

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

Date: 8 June 2020

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 about the decision making process which led to the selection of certain land sites for development. Mid Sussex District Council disclosed some information and withheld other information under the exemption for prejudice to the effective conduct of public affairs – section 36 of the FOIA. During the Commissioner's investigation the council reconsidered the request under the EIR and applied the exception for internal communications (regulation 12(4)(e)) to withhold the same information.
2. The Commissioner's decision is that Mid Sussex District Council has correctly withheld information under regulation 12(4)(e) and that the public interest favours maintaining the exception but that, in handling the request under the FOIA, it breached regulation 5(1) and regulation 14(1) of the EIR.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 17 September 2019, the complainant wrote to Mid Sussex District Council (the "council") and requested a range of information relating to the decision to select certain sites in the region for development. The request comprises multiple parts and is reproduced in full at the annex to this decision notice.
5. The council responded on 10 October 2019 and disclosed some information.
6. On 14 October 2019 the complainant submitted a supplementary request for "*...all minutes, correspondence, notes or discussions or site visits etc relating to the working group and its decision making process.*"
7. On 15 November 2019 the council confirmed that it was withholding information relating to the working group under the exemption for prejudice to the effective conduct of public affairs – section 36 of the FOIA.
8. Following an internal review the council wrote to the complainant on 5 December 2019. It stated that it was maintaining its decision to withhold the information under section 36 of the FOIA.

Scope of the case

9. On 16 January 2020 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
10. In view of the nature of the request, it occurred to the Commissioner that it was likely that the information constituted environmental information. She therefore invited the council to reconsider the request under the EIR.
11. The council reconsidered the request under the EIR and confirmed that it was withholding the information previously withheld under section 36 of the FOIA under the exception for internal communications – regulation 12(4)(e) of the EIR.
12. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly applied regulation 12(4)(e) to withhold the working group information.

Reasons for decision

Is it environmental information?

13. During the course of her investigation the Commissioner advised the council that she considered the requested information fell to be considered under the EIR. The Commissioner has set down below her reasoning in this matter.
14. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant part of the definition are found in 2(1)(a) to (c) which state that it is as any information in any material form on:
 - '(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements...'*
15. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.
16. In this case the withheld information relates to decisions which will have an impact on the use of land. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information Tribunal in the case of Kirkaldie v IC and Thanet District Council (EA/2006/001) ("Kirkaldie").

17. In view of this, the Commissioner has concluded that the council wrongly (initially) handled the request under the FOIA and breached regulation 5(1) of the EIR. As the council subsequently corrected this the Commissioner does not require the council to take any steps in this regard.

Regulation 14 – refusal to disclose information

18. In the circumstances of this case the Commissioner has found that although the council originally considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore, where the procedural requirements of the two pieces of legislation differ it is inevitable that the council will have failed to comply with the provisions of the EIR.
19. In these circumstances the Commissioner believes that it is appropriate to find that the council breached regulation 14(1) of EIR which requires that a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the council issued (and indeed its internal review) failed to cite any exception contained within the EIR as the council actually dealt with the request under FOIA.
20. Since the council has subsequently addressed this failing the Commissioner does not require it to take any steps in this regard.

Regulation 12(4)(e) – internal communications

21. Regulation 12(4)(e) of the EIR states:

"12.—(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—

(e) the request involves the disclosure of internal communications."

22. The concept of 'internal communications' is broad, covering all communications made within one public authority.
23. In order to engage the exception, authorities do not need to demonstrate that disclosure would result in harm or indeed any other effects. All that is required is for it to be shown that requested information falls into the category defined by the exception. However, the exception is subject to a public interest test and the EIR requires authorities to apply a presumption in favour of disclosing information.

The Withheld Information

24. The council explained that it is in the process of preparing a Site Allocations Development Plan Document (DPD), with the aim of allocating sites for dwellings.
25. It confirmed that the formal governance, in accordance with the council's Constitution is a Cross Party Member Working Group and oversight by a Scrutiny Committee with decision making by full council. The council explained that the Scrutiny Committees and the council are formally constituted and the meetings are held in public. It confirmed that the Scrutiny Committee has debated the methodology, site selection process, draft Sites DPD and the response to consultation. The council explained that it has also debated the Regulation 19 Sites DPD. And that the final decision on the Regulations 19 draft Sites DPD is to be made by full council in July.
26. The council explained that the Scrutiny Committee agreed to establish the Site Allocations Member Working Group (the "Working Group"), comprising 9 Members drawn from across the district. It confirmed that the role of the working group, was to advise the Scrutiny Committee on the content and direction of the DPD, consider the evidence base, and report back to the Scrutiny Committee.
27. The withheld information consists of a number of detailed meeting agendas produced by/for the Working Group.
28. Having considered the council's submissions and referred to the withheld information, the Commissioner is satisfied that this the information is an internal communication for the purposes of regulation 12(4)(e). She has, therefore, determined that the exception is engaged.

Public interest test

29. Where regulation 12(4)(e) is engaged, it is subject to the public interest test required by regulation 12(1)(b). This is to ascertain whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
30. In carrying out her assessment of the public interest test, the Commissioner is mindful of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.
31. The Council and the complainant provided the Commissioner with their public interest test reasoning. This reasoning, along with other factors that the Commissioner considers relevant, are covered below.

Public interest in disclosure

32. The Commissioner notes that there is a general public interest in transparency and accountability, particularly where, as in this case, decisions made by public authorities are likely to have a significant environmental impact on a local community. The public interest in facilitating local engagement in decision making and in promoting understanding of the rationale for decisions are served by the disclosure of information.
33. The complainant has argued that the Working Group was disbanded in September 2019 and that its recommendations were made and accepted by the Scrutiny Committee and the full council. The complainant, therefore, argues that the Working Group's work has concluded and that it no longer needs a safe space for deliberation as it no longer exists and it is not deliberating.
34. The complainant has further voiced concerns that the Working Group may have acted improperly at one of its meetings and argued that disclosure would promote scrutiny of these genuine misgivings about the council's governance and practice.

Public interest in maintaining the exception

35. The council has argued that there is a need for a safe space for internal deliberation and decision-making processes. It said that the release of the requested information may create a "chilling effect" on the free and frank exchange of views and ideas in the future.
36. The council has stated that the DPD process is still in progress. The Regulation 19 document has not yet been signed-off by council. Releasing confidential discussions about the merits and demerits of sites, which were made before due diligence and final evidence base confirmed would put the Sites DPD at risk, which is not in the public interest.
37. The council confirmed that the Working Group only carried out their work in the full knowledge that its discussions would remain confidential and this was emphasised at every stage of the process. The council has stated that the Working Group would only be effective if the detailed discussions remained confidential due to the type of information (including commercially sensitive information) that they were party to.
38. The council clarified that the Working Group are not the decision-making body in this context and that its deliberations were subject to further due diligence, evidence testing, and formal debate at the Scrutiny Committee and council. It confirmed that the meetings and papers for these are all in the public domain.

39. The council has argued that releasing the deliberations of this Working Group could mislead stakeholders including promoters/developers and residents. Of particular risk, the council has identified, is developers reading too much into the discussions and submitting a speculative planning application for their site. The council considers that this would result in it being subject to determination and potential appeal cost, something which would not be in the public interest.
40. The council has further argued that removing the ability for open deliberation would impact on the operation of future working groups, leading to less scrutiny of proposals in the future – a “chilling effect”. The council confirmed that a similar working group is scheduled to be set up for the next stage of the council’s planning work (the District Plan Review) but this may not be effective or tenable if the conversations are required to be made public.
41. The Commissioner notes the importance of a “private thinking space” in order to allow the council to carry out internal deliberation. The Commissioner considers that this is a valid public interest factor in favour of maintenance of the exception and carries considerable weight.

Balance of the public interest

42. The Commissioner’s guidance on the exception explains that although a wide range of internal information will be caught by the exception, public interest arguments should be focussed on the protection of internal deliberation and decision-making processes. This reflects the underlying rationale for the exception being that it protects a public authority’s need for a “private thinking space”.
43. With regard to attributing weight to the public interest arguments in favour of maintaining the exception, the Commissioner accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This may carry significant weight in some cases. In particular, the Commissioner considers that the need for a safe space will be strongest when the issue is still live.
44. The Commissioner considers that there will always be some public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding of environmental matters, a free exchange of views, and more effective public participation in environmental decision-making, all of which ultimately contribute to a better environment.

45. The Commissioner is mindful that the public interest is time and context sensitive and she accepts that, with the passage of time, the sensitivity of the information may diminish.
46. It is clear from the council's submissions that at the time of the request for information, a final decision in relation to the DPD had not been made. Allowing access when the decision is still to be made is likely to cause a higher degree of media and public interest or contacts from lobby groups which could ultimately delay final decisions and increase the costs and risks to the process. The need to maintain a safe space, therefore, is still relevant. The Commissioner considers that if matters were closed, then the risk of prejudicing the process would be reduced. However, this is not the case, therefore the need to maintain the safe space gives more weight to the argument for maintaining the exception.
47. The Commissioner notes that the council has also confirmed that all information related to final decision making (such as site proformas including non-confidential information, full evidence base and Topic Papers/Documents setting out the methodology and site selection approach) are in the public domain and have been scrutinised in public.
48. Whilst the Commissioner is alive to the complainant's concerns about the integrity of the process followed by the council, she does not have any direct evidence that these concerns have foundations. In the absence of this and, as it is not the Commissioner's role to judge whether authorities have appropriate governance and decision-making arrangements in place (except where these relate to information rights), the Commissioner has not given this argument in favour of disclosure much weight.
49. Having considered the withheld information and the relevant arguments, the Commissioner has determined that, on the facts of the case, the public interest is currently weighted in favour of maintaining the exception. She, therefore, concludes that the council has correctly applied the exception and legitimately withheld the requested information.

Right of appeal

50. 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@justice.gov.uk

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

51. 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.
52. 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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