

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

Date: 6 August 2024

Public Authority: Swansea Council
Address: Civic Centre
Oystermouth Road
Swansea
SA1 2SN

Decision (including any steps ordered)

1. The complainant requested information about a particular development. Swansea Council (the Council) withheld the information requested under regulations 12(5)(f) (the interests of the person who provided the information) and 12(5)(e) (confidentiality of commercial information).
2. The Commissioner's decision is that the Council has correctly applied regulation 12(5)(f) to the request. However, the Commissioner also finds that the Council breached regulations 11 and 14 of the EIR in failing to issue a refusal notice and failing to issue an internal review within the statutory timescales. The Commissioner does not require any steps to be taken.

Request and response

3. On 28 June 2022, the complainant wrote to the Council regarding a specific development and requested information in the following terms:
 1. "A copy of the minutes or notes of the meeting held in February 2017 produced by the Developer or its agents, as referred to in the second paragraph of this email.

2. A copy of the minutes of the meeting in November 2017 between the Council, the Developer and the Developer's agents.
3. A copy of the correspondence passing between the Council and the Developer and its agents between December 2016 and February 2018 on all matters in relation to the alternative proposed access from Brynrhos Crescent".
4. The Council responded on 17 January 2023 and stated that it did not hold any information in relation to parts 1 and 2 of the request. In respect of part 3 of the request the Council confirmed that it had already provided information for the period 23 September 2016 to July 2017. It disclosed additional information in respect of the period from July 2017 to February 2018 and stated that any records which had been marked private and confidential by the Developer were considered exempt under regulations 12(5)(f) of the EIR.
5. On 13 February 2023 the complainant requested an internal review of the handling of their request. They disputed that the Council did not hold any information relating to parts 1 and 2 of the request. In respect of part 3 of the request the complainant stated that the information previously disclosed, in respect of an earlier request for information, for the period September 2016 to July 2017 only referred to correspondence between the Council and Burrow Hutchinson. As such it did not include all correspondence between the Council and the Developer and/or its agents. The complainant also stated that they felt additional information was held for the period July 2017 to February 2018 as only 4 emails had been provided. Finally, the complainant disputed the Council's application of regulation 12(5)(f) to the request.
6. The Council provided the outcome of its internal review on 29 January 2024. It upheld its decision that regulation 12(5)(f) applied to the withheld information and stated that it was also now relying on regulation 12(5)(e) to refuse the request.

Scope of the case

7. The complainant contacted the Commissioner on 8 February 2024 to complain about the way their request for information had been handled. In their complaint to the Commissioner the complainant specifically asked him to consider whether the Council had correctly applied regulations 12(5)(e) and 12(5)(f) to the request.
8. In light of the above, the scope of the Commissioner's investigation into this complaint is to determine whether the Council correctly relied on the exceptions cited to the information it has withheld.

Reasons for decision

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

9. Regulation 12(5)(f) of the EIR states 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. As with all the regulation 12(5) exceptions, the Commissioner considers that, in order to demonstrate that disclosure “would adversely affect” a confider’s interests, a public authority must demonstrate that the adverse effect is more likely than not to occur.

11. The withheld information comprises emails submitted by the Developer to the Council regarding the development in question.

12. The Council provided the Commissioner with evidence that it had consulted with the Developer in question who has not consented to disclosure. The Developer considers the information to be commercial in nature as it relates to discussions on contributions payable through the Section 106 agreements for the development and confidential matters relating to the liability of the site.

13. The Council and the Developer pointed out that it was not under, or could not have been put under any legal obligation to supply the information. The information was not supplied in a ‘developed’ and final form which might have entitled the Council or another authority to disclose it, apart from under the EIR. The Developer explained that the information represents confidential discussions with the Council about the development. It also stated that it did not supply the information with the expectation that the Council would disclose it to the world at large.

14. All of the withheld information is marked confidential. The Developer considers that disclosure of the information into the public domain would adversely affect its commercial interests on a site which is currently being developed and is subject to a number of reserved matters submissions which need to be made and approved by the Council. The Developer explained that the "reserved matters also need to be financially viable in their own right". In light of this, disclosure of information relating to the viability of the scheme would prejudice the Developer's interests in the reserved matters going forward.
15. The Developer also pointed out that the Council's Replacement Local Development Plan (RLDP) is currently in the process of being prepared. It will include competitor sites seeking to be allocated, either rolling over existing allocations or new allocations. Disclosure of the withheld information would adversely affect the economic interests of the Developer in light of the fact that "deliverability of strategic allocations is a key test for the RDLP success".
16. The Commissioner is satisfied that the Developer was not under, and could not have been put under any legal obligation to supply the withheld information to the Council. He is also satisfied that the Council was not entitled to disclose the information, apart from under the EIR and notes that the Developer has refused consent for disclosure of the information provided.
17. Having viewed the withheld information and taken into account the representations provided by the Council and the Developer, the Commissioner's view is that disclosure of the withheld information would be more likely than not to adversely affect the interests of the Developer. In reaching a view, the Commissioner has taken into account the fact that the email discussions were undertaken in confidence, and the subject matter associated with the request is live as the site is currently being developed. He has also taken into account the fact that the development is subject to reserved matters which are yet to be approved.
18. Having found that each of the tests for regulation 12(5)(f) to be engaged are met, the Commissioner's conclusion is that the exception provided by regulation 12(5)(f) is engaged. He has therefore gone on to consider the public interest test.

The public interest test

19. The Council accepts that there is a public interest in openness and transparency. It also acknowledges the public interest in providing

members of the public with information to assist understanding of its decision making process.

20. The complainant explained that on 18 January 2024 the Developer was prepared to enter a legally binding Section 106 Agreement in relation to the site. This meant that the Developer accepted the obligations within the agreement and the conditions associated with the Planning Notice. Within the Planning Notice were conditions that related to 'reserved matters'. These conditions are no different to the ones set out in the planning report produced 7 months earlier. As such, the complainant considers that there should be nothing within the withheld information that "should give rise to either matters that weren't already in the public domain or of such significance to affect the reported viability of the site".
21. The complainant pointed out that access to the site has been a continual problem and local residents have always expressed concerns that the Developer's ambitions for the site did not go beyond the initial phase. The lack of progress on the site in question reinforces this view and the complainant considers it is clear that the development, including the physical and infrastructure on which the allocation of the site was predicted, will not be completed within the required timescale. Additionally, "the financial flexibility and contingency allowances supposedly contained within the viability appraisals to address these issues do not exist".
22. Whilst the complainant accepts that, since the adoption of the LDP in February 2019, or since the execution of the Section 106 Agreement in January 2021, recent events could have raised viability issues, these would not have been known during the period covered by the request. As such, the complainant considers the Council's arguments for withholding the information to be flawed.
23. In favour of maintaining the exception, the Council argues that there is an inherent public interest in preventing the adverse effects on the Developer who provided the information and the principle of confidentiality.
24. The Council also considers that there is a public interest in maintaining the voluntary supply of information from third parties about planning matters. The Council believes that there is a public interest in it being able to engage in free, confidential discussions with developers. Without this ability, developers will be less willing to commit to negotiations in writing.
25. The Council acknowledges that a large amount of information about the development was published as part of its LDP Examination. This includes information such as Statements of common Ground (SoCG) between

itself and various developers which set out areas where agreement has been reached between the parties, along with a report on the findings of an Independent Financial Viability Appraisal (IFVA) of sites that contain summary financial details such as site by site comparisons of costs and values. However, the Council argues that it is reasonable for a developer to consider that whilst some information would be published, they retain the right to expect that certain correspondence about the subject matter would not be published.

26. The complainant has argued that if viability of the scheme was a potential issue between December 2016 and February 2018, this should have been identified during the LDP Examination. The complainant asserts that "the very premise that supported the allocation of the site in the LDP becomes totally undermined". The Council confirmed to the Commissioner that matters relating to the viability of the development were thoroughly discussed publicly at the LDP Examination. This provided a full opportunity for all issues to be raised and for independently appointed planning inspectors to consider matters in an open forum.
27. The Council stated that the development in question was discussed in detail throughout this period of scrutiny, and decisions made based on the most accurate information available at the time. It added that close monitoring since then has highlighted that the site in question, along with other strategic sites, is unlikely to be delivered within the original timescales envisaged. The social and physical infrastructure of the development was negotiated in detail during the planning application process and decisions relating to it were made based on the up to date information and evidence available at that time. The Council added that the delivery of sites within its LDP are closely monitored according to statutory requirements. The results of this process are published annually and submitted to the Welsh Government by way of Annual Monitoring Reports¹.
28. The Council confirmed that a considerable amount of information about the development has been made available to the complainant previously, in response to earlier information requests. However, it argues that the withheld information is not referred to in the published documents and is considered to be confidential.
29. The complainant has argued that the Section 106 agreement and planning notice are public documents and as such the information requested should be disclosed. The Council acknowledges that the

¹ <https://www.swansea.gov.uk/planningdelivery>

Section 106 Agreement, including details relating to financial contributions are publicly available in the Planning Officer's report in relation to the development and within documentation associated with its LDP Examination. However, the Council does not consider that this means that all correspondence relating to such matters should be disclosed in the public interest. It argues that:

"the level of information (including financial and accounting information) would be described in publicly accessible documents to a level of depth appropriate for such inspection and ultimately planning decision making. In principle, certain information and/or statements made by a Developer relating to these issues may still be considered confidential, for example if they thought the release of information relating to some costs associated with their business and/or specific development could compromise in some way commercial competitive advantage".

Balance of the public interest

30. The Commissioner accepts that there is an inherent public interest in transparency and accountability, particularly in cases like this where the development has generated significant interest from local residents. He notes that there is a considerable amount of publicly available information about the development in question which goes some way to meeting this public interest.
31. The Commissioner is satisfied that disclosure of the withheld information, which was provided to the Council in confidence, would have an adverse effect on the Developer. It may also prevent other parties from confiding in the Council regarding similar matters in the future. The Commissioner considers that there is a strong public interest in maintaining the voluntary supply of information from developers to the Council and in maintaining the relationship between the parties.
32. Whilst the Commissioner recognises that the Developer would have a reasonable expectation that information they provided to the Council about the development could be the subject of an EIR request, the third party would equally have a reasonable expectation of confidentiality in respect of certain sensitive information regarding the development. Disclosure of such information could deter planning applicants from engaging in free and frank discussions with the Council in the future, and this could have a negative impact on planning and development generally.
33. In reaching a view on this case, the Commissioner has taken into account the fact that the development is currently ongoing and subject to a number of reserved matters. He also notes that the Council's RDLP is currently being prepared and this will include competitor sites.

34. 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.
35. 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).
36. 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(5)(f) was applied correctly.
37. As the Commissioner has determined that all of the withheld information is exempt under regulation 12(5)(f) of the EIR he has not gone on to consider the Council's application of regulation 12(5)(e) to the information.

Procedural matters

Regulation 14 – issuing a valid refusal notice

38. Regulation 14 of the EIR requires a public authority wishing to withhold information to issue a refusal notice within 20 working days.
39. In this case the request was submitted on 28 June 2022 and the Council did not issue a refusal notice until 17 January 2023. The Commissioner therefore finds that the Council breached regulation 14 of the EIR.

Regulation 11 – Representations and reconsideration

40. Regulation 11 of the EIR provides that, if a requester is dissatisfied with a public authority's response to a request, the requester can ask for a review. Regulation 11(4) provides that a public authority should respond promptly and no later than 40 working days after the date of receipt of the request for review.

41. In this case the complainant requested an internal review on 13 February 2023 and the Council did not provide the outcome of its internal review until 29 January 2024.
42. The Commissioner therefore finds that the Council breached regulation 11 of the EIR in failing to carry out an internal review within the statutory time limit of 40 working days.

Right of appeal

43. 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

44. 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.
45. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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