

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 16 November 2017

Public Authority: Royal Borough of Windsor & Maidenhead
Address: Town Hall
St Ives Road
Maidenhead
SL6 1RF

Decision (including any steps ordered)

1. The complainant has requested pre-application planning advice. The Royal Borough of Windsor & Maidenhead withheld the information under the exception for interests of the information provider – regulation 12(5)(f).
2. The Commissioner's decision is that the Royal Borough of Windsor & Maidenhead 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 April 2017 the complainant wrote to the Royal Borough of Windsor & Maidenhead (the "council") and requested information in the following terms:

"I am placing a request in for a copy of 14/90639/PRE-APP"

6. The council responded on 27 April 2017. It stated that it was withholding the information under the exception for interests of the information provider – regulation 12(5)(f).
7. Following an internal review the council wrote to the complainant on 9 May 2017. It stated that it was maintaining its position.

Scope of the case

8. On 30 May 2017 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the requested information under regulation 12(5)(f).

Reasons for decision

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

10. The council has withheld all the requested information under regulation 12(5)(f).
11. Regulation 12(5)(f) sets out a number of criteria which must be met for this exception to be engaged. These criteria have been drawn from the Tribunal decision in *John Kuschnir v Information Commissioner and Shropshire Council (EA/2011/0273; 25 April 2012)*¹ and include the following:

1

http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i750/2012_04_25%20Mr%20Kuschnir%20decision.pdf

- the person was not under any legal obligation to supply that information to any public authority;
 - the person supplying the information did not supply it in circumstances in which the public authority is not entitled, apart from under the EIR, to disclose it; and
 - the person supplying the information has not consented to its disclosure.
12. In its submissions the council has advised the Commissioner that it considers the facts of a previous decision notice are transposable to this specific case. The decision notice in question ("FER0632719") related to a request made to Darlington Borough Council for pre-application planning advice².
13. In considering the council's submissions, the Commissioner has, therefore, had regard to this previous decision notice whilst also considering the specific facts of this case.

the person was not under any legal obligation to supply that information to any public authority

14. The council has stated that the developer in question was not under any legal obligation to supply the information. It has confirmed that, as in the case of FER0632719, 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.

² ICO reference: FER0632719, issued 2016; published on the ICO website here: <https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1625169/fer0632719.pdf>

the person supplying the information did not supply it in circumstances in which the public authority is not entitled, apart from under the EIR, to disclose it

15. The council has stated 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 confirmed that the developer submitted the request for advice in the expectation that it would not be disclosed more widely.
16. 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

the person supplying the information has not consented to its disclosure

17. Public authorities must consider whether, at the time a request is made, the person who supplied the information has not consented to its disclosure. This will often be determined at the time the information was supplied. It is a matter of good practice that a public authority should advise the supplier at the time the information is supplied to what uses the information will be put, including any likely disclosures. This should help to establish whether the supplier consents to disclosure and also provide the authority with the opportunity to encourage the supplier to provide such consent.
18. The Commissioner considers that, as circumstances can alter, it is equally a matter of good practice, where possible, to revert to the supplier following receipt of a request in order to confirm whether or not there is consent to disclose. This will be especially relevant where circumstances have changed since the information was first supplied to the authority.
19. The council has confirmed that the developer has explicitly stated that it does not consent to the disclosure of the information. The Commissioner has had sight of relevant correspondence between the council and the developer which confirms this.

Adverse Affect

20. As with all the exceptions in regulation 12(5), the threshold necessary to justify non-disclosure, because of adverse effect, is a high one. The effect must be on the interests of the person who voluntarily provided the information and it must be adverse.

21. In considering whether there would be an adverse effect in the context of this exception, a public authority needs to identify harm to the third party's interests which is real, actual and of substance (i.e. more than trivial), and explain why disclosure would, on the balance of probabilities, directly cause the harm.
22. As the Tribunal in the Kuschnir case (cited above) noted, 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. 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.
23. 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.
24. In its submissions the council has directed the Commissioner to the adverse effects identified in FER0632719 and argued that the same effects would result from disclosure of the information in this case.
25. The Commissioner notes that, aside from communications from the developer which state that the information is "sensitive", the council has not provided any specific evidence which reflects the developer's views on the effects of disclosure. Moreover it has not provided any evidence that the conditions identified in FER0632719 are directly transposable to the facts of this case.
26. The Commissioner is mindful that pre-application advice is not part of the formal planning process and not subject to associated statutory obligations to make it publically available. However, as the Commissioner has made clear to the council, pre-application advice or any other category of information is not automatically excepted from disclosure under the EIR. It is for public authorities to demonstrate that, where an exception is being applied, the relevant facts meet the criteria for engaging the exception.
27. Where an exception, such as 12(5)(f), relates to a third party, the Commissioner will not generally accept speculation on the part of public authorities as to the potential effects of disclosure on the party in question. In this case the council has not provided evidence that it sought the council's views on the specific effects of disclosing the information.

28. In directing the Commissioner to FER0632719, the council also has not identified any specific links between the information withheld in this case and the effects described therein. The Commissioner is left with the perception that the council has sought to apply the exception on a general basis without regard for the specific facts necessary to demonstrate plausible, identifiable harm in the case of the information requested.
29. The Commissioner clearly sets out in his correspondence that public authorities will have one opportunity to set out their final position in relation to the handling of a request. In this instance, in order to be assured she had the full facts of the case, the Commissioner gave the council a further opportunity to provide detailed submissions, specifically in relation to any adverse affects which disclosure would cause. The Commissioner considers that the council has still failed to provide adequate submissions in this regard and as his her standard approach in such cases, she does not consider it to be her role to generate arguments on its behalf.
30. In the absence of evidence which shows that the conclusions reached in FER0632719 are directly transferable to this case or other direct evidence of specific adverse affects or arguments in this regard, the Commissioner has concluded that the council has failed to show that the exception is engaged.
31. As the exception is not engaged the Commissioner has not gone on to consider the public interest.

Right of appeal

32. 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

33. 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.
34. 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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