

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 3 July 2024

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 from West Devon Borough Council ("the Council") relating to a specific planning application.
2. The Commissioner's decision is that the Council is entitled to rely on regulation 12(4)(e) (internal communications) of the EIR to refuse to provide the withheld information.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 17 November 2023 the complainant wrote to the Council and requested information in the following terms:

"A copy of all correspondence sent or received by West Devon in relation to planning application 2861/23/FUL."
5. The Council responded on 15 December 2023 and provided the complainant with some information within the scope of the request. However, it withheld some information citing regulation 13(1) (personal data) and regulation 12(4)(e) (internal communications) of the EIR as its basis for doing so.

6. The Council provided the complainant with the outcome of an internal review on 20 December 2023 in which it maintained its original position.

Scope of the case

7. The complainant contacted the Commissioner on 31 January 2024 to complain about the way their request for information had been handled.
8. In their complaint to the Commissioner, the complainant stated that they do not consider the requested information to be environmental. They also consider the Council to have incorrectly applied regulation 12(4)(e) of the EIR to their request.
9. Therefore, the Commissioner will firstly consider whether the Council was correct to handle the request under the EIR rather than FOIA. If the Commissioner determines that the Council was correct to handle the request under the EIR, he will then consider whether the Council is entitled to rely on regulation 12(4)(e) to withhold information.

Reasons for decision

Is the requested information environmental?

10. Regulation 2(1) of the EIR defines environmental information as being information 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)...as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;

- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
11. The Commissioner is satisfied that the requested information is environmental. He considers that as the requested information relates to a planning application, it would fall within regulation 2(1)(c) "activities affecting or likely to affect the elements and factors referred to in (a) and (b)" of the EIR. Therefore, the Commissioner considers that the Council was correct to handle the request under the EIR rather than FOIA.

Regulation 12(4)(e) – internal communications

12. Regulation 12(4)(e) provides an exception for information which constitutes an 'internal communication'. In order for the exception to be engaged it needs to be shown that the information in question constitutes a communication within one public authority, specifically, the authority to which the request is made.
13. In its submissions to the Commissioner, the Council stated that it has withheld several emails relating to the planning application referred to in the request. It considers the emails to constitute internal communications as the emails were sent between council officers.
14. The Commissioner has viewed the withheld information. He is satisfied that the emails, including the attachments to those emails, constitute internal communications as they were sent between Council officers. Whilst the Commissioner notes that one of the withheld emails was sent from a council officer who is employed by the Council on a contractual basis, he considers the email to be an internal communication. The Council has explained that this officer works on behalf of the Council's environmental health service as an internal consultee.
15. Therefore, the Commissioner finds that regulation 12(4)(e) of the EIR is engaged. He will now go on to consider the public interest test.

The public interest test

16. With regards to the public interest test, in its submissions to the Commissioner, the Council acknowledged that there is a general public

interest in the openness and transparency of the Council. It also recognised that disclosure of the withheld information would allow the public to have a greater understanding of how finances are spent and the planning process.

17. However, the Council also considers that Council officers need a 'safe space' to be able to develop ideas, debate issues and reach decisions away from external interference and distraction. The Council acknowledged that it has already made its decision on the planning application referred to in the request and that the decision has been appealed to the Planning Inspectorate. However, it considers the planning application to still be live as the Planning Inspectorate has not provided its decision on the appeal and the time for seeking a judicial review of the appeal decision has not expired.
18. As the planning application is still live, the Council considers the safe space argument to carry significant weight. It stated that the disclosure of the withheld information would impact planning officers' ability to carry out their work. Furthermore, the Council considers that as the withheld information contains discussions, debates and enquiries about a complex matter, its disclosure would prevent such discussions from being fully explored again which would not be in the public interest.
19. The Council considers that disclosure of the withheld information might prevent Council officers and members from having free and frank discussions about the planning application. It stated that senior council officers and council members may feel unable to have free and frank discussions if there is the possibility that such discussions would be disclosed in the future. The Council believes that this in turn, may lead to junior officers feeling that they are unable seek appropriate advice which would lead to poorer decision making and a subsequent lack of confidence in the planning application process.
20. Therefore, the Council considers that the public interest in maintaining the exception outweighs the public interest in the disclosure of the withheld information.
21. The complainant does not consider the planning application referred to in the request to be live as the Council has made its decision on the matter. Therefore, they believe that the Council does not need to maintain a safe space to discuss the planning application as it is not undertaking any further work on the matter. The complainant considers that the disclosure of the withheld information would be in the public interest as it would increase transparency in the Council's planning process and decision making process.

The Commissioner's position

22. The Commissioner recognises that there a public interest in the openness and transparency of the Council's planning processes. He also recognises that disclosure of the withheld information would lead to greater public understanding of the Council's decision making processes and of its decision to refuse the planning application referred to in the request.
23. However, the Commissioner notes that information relating to the planning application is already available within the public domain on the Council's website. He is also aware that the complainant has been provided with some information in response to the request in this case. Therefore, the Commissioner considers that the public interest in disclosing the withheld information has already been met to some extent.
24. Furthermore, the Commissioner notes that at the time of the request, the Council had made its decision on the planning application and that the decision had been appealed to the Planning Inspectorate. However, as the Planning Inspectorate had not at the time of the request made its decision on the appeal and had still not by the date of this notice, he considers the planning application to be a live issue. Therefore, the Commissioner accepts that the Council needs to maintain a safe space to develop ideas and debate issues relating to the planning application without external interference. He also accepts that council officers need to be able to have free and frank discussions about the planning application.
25. The conclusion of the Commissioner is that the public interest in the maintenance of the exception outweighs the public interest in disclosure of the withheld information. The Council was not, therefore, obliged to disclose the withheld information.
26. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner (SGIA/44/2019)*:

"If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations"
(paragraph 19).

27. In this case the Commissioner's view is that the balance of the public interest favours the maintenance of the exception, rather than being equally balanced. 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.

Right of appeal

28. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

29. 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.
30. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Ben Tomes
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF