raised which the developer needed to address before submitting a formal planning application.
56. Having considered the relevant facts and the submissions provided, the Commissioner has concluded that in this case the balance of the public interest favours maintaining the exception.

Right of appeal

57. 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

58. 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.

59. 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

**Catherine Dickenson
Senior Case Officer
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