

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

Date: 5 November 2019

Public Authority: Harrogate Borough Council
Address: PO Box 787
Harrogate
HG1 9RW

Decision (including any steps ordered)

1. The complainant has requested information relating to pre-application planning advice. Harrogate Borough Council withheld the information by virtue of the exception at EIR 12(5)(f) - interests of the person who provided the information.
2. The Commissioner's decision is that Harrogate Borough Council has failed to demonstrate that regulation 12(5)(f) is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Disclose the requested information to the complainant.
4. The public authority 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 25 March 2019, the complainant wrote to Harrogate Borough Council ('the council') and requested information in the following terms:

"West Winds 19/00028/OUT -

Pre-application advice 2015 & 2016 (15/03178/PRE & 16/01104/PRE)

A few years ago we were able to read online, the pre-application advice given for [redacted], the northern border of which, is 31m south of the [redacted] boundary.

If we are correct in concluding, that pre-application advice was given about [redacted], which has culminated in the outline permission granted on the 21.03.2019, would it be possible for us to read that, online or by visiting HBC's offices?

If that information is confidential, we would be grateful if someone could provide an exact legal reference to that effect."

6. The council responded on 24 April 2019. It refused to provide the requested information. It cited the following exception as its basis for doing so: EIR 12(5)(f) – interests of the information provider.
7. The complainant requested an internal review on 25 April 2019. The request outlined a number of questions regarding the council's reliance on EIR 12(5)(f) to refuse the request. They also asked *"If the local authority has concluded that the public interest can only be protected, by not providing the requested document, how could public knowledge of the advice in that document, possibly harm the public interest?"*
8. The council sent the outcome of its internal review on 26 April 2019. It upheld its original position and provided further explanation of its reasoning in light of the questions raised.
9. The complainant responded on 28 April 2019 with a number of further questions and requesting another review.
10. The council provided a second review on 23 May 2019. It upheld its original position, provided further information clarifying the use of the EIR rather than the FOIA and provided responses to the complainant's questions.

Scope of the case

11. The complainant contacted the Commissioner on 29 May 2019 to complain about the way his request for information had been handled. The complainant refutes the council's reliance on EIR 12(5)(f). Furthermore they indicate that a precedent has been set, stating that pre-application advice has been previously released by the council "*in virtually identical circumstances about two other properties – one is physically connected and the other within 4 meters of the land in question*".
12. The Commissioner considers the scope of this case is to establish whether the council has correctly engaged the exception at EIR 12(5)(f) to withhold the requested information in its entirety. If it has, then she will consider where the balance of public interest lies.

Reasons for decision

Regulation 2(1) - Environmental Information

13. Information is 'environmental information' if it meets the definition set out in regulation 2 of the EIR. If the information satisfies the definition in regulation 2 it must be considered for disclosure under the terms of the EIR rather than the FOIA.
14. Regulation 2(1) of the EIR defines environmental information as 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...emissions...and other releases into the environment, likely to affect the elements 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) and (b) as well as measures or activities designed to protect those elements;..."

15. Information about a plan, or a measure, or an activity, that affects or is likely to affect the elements of the environment, is environmental information. The information in this case relates to plans to develop land. These are clearly a measures affecting or likely to affect the elements and factors referred to in Regulation 2(1)(a) or (b).
16. The Commissioner therefore finds that the information is environmental information, and that the council was correct to consider it under the EIR.

Regulation 12(5)(f) – Interests of the information provider

17. Regulation 12(5)(f) states:

For the purposes of paragraph 1(a), 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...

18. The Commissioner's public 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 the information.
19. With regard to engaging the exception, and as recognised by the Tribunal, a four stage test has to be considered, namely:

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?
 - Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from 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?
20. The council has confirmed that the pre-planning applicant was not under any legal obligation to supply the council with the withheld information; and that pre-planning advice is not a statutory service.
21. The council advised that the service is beneficial to both the applicant and the council in terms of early oversight and the provision of advice. However it stated that *"Whether developers enter in to such discussions and provide information in support of this, is purely a result of whether the developer decides to make use of the Council's pre-planning advice service."*
22. The council stated that *"It is clear that the information in relation to the pre-planning application and the advice given is on a voluntary flow of information and there is no legal obligation in relation to this flow of information in the pre-application process."*
23. The Council has explained that, apart from under the EIR, it is not entitled to disclose the information. It stated *"The legislation which governs the planning application and enforcement processes does not require the Local Planning Authority to disclose the pre-application information. Therefore, the Council would not be entitled to disclose the information in any other circumstances other than under the EIR."*
24. The council confirmed that the person supplying the information had not consented to its disclosure. It stated *"The Council contacted the agent [the Agent] for the Pre-Planning Applicant and the Agent confirmed their client [the Developer] did not consent to the disclosure of the information."*

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

25. In considering whether there would be an adverse effect on the interests of the person who voluntarily provided the information, the Council needs to identify harm to the person's interests which is real, actual and

of substance, and to explain why disclosure would, on the balance of probabilities, directly cause harm.

26. There is no requirement for the adverse effect to be significant – the extent of the adverse effect would be reflected in the strength of arguments when considering the public interest test (i.e. once the application of the exception has been established). However, the public authority must be able to explain the causal link between disclosure and the adverse effect, as well as why it would occur. The need to point to specific harm and to explain why it is more probable than not that it would occur reflects the fact that this is a higher test than 'might adversely affect', which is why it requires a greater degree of certainty. It also means that it is not sufficient for a public authority to speculate on possible harm to a third party's interests.
27. The council stated that *"the Agent confirmed to the Council that his Client considers the information to be commercially sensitive as it relates to a proposal for the development on private land. The Agent informed the Council that disclosure of the information in to the public domain would adversely affect the developer's interests."*
28. The council advised that it considers that the likelihood of an adverse effect would be more substantial than remote as the disclosure of the information would 'would' have an adverse effect. It stated *"the Council's response to the Pre-Application Enquiry contains information about a proposed development and therefore directly affects the developer's commercial interests."*
29. In this case, the council has confirmed to the Commissioner that the Agent and the Developer consider that disclosure would adversely affect the Developer's commercial interest. However the Commissioner considers that the harm identified is vague and has not been linked to any specific elements of the withheld information.
30. The Commissioner notes that the council has not defined what form the adverse effect, on the Developer's commercial interest, would take. There is no explanation provided of how, specifically, the commercial interest would be negatively impacted. Neither has it provided any scenarios that clarify the causal link between disclosure and the specific nature of the negative commercial impact.
31. The Commissioner is mindful that outline planning permission had been granted² prior to the request being made. The site in question is also

² <https://democracy.harrogate.gov.uk/documents/s2424/Delegated%20Decisions.pdf>

advertised for sale, with specific reference to the outline planning permission³, further indicating that this stage of the process is complete and, in the Commissioner's view, adding to the need to explain the causal detrimental effect that release of the information might have.

32. As no convincing argument has been provided, the Commissioner therefore considers that the potential effect alluded to is not made sufficiently concrete and the likelihood of the effect occurring has not been demonstrated.
33. In cases where an authority has failed to provide adequate arguments to engage an exception the Commissioner does not consider it her duty to formulate arguments on its behalf. On the basis of the submissions made by the council the Commissioner has, therefore, concluded that it has failed to demonstrate that disclosure of the information would adversely affect the interests of the Developer.
34. As this stage of the test is integral to the operation of the exception the Commissioner has concluded that the council has failed to show that the exception is engaged. She has not, therefore, gone on to consider the public interest test.
35. Having considered the withheld information, and the arguments provided by the council, the Commissioner has concluded that the council failed to demonstrate that disclosure of the pre-application advice would adversely affect the interests of the Developer. She has therefore finds that the exception provided by regulation 12(5)(f) is not engaged.

³ <https://www.rightmove.co.uk/property-for-sale/property-74051608.html>

Right of appeal

36. 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

37. 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.
38. 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