

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 4 October 2016

Public Authority: Darlington Borough Council
Address: Town Hall
Darlington
DL1 5QT

Decision (including any steps ordered)

1. The complainant has requested pre-application advice in relation to a proposed housing development. Darlington Borough Council refused the request, withholding the information under the exception for interests of the information provider – regulation 12(5)(f) of the EIR.
2. The Commissioner's decision is that Darlington Borough Council has correctly applied regulation 12(5)(f) to withhold the requested information and that the public interest favours maintaining the exception.
3. The Commissioner does not require the public authority to take any steps

Request and Response

4. On 17 March 2016, the complainant wrote to Darlington Borough Council (the "council") and requested information in the following terms:

"The information I am seeking is the pre-application advice given by Darlington BC in response to Peel enabling housing development proposal reference:

<http://www.darlington.gov.uk/PublicMinutes/Cabinet%5COctober%206%202015%5CItem%20No.%206a%20-%20DTVA.pdf>

4. The report sets out Peel's proposal and the consequential officer advice.

17. Progress is also being made in relation to the preparation of an application for the enabling housing development at the airport site, and discussions are ongoing with officers regarding a related Section 106 planning agreement. Peel has presented the enabling development proposals to the Planning Applications Committee as a preapplication proposal.

This is fundamentally what Mr Stapleton sought and which Darlington BC claimed was exempt information. I have made a case for release of that information."

5. The council responded on 19 April 2016. It stated that it was withholding the information under the exception for adverse affect to the interests of the information holder – regulation 12(5)(f) of the EIR.
6. Following an internal review the council wrote to the complainant on 1 June 2016. It stated that it was maintaining its position.

Scope of the case

7. On 7 June 2016 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly applied regulation 12(5)(f).

Reasons for decision

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

9. The council has withheld the entirety of the requested information under regulation 12(5)(f). The information consists of communications between the council and a developer, including pre-application advice provided by the council.
10. Regulation 12(5)(f) provides that information can be withheld where its disclosure would have an adverse affect on the information provider. In order for the exception to be engaged it must be shown that the information provider:

"(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.

11. In relation to (i), the council has stated that the developer in question was not under any legal obligation to supply the information. It confirmed that the developer supplied the information on a voluntary basis for the purpose of seeking advice about a prospective planning application. The council has advised the Commissioner that it would not have had the right to require or otherwise compel the developer to provide this information as no formal planning application had been made at the time the information was volunteered.
12. In relation to (ii), the council has confirmed that the developer did not supply it with the information in circumstances in which the council was entitled, apart from under the EIR, to disclose it. The council has stated that the developer submitted the request for advice in the expectation that it would not be disclosed more widely.
13. The council has explained that its "Statement Of Community Involvement" states that its One Stop Shop Pre-Application Service is a "confidential advisory service..". The council has stated that it is clear that the developer would expect the information it provided and the advice given in return, therefore, to be treated in confidence. The council has advised the Commissioner that Pre-Application advice requests are not planning applications and are not subject to the normal formal reporting of plans as planning applications. The council considers, therefore, that it does not have an automatic entitlement to disclose the information.
14. In relation to (iii), the council has confirmed that the developer has explicitly stated that it does not consent to the disclosure of the information.
15. Having considered the withheld information and the council's submissions the Commissioner is satisfied that the information meets the 3 criteria specified by the exception. She has gone on to consider whether disclosure of the information would have an adverse affect on the interests of the developer.

Adverse Affect

16. The Commissioner interprets the wording of "would adversely affect" in regulation 12(5)(f) to set a relatively high threshold in terms of 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.

17. The council has argued that the timing of the complainant's request prior to the submission of the formal planning application would have adversely affected the interests of the developer. It has argued that publication of the pre-application information would have dissuaded the developer from submitting their formal application in respect of a contentious development in the local area.
18. The council has argued that disclosure would proposals in the public domain which would bear no relation to those set out in the subsequent planning application. The identification of possible options would generate confusion and invite objections which would need to be addressed, diverting the developer's attention away from the construction of a formal planning application. The council explained that, since the planning application was submitted (on 25 May 2016), in excess of 300 letters of object have been received, giving credence to this scenario.
19. The Commissioner accepts that, had the information been disclosed at the time of the request, the developer may then have faced significant objections to plans which it may have decided not to formally submit. This would clearly have had an adverse effect upon the developer's interests. If, as in the case, the developer was continuing to consider their options as regards the proposed development, disclosure of the withheld information might have caused it to delay its formal application and it may have incurred costs as a result of the actions of interested parties who would seek to prevent the development occurring prior to the planning application process.
20. The council has further argued that, for the same reasons identified above, disclosure of the information prior to a decision being made in relation to the formal planning application, would generate the same confusion and distraction and would result in the same harm to the interests of the developer.
21. 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 adverse effects to the developer's interests.
22. As she has determined that regulation 12(5)(f) is engaged the Commissioner has gone on to consider the public interest test.

Public interest in disclosing the information

23. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in their understanding of how public authorities make their decisions and in turn fosters trust in public authorities. In many circumstances the disclosure of recorded information may allow greater public participation in the decision making process. In its submissions the council has acknowledged the public interest inherent in these factors.
24. The council has also acknowledged that the development in question (some 300 residential properties) is relatively large with significant environmental implications and impact on those living locally. The council has suggested that disclosure of the information could assist interested parties in reaching a decision as to whether to support or oppose the development.

Public interest in withholding the information

25. The council has argued that the central public interest in the exception being maintained is that individuals and organisations should be able to seek advice about ideas for potential future developments from planning authorities on a confidential basis.
26. The council has explained that pre-application advice requests are a way for developers to "test the waters" in relation to particular types of developments in specific areas. The process provides developers with advice as to what issues are likely to crop up prior to drawing up plans for formal approval. A benefit of this process is that developers will save time and money identifying such problems and averting potential time and expenditure at the formal application stage.
27. The council has argued that the pre-application process also saves public expense by enabling it to eliminate any planning problems before the formal application process is engaged. It has further argued that, should pre-application advice be routinely disclosed, developers would be less likely to engage with the process and would be more likely to submit inappropriate plans which would need re-submission. An outcome of this would be an increase in the time and expenditure needed to deal with planning applications, to the detriment of both developers and the council.
28. The council has further argued that once the formal planning application process has begun (as it has in respect of this development) all interested parties have the opportunity to scrutinise and comment on the proposals based on the information provided as part of the formal process. The council has confirmed that that application will be

determined by the Planning Application Committee at which the developer, objectors and planning officers will be able to make further verbal representations. The council considers that objectors' ability to voice concerns or apply scrutiny to the planning application has not been affected by the withholding of the information.

Balance of the public interest

29. In this case the Commissioner has given due weight to inherent public interest in transparency and accountability, particularly in this case where planning decisions made by the council will have far reaching environmental outcomes and significant impact on the local community.
30. The Commissioner also acknowledges that the pre-planning application service provides enables to developers to eliminate any potential difficulties with prospective applications prior to formal submissions. She accepts that disclosing information relating to the pre-application process would result in harm, both in terms of time and expenditure, to the interests of the developer. Whilst she accepts that the withheld information might be of interest to those potentially affected by the proposed development, she does not consider that its disclosure would 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. As identified by the council, any planning decision is to be made on the information provided as part of the formal planning process and not on any speculative, initial proposals.
31. The Commissioner acknowledges that the proposed development attracts genuine local interest and concern, however, she does not consider that disclosing the information would, in this case, benefit informed decision making. Rather, the Commissioner considers that, as the council has argued, disclosing the information would result in confusion and for the reasons identified above, adverse effects to the interests of the developer.
32. The Commissioner does not consider that it is the purpose of the EIR to circumvent existing procedures within planning law and the mechanisms for public scrutiny which already exist. Whilst she acknowledges that facilitating public engagement with environmental issues is one of the general principles behind the EIR, she does not consider that, in this case, that disclosing the information would assist in furthering this principle, at least not to the extent that any public benefit would outweigh the public interest in protecting the interests of the information provider.

33. 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

34. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. 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.
36. 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
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