

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 7 May 2019

Public Authority: Mid Sussex District Council
Address: Oaklands
Oaklands Road
Haywards Heath
West Sussex
RH16 1SS

Decision (including any steps ordered)

1. The complainant has requested information relating to the councils monitoring of windfall developments. The council provided some information however it refused other information on the basis that the exception in Regulation 12(4)(e) of the EIR applied. During the course of the Commissioner's investigation it also applied Regulation 12(4)(d) to withhold the information.
2. The Commissioner's decision is that the council was not correct to apply Regulation 12(4)(d) to the information, She has also decided that although Regulation 12(4)(e) is engaged, the public interest in the disclosure of the information outweighs that of the exceptions being maintained.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose a copy of the withheld 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 September 2018, the complainant wrote to the council and requested information in the following terms:

"...Could you please...

- 1. Confirm that the Council is indeed monitoring 'windfalls' against the 'windfall' allowance of 495 homes set under the adopted Mid Sussex District Plan.*
- 2. Set out this monitoring process, indicating how this is being done and how it is being reported.*
- 3. Provide a link to the monitoring report or provide me with a full list of all applications approved under this 'windfall' allowance.*
- 4. Confirm how many 'windfall' homes have been recommended for approval by officers and how many have actually been granted permission since 21st July 2017*
- 5. In relation to the model zones referred to by [name redacted] and [name redacted], could you provide a breakdown by development area (model zone) of the 495 new homes windfall capacity envisaged in the District Plan Habitats Regulations Assessment (ie. to which zones was development allocated when carrying out the testing by the version of the Mid Sussex Transport Study used to underpin the District Plan at Examination) and set out to what extent approvals have already been made against these individual zones and hence any remaining 'windfall' capacity in each zone.*
- 6. Confirm both what the scope of work and the time schedule (including significant milestones) are for completing the revised Habitats Regulations Assessment, necessary to support the increased numbers proposed in the District Plan and the proposed allocations DPD and how far this work has progressed to date."*

6. The council responded on 10 October 2018. It provided a general response to the overall request but did not provide the specific information requested. The complainant then wrote asking the council to consider the request under the EIR and respond accordingly.
7. The council responded again on 25 October 2018. It provided responses to questions 1, 2, and 6, directed the complainant to its planning portal for information relating to part 4 and refused the parts 3 and 5 of the request on the basis that Regulation 12(4)(e) applied (internal communications). The complainant wrote back to the council stating that he considered that the information should be provided to him.
8. Following an internal review the council wrote to the complainant on 16 November 2018. It maintained its position that parts 3 and 5 of the request were exempt under Regulation 12(4)(e).

Scope of the case

9. The complainant contacted the Commissioner 24 November 2018 to complain about the way his request for information had been handled.
10. During the course of the Commissioner's investigation the council also applied Regulation 12(4)(d) to withhold the information.
11. The withheld information would provide a response to parts 3 and 5 of the request. It would also respond to part 4 of the request, although, as stated, the council indicated that that information was already available to the complainant by searching through individual planning decisions on the planning portal section of its website. The information would however be difficult to collate from this form of publication.
12. The Commissioner considers that the complaint is that the council was not correct to withhold the information under the exceptions it has cited.

Reasons for decision

Background information

13. The requested information relates to windfall developments, essentially developments that are under consideration which have not been taken into account by the council in its District Plan. Annex 1 of the Select Committee on Environment, Transport and Regional Affairs Tenth Report describes windfall developments as:

*"The term 'windfall sites' is used to refer to those sites which become available for development unexpectedly and are therefore not included as allocated land in a planning authority's development plan. For example, a bus depot may shut down or an industrial site become vacant which may provide a suitable location for housing."*¹

14. The complainant considers that the council's policies restrict the amount of windfall developments to a limited amount of 495 per annum. He believes that this policy is in place in order to protect the environment around the area of the Ashdown Forest which is designated as a Special Area of Conservation (a SAC) under the EC Habitats Directive. It is also designated as a Special Protection Area (a SPA).
15. The Joint Nature Conservation Committee, (the JNCC), is a technical advisory body to the government. It defines SAC's as: *"Special Areas of Conservation (SACs) are strictly protected sites designated under the EC Habitats Directive. Article 3 of the Habitats Directive requires the establishment of a European network of important high-quality conservation sites that will make a significant contribution to conserving the 189 habitat types and 788 species identified in Annexes I and II of the Directive (as amended)."*²
16. SPA's are defined by the Joint Nature Conservation Committee as: *"Special Protection Areas (SPAs) are strictly protected sites classified in accordance with Article 4 of the EC Birds Directive³, which came into force in April 1979. They are classified for rare and vulnerable birds (as listed on Annex I of the Directive), and for regularly occurring migratory species"*⁴
17. The Conservation of Habitats and Species Regulations 2017⁵ transpose Council Directive 92/43/EEC, on the conservation of natural habitats and of wild fauna and flora (EC Habitats Directive), into national law. They also transpose elements of the EU Wild Birds Directive in England and Wales. Amongst other things, the application of these regulations affect

¹ <https://publications.parliament.uk/pa/cm199798/cmselect/cmenvtra/495/49524.htm>

² <http://jncc.defra.gov.uk/page-23>

³ <http://jncc.defra.gov.uk/page-1373>

⁴ <http://jncc.defra.gov.uk/page-162>

⁵ <http://www.legislation.gov.uk/ukxi/2017/1012/contents/made>

local council's ability to agree development in areas where SAC's and SPA's may be affected. The JNCC states in its guidance on this that:

"Adaptation of Planning and Other Controls

*The Regulations require competent authorities to consider or review planning permission, applied for or granted, affecting a European site, and, subject to certain exceptions, restrict or revoke permission where the integrity of the site would be adversely affected. Equivalent consideration and review provisions are made with respects to highways and roads, electricity, pipe-lines, transport and works, and environmental controls (including discharge consents under water pollution legislation). Special provisions are also made as respects general development orders, special development orders, simplified planning zones and enterprise zones."*⁶

18. Local planning authorities are required to consider the impact of any plan or project likely to have an adverse effect on a SAC or an SPA. Plans and projects can only be permitted having ascertained that there will be no adverse effect on the integrity of the site(s) in question. This is assessed through HRA's. HRA's of plans and planning applications considers the impacts of plans and proposed development on SAC and SPA sites. HRA's are required under section 102 of the Conservation of Habitats and Species Regulations 2010⁷. Section 102(4) provides that:

"(4) In the light of the conclusions of the assessment, and subject to regulation 103 (considerations of overriding public interest), the plan-making authority or, in the case of a regional strategy, the Secretary of State must give effect to the land use plan only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be)."

19. The council's District Plan relied upon its Habitats Regulations Assessment (a HRA). This used, as a reference, the figure of 495 windfall developments per annum as a means of demonstrating that its District Plan would not have an adverse effect upon traffic levels and associated air quality to the detriment of the environment in the designated SAC and SPA areas.

⁶ <http://jncc.defra.gov.uk/page-1379>

⁷ <http://www.legislation.gov.uk/uksi/2010/490/regulation/102/made>

20. The complainant wishes to know whether the figure of 495 windfall developments designated in the HRA is being met or surpassed, in what specific areas, and to what degree.

Regulation 12(4)(d)

21. Regulation 12(4)(d) provides that a public authority may refuse to disclose information to the extent that – the request relates to material which is still in course of completion, to unfinished documents or to incomplete data.
22. If the information in question falls into one of those categories, then the exception is engaged. It is not necessary to show that disclosure would have any particular adverse effect in order to engage the exception, but any adverse effects of disclosure may be relevant to the public interest test.
23. The information withheld under both Regulation 12(4)(d) and 12(4)(e) is contained within a Microsoft Excel spreadsheet. The council says that this is updated continually as further planning applications are made which fall within the scope of the data which the spreadsheet is used to monitor. Effectively it is a 'rolling' document which will not be 'completed' or 'finished' but is used as an ongoing monitoring tool.
24. The Commissioner has considered the nature of this document. It is not complete, but it is never designed to be a finished or complete document as such. It is an ongoing monitoring tool which will always be subject to further changes when further windfall developments are identified.
25. The Commissioner considers that in a situation where this is no fixed point, and no future intention to have a fixed point at which the information can be considered 'complete' or the document 'finished' then Regulation 12(4)(d) is not applicable to the information. If it were applicable then the document would continually fall within the scope of the exception.
26. Regulation 5(4) requires that the information which is provided is accurate and up to date when it is disclosed and in such situations she considers that the onus is on the authority to provide an up-to-date and accurate 'current' version of the information, bearing in mind that that version will be amended as time moves forward.
27. The Commissioner has therefore decided that the council was not correct to apply Regulation 12(4)(d) to withhold the information.

Regulation 12(4)(e)

28. Regulation 12(4)(e) provides that a public authority may refuse to disclose information to the extent that – the request involves the disclosure of internal communications.
29. As stated, the information is contained in a spreadsheet used by the council to monitor developments in accordance with the HRA. The Commissioner accepts the council's argument that it is an internal document used for its own reference and monitoring purposes and therefore the exception in Regulation 12(4)(e) is engaged.
30. As such the Commissioner has gone on to consider the public interest test required by Regulation 12. When doing so she has again taken into account the presumption in favour of disclosure specified by Regulation 12(2).
31. The test, provided in Regulation 12(1)(b), is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information

The public interest

The public interest in the exception being maintained

32. The council argues that the spreadsheet is updated on an almost daily basis, and so the data is constantly changing. It argues that the data requires a detailed level of interpretation to arrive at reliable conclusions. It further argues that, as an internal document, the spreadsheet is designed and set up to use by its own officers and requires internal knowledge and experience in order to interpret the spreadsheet.
33. Because of this, it argues that if the information were to be disclosed into the public domain it could be misinterpreted and the public might arrive at spurious conclusions. If these were subsequently quoted then it could be misleading to others and be different to the official (and accurate) data.
34. It further argues that the *"data contained within the Excel spreadsheet is used to inform the Habitats Regulations Assessment that is undertaken for each planning application in accordance with the Conservation of Habitats and Species Regulations 2017 (as amended). The Habitats Regulations Assessment assesses the proposed development in terms of its potential impacts on the Ashdown Forest SPA and SAC and concludes whether or not the proposed development would have an adverse effect on the integrity of the Ashdown Forest SPA"*

and SAC. Consultation with Natural England on the Habitats Regulations Assessment is undertaken where appropriate, but in any case, Natural England is content with the approach and methodology used to inform the Habitats Regulations Assessment”.

35. The council argues that information is already made available to members of the public on its online planning portal for each applicable planning application. It further argues that its District Plan Habitats Assessment is also available.
36. It further argues that: *“It is important to maintain the integrity of the “data and its interpretation and retain this information as an internal document because it is linked to housing delivery as set out in the Mid Sussex District Plan 2018-2031 (March 2018). Housing delivery is a government priority and as such this should be a focus for the work of Mid Sussex District Council”.*

The public interest in the information being disclosed

37. The central concern is that the Ashdown Forest is designated as both an SAC and an SPA. It is therefore provided with protection against factors which can adversely impact upon the areas and the species which the designation is designed to protect. This includes issues such as additional traffic generation through development, and air pollution figures for the area. One aspect of this is the amount of houses developed in specific areas, the likely additional traffic this might generate, and the effect on air quality which would be likely to result from this.
38. At Paragraph 5.4.13 of its *‘Habitats Regulations Assessment for the Mid Sussex District Plan’ (September 2017)*⁸, the council sets out the Development Case Scenario from its Transport Study. This stipulated a figure of 495 windfall developments per annum.
39. The amount of windfall developments in the area is therefore based on the council’s Development Case Scenario, which concluded that there would be no significant adverse effect to air quality using the specific number of 495 windfall developments per annum. This was specifically used as a basis for the District Plan, which was approved by the

⁸ <https://www.midsussex.gov.uk/media/2225/district-plan-main-modification-habitats-regulations-assessment.pdf>

Planning Inspectorate in its '*Report on the Examination of the Mid Sussex District Plan 2014- 2031*' (March 2018)⁹.

40. There is a public interest in allowing the public to access the councils monitoring of these windfall developments as the basis of the District Plan was set and agreed by the Planning Inspectorate with a stipulated level of 495 windfall developments per annum.
41. Any significant deviation from the District Plan could have an impact upon the council's implementation of its planning policies. It might also bring into question the continued viability of the District Plan if the overall levels of development greatly differ from the levels stipulated within the plan to the extent that this could be detrimental to the environment in the protected areas. Whilst the District Plan is likely to be updated on a regular basis there is a public interest in allowing the public to have access to information, particularly relating to factors relating to the protection of the designated sites, in order that any significant deviation from the plan during the interim period can be recognised and addressed.
42. If the council is exceeding this figure to a marked degree then the public will be able to question this with the council and seek to hold the council accountable for this. If it is conforming to its Development Case Scenario figures then the public can be reassured that air quality levels will not be adversely affected beyond the amounts already recognised and analysed in the scenario. If it has significantly underutilised this capacity then there may be a potential to use this as a basis to enable further development; there is also a clear public interest in the new housing being built where this is catered for and deliverable within the terms of the approved District Plan.
43. The public, however, has no direct means of accessing any monitoring information on the application of this policy. The Commissioner notes that the council already publishes details of windfall developments on each relevant planning application on its planning portal. However this can only be achieved by carrying out searches of individual planning applications. This method does not therefore provide an easily accessible overview of the council's current position as regards identified windfall developments. A disclosure of the council's monitoring spreadsheet will provide an accessible overview of the situation at the time of the request, recognising that those figures do, and will have changed over time.

⁹ <https://www.midsussex.gov.uk/media/2216/mid-sussex-lp-report-mar-2018.pdf>

There is therefore a strong public interest in allowing the public to have access to this information. A disclosure of the information will allow interested parties to understand how the council is addressing its obligations under environmental legislation. It will clarify whether the council is acting in line with its District Plan, and ensuring that development does not have an adverse effect upon the air quality in the area, and specifically within the protected areas in Ashdown Forest.

44. Whilst the council argues that individuals without the necessary experience may misunderstand the information this argument does not outweigh the public interest in the public having the ability to, where necessary, ask questions of the council or other parties in order to understand the data better.

The Commissioner's conclusions

45. The Commissioner has considered the above arguments. She is not persuaded by the council's argument that the figures change almost daily and that the spreadsheet may be confusing or misleading. It is able to provide an explanation to demonstrate how it is meeting the stipulated figures, or why it is exceeding or underachieving those figures if that is the case. It is able to answer further questions in relation to its compliance with the stated figure where any questions are raised.
46. The data highlighted in its spreadsheet are the figures relied upon by the council to monitor its adherence to its policies, and on a matter of such environmental importance there is a public interest in allowing the public to scrutinise the council's management of the issue and question any marked deviation from the approved District Plan. Whilst the council states that housing delivery is its focus, it is also essential that the delivery meets with the approach approved by the Planning Inspectorate and occurs in line with the relevant protections provided to the environment. Allowing the public to access monitoring statistics acts as a public safeguard to ensure that policies and requirements are developed, managed and maintained with this in mind.
47. The Commissioner therefore considers that there is a strong public interest in providing information to the public which creates greater transparency on the numbers of windfall developments identified by the council. The Commissioner has therefore decided that the public interests rests in the disclosure of the information.
48. The Commissioner's decision is therefore that the information should be disclosed.

Right of appeal

49. 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

50. 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.
51. 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

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