

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 11 January 2023

Public Authority: West Devon Borough Council
Address: Kilworthy Park
Drake Road
Tavistock
Devon
PL19 0BZ

Decision (including any steps ordered)

1. The complainant requested information relating to a specific planning application. West Devon Borough Council (the council) initially refused the request under regulation 12(4)(b) of the EIR – manifestly unreasonable. Following a refining of the request, the council provided some information and withheld the remaining information under regulation 12(4)(e) of the EIR – internal communications.
2. The Commissioner's decision is that regulation 12(4)(e) of the EIR is engaged to the information that has been withheld and the Commissioner is satisfied that the council has located all the information falling within the scope of the complainant's request.
3. The Commissioner also found that the council breached regulation 5(2) of the EIR as it did not provide all the information that was not exempt from disclosure within the required 20 working days and it breached regulation 11(4) of the EIR as it did not carry out an internal review within the required 40 working days.
4. As all the information that is not exempt has been disclosed, the Commissioner does not require the council to take any steps.

Request and response

5. On 27 July 2021 the complainant made the following information request to the council:

"The following requests relate to the development of the site covered by planning application [redacted], referred to as '[redacted]'.

References to 'pre-submission' mean prior to November 18th 2020, when application [redacted] was submitted. References to 'post-submission' mean after 18th November 2020

1. Please provide details of any discussions or correspondence relating to the [redacted] Land, whether pre-submission or post-submission, between the following officers of West Devon [redacted] Estates and their representatives. Please include:

- Physical meetings
- Virtual meetings
- Telephone conversations
- Written exchanges including digital (email etc)

Please set out:

- the names and responsibilities of the officers involved
- the names of the [Redacted] Estates representatives involved (including consultants)
- the names of any Devon County officers involved
- the subject matter discussed

Please provide copies of any notes or other records that were made of the discussions or correspondence

2. Please provide details of any discussions or correspondence relating to the [redacted] Land, whether pre-submission or post-submission, between the following elected members of West Devon BC and [redacted] Estates and their representatives. Please include:

- Physical meetings
- Virtual meetings

- Telephone conversations
- Written exchanges including digital (email etc)

Please set out

- the names and responsibilities of any West Devon BC officers involved
- the names of any Devon County officer involved
- the names of the [redacted] Estates representatives involved (including consultants)
- The subject matter discussed

Please provide copies of any notes or other records that were made of the discussions or correspondence

3. Please provide details of any discussions or correspondence relating to application [redacted], whether pre-submission or post-submission, between the following officers or elected members of West Devon BC and officers of the Plymouth and South West Devon Joint Local Plan Team or elected members of the Joint Local Plan Steering Group. Please include:

- Physical meetings
- Virtual meetings
- Telephone conversations
- Written exchanges including digital (email etc)

Please set out

- the names and responsibilities of the officers and elected members involved
- the names and responsibilities of any West Devon BC officers involved
- the names of any Devon County officer involved
- The subject matter discussed

Please provide copies of any notes or other records that were made of the discussions or correspondence

4. Please provide details of any WDBC officer group, officer/member group or member group (including committees, subcommittees or working groups) at which the development of the [redacted] Land has been discussed. This request covers the pre-submission and post submission periods.

Please set out

- the names and responsibilities of the elected members involved
 - the names and responsibilities of the West Devon BC officers involved
 - the names of any Devon County officer involved
 - the names of any [redacted] Estates representatives involved (including consultants)
 - The subject matter discussed
 - Any notes or other records that were made of the discussions. If the matters for which records are requested are deemed to be Confidential, please indicate the precise reason why they are deemed Confidential and the broad outcome of the discussions."
6. The council responded on 17 August 2021, applying regulation 7(1) of the EIR to extend the time for responding to the request. It advised it would therefore respond by 21 September 2021.
 7. The council responded further on 22 September 2021 refusing the request under regulation 12(4)(b) of the EIR as it determined it was manifestly unreasonable. It suggested to the complainant that it may be able to provide information if they limited the emails to key officers and Members, rather than 'all'.
 8. The complainant responded on the same day and agreed to limit parts 1 and 3 of the request, refining it to several named people at the council including the Chief Executive at the time.
 9. For part 2 of the request, the complainant limited it to two Councillors.
 10. The complainant questioned having to revise part 4 of the request, and so chose not to, arguing that the council must retain records of all relevant meetings, so it should not be too onerous to locate them.
 11. The council responded to the revised request on 19 October 2021, providing the following information to each part of the request, except part 3 where it stated no information was held:

- Part 1 of the request: Pre application Documents, Correspondence between its officers and [redacted name] Estates.
 - Part 2 of the request: Correspondence between the councillors and [redacted name] Estates.
 - Part 4 of the request: Discussions between Officers and [redacted name] Estates in accordance with the requirements of the Planning Performance Agreement in place.
12. The council withheld emails between its officers and Members under regulation 12(4)(e) of the EIR – internal communications.
 13. Following further communication for some clarification on missing information, on 20 October 2021, the council resent some documents that did not come through to the complainant. It also confirmed that a redacted section of an email dated 25 September 2020 was redacted because it does not relate to the request.
 14. On 21 October and 1 November 2021, the complainant requested an internal review, pointing out information they considered missing and disputing the council's application of regulation 12(4)(e) of the EIR.
 15. On 1 November 2021, the council confirmed an internal review would be carried out. The complainant sent chasers after this confirmation as no internal review outcome had been received. The last chaser email was sent by the complainant on 22 February 2022.
 16. The complainant contacted the Commissioner on 4 March 2022 to complain that he still had not received the internal review outcome.
 17. The Commissioner wrote to the council on 14 March 2022 asking that it carry out an internal review. The council provided the complainant with its internal review on the same day, upholding its application of regulation 12(4)(e) of the EIR.

Scope of the case

17. The complainant contacted the Commissioner and raised the refusal to disclose some information under regulation 12(4)(e), that the council has not addressed the complainant's assertion that further information falling within the scope of their request is held and the timeframe it has taken to respond to the request and provide the internal review outcome.

18. During the Commissioner's investigation the council determined there were further communications between itself and [name redacted] Estates and so provided this information to the complainant on 4 January 2023. It maintained the exception for the remaining withheld information.
19. The scope of the case is for the Commissioner to determine whether regulation 12(4)(e) of the EIR is engaged to the withheld information, whether the council has now identified all the information it holds that falls within the scope of the complainant's information request, and the timeframe the council has taken to respond to the request.

Reasons for decision

Regulation 12(4)(e) – Internal Communications

20. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.
21. The Commissioner has published guidance¹ on regulation 12(4)(e) which includes a description of the types of information that may be classified as 'internal communications'.
22. The information being withheld in this case under this exception is emails between council officers and members.
23. The Commissioner is satisfied that this information constitutes internal communications and that the exception at regulation 12(4)(e) of the EIR is therefore engaged.

Public Interest Test

24. Although regulation 12(4)(e) has been found to be engaged in this case, the exception is subject to the public interest test as required by regulation 12(1) of the EIR.

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/regulation-12-4-e-internal-communications/>

25. The public interest test is to determine whether in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
26. What the Commissioner must take into account, when carrying out the public interest test, is a presumption towards disclosure of the information as required by regulation 12(2) of the EIR.

Public interest in favour of disclosure

27. The council acknowledges that there is public interest in making information available as it can increase public participation in decision making and aids the transparency and accountability of public authorities. It would also, in this case, allow the public to fully understand how finances are spent and give a better understanding of the planning process.
28. The complainant is of the view that public servants working properly under the statutory instruction of Section 38(6) of the 2004 Planning and Compulsory Purchase Act should have no need to hide their thinking from those in whose interests they purport to work.
29. The complainant states that in this case there is a very clear Development Plan policy that covers the site and if council officers are applying that policy correctly, then there would be no need for a 'safe space' and the knowledge that they are carrying out their duty would only give the public confidence in them.
30. He also notes that the council has already disclosed some correspondence between officers within the council and so considers the 'safe space' no longer applies.

Public Interest in maintaining the exception

31. The council noted that the withheld information includes details of observations, comments and recommendations by and to officers and members relating to planning applications made in relation to the location specified in the request and an investigation into the handling of those applications.
32. It argues that the purpose of the exception is to create a protected space within which a public authority can reflect and engage in internal discussions.

33. It has quoted a decision notice² in which the Commissioner stated:

“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” but “that if planning matters relating to the development were completed then the risk of prejudicing the planning process would be reduced” before concluding “However, this is not the case, therefore the need to maintain the safe space gives more weight to the argument for maintaining the exception.”

31. The Council considers the situation to be similar in this case explaining that the issue of the formal planning permission has yet to occur because although the substantive terms are agreed, there is a delay in finalising the section 106 agreement.

32. The council concludes that the applications are therefore still live matters and so the public interest favours maintaining the exception.

Balance of public interest

33. The Commissioner’s guidance on this 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’.

34. 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 the withheld information relates to is still live.

35. The Commissioner appreciates that there is a strong public interest in matters concerning planning matters. The Commissioner accepts that

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4020070/ic-104397-s8c0.pdf>

disclosure of the withheld information would provide the public with an insight into the council's decision making.

36. As stated by the complainant, the council has released some internal communications already. This does show that the council is proactively providing information and not just issuing a blanket refusal to provide all internal communications.
37. The Commissioner notes at the time of the request, planning permission had not yet been granted. The Commissioner therefore accepts that the Council required a safe space in order to deliberate issues around the application. He also recognises the danger of a 'chilling effect' on future internal deliberations about the subject matter of the request being caused through disclosure of the withheld information.
38. Having considered the relevant facts and the circumstances of this case, the Commissioner's view is that the balance of the public interest favours maintaining the exception. 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(4)(e) was applied correctly.

Regulation 12(4)(a) of the EIR - Information held/ not held

39. Regulation 5(1) of the EIR requires a public authority that holds environmental information to make it available on request.
40. Regulation 12(4)(a) of the EIR allows a public authority to refuse to provide the requested information if it does not hold it at the time of the request.
41. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request).
42. In this case, the council has provided some information to the complainant and withheld the remaining.
43. With regards to whether there is any further information held by the council within the scope of the request, the Commissioner has asked the council what searches it carried out to ensure it has located all information held.

44. The council has explained to the Commissioner that it has interrogated its emails using detailed email IT audits, searched its back office planning system for any relevant documents and approached relevant officers, departments and Councillors to determine what they hold.
45. Based on the searches the council has explained to the Commissioner, he is satisfied, on the balance of probabilities that the council holds no further information than what it has identified. The exception provided by regulation 12(4)(a) of the EIR is, therefore, engaged.

Regulation 5(2) of the EIR – Time for compliance

46. Regulation 5(2) of the EIR states "Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request."
47. In this case the complainant made his refined request on 22 September 2021. The council did not disclose some of the information within the scope of the request until 4 January 2023.
48. The Commissioner finds that the council has breached regulation 5(2) of the EIR.

Regulation 11(4) of the EIR – Internal review timeframes

49. Regulation 11(4) requires a public authority to carry out an internal review within 40 working days following the receipt of a request for a review to be carried out.
50. In this case the complainant requested an internal review on 21 October and 1 November 2021. The council did not provide its internal review until 14 March 2022.
51. This is outside the required timeframe and therefore the Commissioner finds the council breached regulation 11(4) of the EIR.

Other Matters

52. The Commissioner has concerns in this case with the timeframes the council has taken to provide both its initial response and internal review response as well as the time it took in identifying and providing all the information, that was not exempt, to the complainant.
53. The Commissioner will be adding the details of these delays to his internal concerns tracker, which he uses to help monitor the performances of public authorities.

54. The Commissioner expects the council to take note of the above and to ensure, with future requests, it identifies all information it holds and responds to those requests, accordingly, within the required timeframes of the legislation.

Right of appeal

55. 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

56. 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.
57. 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

Ben Tomes
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SK9 5AF