

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 10 February 2023

Public Authority: Thanet District Council
Address: Cecil Street
Margate
Kent CT9 1XZ

Decision (including any steps ordered)

1. The complainant requested pre-application planning advice. Thanet District Council (the "council") refused the request, citing the exceptions for the confidentiality of proceedings (regulation 12(5)(d)) and the interests of the information provider (regulation 12(5)(f)).
2. The Commissioner's decision is that the council was entitled to withhold the requested information under regulation 12(5)(d).
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 13 July 2022, the complainant made the following request for information to Thanet District Council (the "council"):

"Re: Planning Application 22/0414 – Land to the North of Foxborough Lane, Minster

A copy of any Pre-Application advice given to the applicant or any other party."
5. The council's final position is that the information is subject to the exceptions for confidentiality of proceedings (regulation 12(5)(d)) and interests of the information provider (regulation 12(5)(f)).

Reasons for decision

Regulation 12(5)(d)- confidentiality of proceedings

6. Regulation 12(5)(d) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that public authority, or any other public authority, where such confidentiality is provided by law.
7. The council has argued that its pre-application advice service constitutes a "proceeding" for the purposes of regulation 12(5)(d).
8. The council considers that disclosure of the requested advice would damage confidentiality and result in harm to the pre-application process as it would discourage engagement with this process.
9. The council has argued that the pre-application process is meant to occur in a 'safe space' and to share it with the wider world undermines the ability to consult free of public scrutiny and condemnation of ideas that never actually lead to fruition, that can create unnecessary negative public concerns about designs that never are implemented. The council considers that confidentiality at the early stages of the pre-application process holds significant importance where an application is still subject to change, rooting out proposals that could be illegal, disagreeable, unworkable or inappropriate.
10. The council has argued that disclosure would prejudice the public consultation of future formal planning applications as the pre-application process can identify planning concerns early on, giving applicants the opportunity to modify their plans before submission within a supportive and confidential dialogue.

11. In this case, the Commissioner considers that disclosure would have an adverse effect on the confidentiality of the pre-application process as it would damage the general principle of confidentiality itself and result in harm to the interest the exception is designed to protect. In the Commissioner's view disclosing the specific information requested in this case would discourage full engagement with the pre-application process, both from this applicant and others, for fear of the public dissemination of such information.
12. In addition to considering the factors above, the Commissioner has also referred to a number of decision notices he has issued regarding other instances where regulation 12(5)(d) has been applied to requests for pre-application advice¹. He considers that the conclusions reached in these previous decision notices are transposable to this case.

Public Interest Test

13. In relation to the public interest in disclosure the Commissioner notes that a formal planning application relating to the requested pre-application advice had been submitted and a decision reached at the time the request was considered. He has also considered arguments in favour of disclosing the information submitted by the complainant.
14. The complainant has argued that there is a public interest in knowing what advice was given to the applicant to determine whether the council provided unwarranted assurances in relation to the future success of any planning application. In effect, the complainant is suggesting that the council displayed undue bias towards the applicant in its consideration of their planning proposal.
15. In relation to this allegation, the Commissioner has no direct evidence that it is based in fact. He also acknowledges that the purpose of pre-application advice is to provide an indication of the form a planning application should take if it is to have a chance of being approved. What the complainant may categorise as unwarranted assurances can also, therefore, be interpreted as warranted advice provided within the restrictions of the pre-application advice process.

¹ See, for example: <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2618026/fer0900414.pdf>; <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022697/ic-115533-y4t6.pdf>

16. The Commissioner also notes that the resulting planning application submitted by the applicant was actually refused permission by the council so the suggestion that the council unduly facilitated the applicant is not plausible.
17. In relation to the public interest in maintaining the exception the Commissioner accepts that there will always be a general public interest in protecting confidential information. Breaching an obligation of confidence undermines the relationship of trust between confider and confidant. For this reason, the grounds on which confidences can be breached are normally limited. Therefore, where the exception is engaged, the Commissioner accepts that there will always be some inherent public interest in maintaining it. He considers that confidentiality in this case assists the council in operating an effective pre-application advice service which in turn can facilitate the effectiveness of its consideration of associated planning applications.
18. Countering this, the Commissioner accepts that there is always a general public interest in disclosure, particularly where this can contribute to public understanding of an participation in planning matters.
19. In determining the balance of public interest, the Commissioner considers a key factor is how far the information would add to public understanding. In this case he finds this to be minimal as, in effect, these pre-application enquiries have been superseded by the submission of a formal planning application. Moreover, the planning application process provides a mechanism for public engagement with planning decisions and pre-application advice has no direct bearing on the decision to approve or refuse an application.
20. As the pre-application advice process provides a forum for the modification of or removal of elements of an application that may be submitted, there is a likelihood that disclosing the information would muddy the public understanding of a planning matter rather than enhance it.
21. The Commissioner recognises that the EIR and this regulation in particular do not provide a blanket prohibition on the disclosure of pre-application planning advice. He acknowledges that, in some cases, developers may actually submit advice received as part of their formal planning application for publication. The Commissioner understands that this has not happened in this case.

22. Given the facts of this case, the Commissioner considers that disclosing the information would not enhance public understanding to the extent that this would counterweigh the public interest in maintaining the confidentiality of pre-application advice proceedings. He also does not consider that the arguments submitted by the complainant in relation to any bias ascribed to the council carry any weight.
23. The Commissioner considers that far greater weight 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.
24. Therefore, taking all of the above into account, the Commissioner considers that the public interest in this case lies in maintaining the exception. His conclusion is that the exception to the duty to disclose environmental information at regulation 12(5)(d) properly applies to the requested information.
25. As the Commissioner has found that the council has correctly applied regulation 12(5)(d) in this case he has not gone on to consider its application of regulation 12(5)(f).

Right of appeal

26. 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

27. 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.
28. 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

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