

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 14 April 2022

Public Authority: Department for Levelling Up, Housing and Communities

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested from the Department for Levelling Up, Housing and Communities ("the DLUHC") information relating to the decision to not call-in two related planning applications. The DLUHC withheld the requested information under regulation 12(4)(b) (manifestly unreasonable requests) of the EIR.
2. The Commissioner's decision is that the DLUHC was entitled to withhold the requested information under regulation 12(4)(b), and that it has complied with the requirement of regulation 9 (advice and assistance).
3. The Commissioner does not require the DLUHC to take any steps.

Request and response

4. On 5 August 2020, the complainant wrote to the DLUHC and requested information in the following terms:

I wish to understand how the Secretary of State came to the decision not to call in the applications at Kings Hill Warwickshire.

Can I please see the case file, including the brief to case officers, any notes, reports or communications made by the case officers or ministers, any evaluations or weightings of the factors for and against call in, emails about the case, a list of the evidence which was considered, calendar requests, agendas, and minutes for any meetings which considered the matter, communications with the local authorities involved.

I do not require the names of any junior officials involved. However, I would like to see the names of any senior civil servants or politicians who took part. (as per the Guardian/Rob Evans v the MOD Tribunal case about the address book of the Defence Export Services Agency Appeal Number: EA/2006/0027)

As this is an environmental matter, - concerning a decision about land use - it should be considered under the Environmental Information Regulations.

5. The DLUHC responded on 13 August 2020. It refused the request under regulation 12(4)(b).
6. Following an internal review, the DLUHC wrote to the complainant on 8 October 2020. It maintained the application of regulation 12(4)(b).

Scope of the case

7. The complainant contacted the Commissioner on 10 November 2020 to complain about the way their request for information had been handled, and specifically that the DLUHC was not entitled to withhold the information under regulation 12(4)(b).
8. The scope of this case and of the following analysis is whether the DLUHC was entitled to rely upon regulation 12(4)(b) to withhold the requested information, and whether it has complied with the requirement of regulation 9 to provide advice and assistance.

Background

9. The Secretary of State has the power to take over ('call-in') planning applications that have been submitted to a local planning authority, with the eventual determination being made by the Secretary of State. This is normally done in respect of planning applications that either conflict with national policy in an important way, or are nationally significant.
10. In 2020, requests were received by the DLUHC asking the Secretary of State to call-in two related planning applications that were being considered by Coventry City Council and Warwick District Council. These two applications related to the development of up to 2500 dwellings and associated infrastructure at Kings Hill, Warwickshire.
11. The Secretary of State considered the request, and decided not to call-in the applications, with the associated decision letters being issued on 3 August 2020. Consequently, determination of the applications was left for Coventry City Council and Warwick District Council, as local planning authorities, to decide.

Reasons for decision

Regulation 12(4)(b) – Requests that are manifestly unreasonable

12. Regulation 12(4)(b) provides:

*For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that–
(b) the request for information is manifestly unreasonable...*

13. The Commissioner has issued public guidance¹ on the application of regulation 12(4)(b). This guidance contains the Commissioner's definition of the regulation, which is taken to apply in circumstances where either the request is 1) vexatious, or 2) where the cost of compliance with the request would be too great. In this case the DLUHC considers that circumstance 2) is applicable.
14. The EIR does not contain a limit at which the cost of compliance with a request is considered to be too great. However, the Commissioner's

¹ <https://ico.org.uk/media/for-organisations/documents/1615/manifestly-unreasonable-requests.pdf>

guidance suggests that public authorities may use The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Regulations") as an indication of what Parliament considers to be a reasonable charge for staff time. The Regulations specify that £600 is the appropriate limit for central government authorities, and that the cost of complying with a request should be calculated at £25 per hour; this applies a time limit of 24 hours.

15. For the purposes of the EIR, a public authority may use this hourly charge in determining the cost of compliance, which may include the consideration of exceptions. However, the public authority is then expected to consider the proportionality of the cost against the public value of the request before concluding whether the request is manifestly unreasonable.

Is the exception engaged?

16. The DLUHC has informed the Commissioner that the request seeks the entire case file relating to the Secretary of State's decision to not call-in two connected planning applications.
17. The DLUHC has provided the Commissioner with a spreadsheet detailing the contents of the case file. The case file contains 74 individual documents, which the Commissioner understands to largely represent digital scans of hardcopy letters and email correspondence. The DLUHC has previously estimated (at internal review) that the information would equate to approximately 285 sides of A4 paper.
18. The DLUHC has provided the Commissioner with a sample of three of the documents contained in the case file, representing 16 sides of A4 paper.
19. The DLUHC has further informed the Commissioner that, due to the context of the information, it reasonably considers that it would need to consider the application of several exceptions. This includes:
 - Regulation 13 (personal data) – regarding the personal data of individuals party to correspondence and discussion; and,
 - Regulation 12(4)(e) (internal communications) – regarding advice to Ministers and matters of internal discussion.
20. The DLUHC also considers that it may have to consider the application of regulation 12(5)(c) (intellectual property rights), 12(5)(d) (confidentiality of proceedings), and 12(5)(e) (confidentiality of commercial information).

21. The DLUHC has informed the Commissioner that it considers the preparation of the case file for public disclosure (including the reading of each document, and consideration of any parts that may fall under an exception) would take approximately 36 hours, based on an average time of 30 minutes per document. This is in excess of the time limit of 24 hours.
22. The Commissioner has considered the DLUHC's submissions and recognises that a significant amount of recorded information is held that would fall within the parameters of the complainant's request – namely 74 documents, or approximately 285 sides of A4 paper. The Commissioner is mindful that, for the DLUHC to comply with the request in under 24 hours, it would need to review – and consider the relevance of any exceptions to – each document in less than 20 minutes, or otherwise, each side at 5 minutes or less.
23. Having considered the nature of the withheld information, and having reviewed a sample of it, the Commissioner is satisfied that it is likely the DLUHC would be entitled to consider the application of exceptions. In particular, the Commissioner recognises that the information will contain personal data, and further, is likely to represent advice to ministers and internal discussion about the decision – as has been previously found by the Commissioner in other Decision Notices relating to the call-in of planning applications.
24. The Commissioner is particularly mindful that for the consideration of exceptions, an officer will not only need to consider the information at a granular level, but also may need to consult with other individuals in different business areas.
25. Furthermore, the Commissioner must also consider that applying any necessary redactions, and providing the information to the complainant, will of necessity require further time – particularly in light of the current file size of the requested information (which the DLUHC has stated to be 166 MB), and the likely steps that would be needed to either send it electronically or in hardcopy.
26. The Commissioner notes that the complainant argues that the redaction of individual pages would be unlikely to take more than five minutes a page. The Commissioner has considered this but notes that it is not the physical act of redaction that will require time to be expended, but the analysis – and if necessary, consultation with other parties – by the responsible officer, who must apply their knowledge of the legislation - and the Commissioner's guidance - in deciding whether an exception may be engaged.

27. On this basis, the Commissioner accepts that the request is manifestly unreasonable within the meaning of regulation 12(4)(b).

The public interest test

28. As the exception is engaged for the information, the Commissioner has considered the associated public interest test required by regulation 12(1)(b). The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. When carrying out the test the Commissioner must bear in mind the presumption towards disclosure provided in regulation 12(2).

The public interest in the information being disclosed

29. The DLUHC has argued that the disclosure of information would, as well as demonstrating transparency, show that the decision not to call-in was based on weighing this against the published call-in policy.
30. Whilst the only matter under consideration was whether to call-in the application, rather than specific analysis of the application itself, disclosure would demonstrate that this consideration was thorough, with a final decision being made at Ministerial level.
31. The complainant has argued that there is a public interest in ensuring that there is a right to participate in environmental decision making – for which there is a need to ensure full and transparent understanding of how decisions are reached. For example, should individuals wish to seek a judicial review in respect of the Secretary of State's decision, it would be necessary for them to understand the reasoning of the decision in order to seek a legal opinion.
32. The complainant further argues that public consultation, under the terms of the Town and Country Planning Act 1990, does not fully represent their right to participate in environmental decision making, and that access to the information is necessary to ensure a right to environmental justice.

The public interest in maintaining the exception

33. The DLUHC argues that the planning process, as provided by legislation, is designed to be transparent, in that the various decision-making steps are published as part of the consideration process. This includes the planning application itself, and request for public comments or objections, which are published by the local planning authorities.
34. The DLUHC further argues that compliance with the request – encompassing the necessary review, consideration of exceptions, and

dispatch of the information - would impose significant disruption on its normal business. The DLUHC does not consider that this would add anything to the final planning decisions made.

Balance of the public interest test

35. The Commissioner recognises the inherent importance of accountability and transparency in decision-making within public authorities, and the necessity of a public authority bearing some costs when complying with a request for information. However, in considering the public interest test for this matter, the Commissioner must assess whether the cost of compliance is disproportionate to the value of the request.
36. The Commissioner recognises that the request is connected to two related planning applications, which, if approved, would have significant environmental implications due to the size and extent of the developments.
37. However, the Commissioner also recognises that the specific information sought by the request does not directly relate to the planning applications, but rather, relates to a separate decision by the Secretary of State on whether to 'call-in' the planning applications to be considered by an inquiry. The Commissioner has considered a similar request for information in Decision Notice FER0670737², in which the Commissioner likewise emphasised this distinction:

In this case, the proposed application identifies a significant development. However, the Commissioner notes that the requested information does not directly relate to the decision as to whether the application should or should not be approved. Rather, it is confined to the question of whether the application should be called-in for consideration by the Secretary of State.

38. In Decision Notice FER0670737, the Commissioner also emphasised that the disclosure of the sought information was not necessary for members of the public to engage with the related planning applications (such as through submitting comments or objections to the local planning authority), or to challenge an approved planning application by judicial review.

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2259584/fer0670737.pdf>

39. Additionally, in Decision Notice FER0670737 the Commissioner also considered it relevant that, in relation to the Ministerial decision, should a party consider it to be incorrect in law, then the judicial review process provides a legal remedy for that to be addressed.
40. Having considered the circumstances of the present case, there is no evidence available to the Commissioner that the DLUHC's handling of the call-in requests have been deficient, or in anyway improper – either of which may have increased the public interest in the request being complied with.
41. Whilst the Commissioner recognises the complainant's argument that they cannot decide whether to seek a judicial review without being able to submit the DLUHCs case file to a legal advisor – in order to consider the strength of their position, it also reasonable for the Commissioner to consider that, in the absence of any reasonable evidence, the Commissioner cannot base his consideration of the public interest on a speculative scenario.

Conclusion

42. Having considered these factors, the Commissioner has concluded that regulation 12(4)(b) has been correctly engaged, and that the outcome of the public interest test indicates the exception should be maintained.
43. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner (SGIA/44/2019)*, "If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).
44. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(b) was applied correctly.

Regulation 9 – Advice and assistance

45. Regulation 9(1) provides that:

A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

46. This regulation places a duty on a public authority to provide advice and assistance to someone making a request. The Commissioner considers that this includes assisting a requestor to refine a request if it is deemed that answering a request would otherwise incur an unreasonable cost.
47. In this case the DLUHC refused the original request on the basis that it would be likely to engage regulation 12(4)(b) and invited the complainant to submit a more specific request – suggesting at internal review stage that they may wish to do so for the call-in requests the DLUHC had received.
48. The DLUHC submits to the Commissioner that, without knowing the complainant's remit in making the request, it is uncertain what specific documents they may be interested in. This limits the DLUHC's ability to suggest specific documents that the complainant may be interested in.
49. The Commissioner recognises that the information sought in the original request is all information (including varied internal and external correspondence) relating to a single, narrow subject – namely the decision on whether to call-in the planning applications. In such a scenario, the Commissioner recognises that the ability to provide advice and assistance is limited by the practical difficulties of separating such information in a meaningful or useful way for a requestor. It is also relevant for the Commissioner to note, that in light of the complainant's stated purpose in making the request (noted in paragraph 30), it seems unlikely that the DLUHC would be able to provide appropriate advice and assistance that would assist that purpose.
50. As such, the Commissioner considers that the DLUHC's invitation to submit a narrower request – with a proposed suggestion being for the received call-in requests - to be a proportionate attempt to provide advice and assistance. On this basis the Commissioner considers that the DLUHC has complied with regulation 9(1).

Right of appeal

51. 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

52. 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.
53. 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

Daniel Perry
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF