



Internal Review IR09705

Date received: 28/08/2024

Date response due: 26/09/2024

Date response provided: 25/09/2024

Review request:

Please see Attached

Information Requested in the original FOI:

I would be grateful if you can register the following Freedom of Information request:

In the Summer of 2023, West country Land engaged with Mid Devon District Council as the local planning authority regarding a proposed access to 'Area B' of the Tiverton Eastern Urban Extension [TEUE] (page 2, point '3' of the attached West country Land letter).

Please provide a full copy of all the pre-application engagement you have had with West country Land (and any of their professional representatives) for this proposed access to the TEUE. In your response to the above request, please include all documents provided to the Council, as well as all the advice proffered by the Council (and any representatives engaged on your behalf). We expect the response to this request will include (but will not be limited to):

- All written correspondence;
- Meeting notes;
- Details, information and surveys provided to the Council; and
- Copies of any plans provided to the Council.

We enclose for clarity a plan and email chain (which MDDC was included in) that we understand formed part of this process.

Further, please provide a complete list of pre-application engagement you have received regarding all potential access routes to 'Area B' of the Tiverton Eastern Urban Extension including all documents provided to the Council in association with the pre-application engagement, and a copy of all advice proffered by the Council.

Should you have any queries with the above, please let me know.

Please confirm receipt of this request.

Was the FOI/EIR procedure followed correctly?

Yes, the request was responded to fully within the 20 working day period.

What exemptions were applied?

Regulation 12(5d) confidentiality of proceedings.

Were the reasons these exemptions were applied correct?

Please note this request has been considered based upon the date the request was made and at no point thereafter. This is in accordance with the Upper Tribunal precedent of *Montague v Information Commissioner and the Department of International Trade* [2022] UKUT 104 (AAC). This review has been conducted based upon the application of Environmental Information Regulations, not standard disclosure as this is not relevant to these requests.

At this point we are going to address the arguments made within the review request. To clarify it is the position of the review that the exemption was applied correctly.

You have referenced the guidance notes by the ICO on exemption 12(5d), that confidentiality of proceedings related to the final decision making process. The Council interprets this part of the notes differently. The council also believes that decision notices support this interpretation. The ICO considers anything that is has a formal level of proceeding as possessing a certain level of formality. The ICO has also considered pre application process under this regulation on a number of occasions.

In [IC-292887-Z7J4](#) the ICO assessed whether Regulation 12(5d) should be engaged for pre-application advice and communications for a high profile Solar Farm (notably similar information to that requested above). The ICO, favouring non-disclosure, stated in paragraph 16 notes that “the commissioner has previously acknowledged in a range of decisions that such a process represents a ‘proceeding’ for the purposes of engaging regulation 12(5d)” the Commissioner went on the state they were satisfied that this was still the case in that decision. This shows that on numerous occasions the ICO has specifically identified pre-application advice as a formal proceeding.

Within the review request, you have stated that common law confidentiality does not apply to pre-application advice. This has also been considered carefully by the commissioner on numerous occasions. In Paragraph 16 and 17 of Decision Notice [IC-286268-Z8G5](#) the commissioner stated that confidentiality does indeed apply to Pre-application advice. Pre-application advice is not trivial information, it is an integral part of the planning process and is entered into entirely voluntarily by the applicant. It is also paid for service that supports the applicants planning process. These all support the position that planning advice falls under common law confidentiality. The Commissioner in Paragraph 18 of IC-286268-Z8G5 makes it clear the commissioner supports the position that Pre-application advice and communication relating to the advice falls under common law confidentiality. This has been further confirmed by numerous other decision notices.

In reference to the point raised regarding Cornwall Council. The council does not believe an isolated policy towards pre-application advice proves any statutory requirement to publish. The S69 and S69A of the Town and Country Planning Act 1990 and Article 40, 41 and 42 of The Town and Country Planning (Development Management Procedure) (England) Order 2015) do not apply to pre-application and the majority of councils do not publish this advice. Furthermore in decision notice [IC-282440-Y7D8](#) Paragraph 18 it was confirmed that there are “no circumstances, statutory or otherwise in which it is required to publish pre-application advice given to applicants under EIR”. This shows that your position is not supported by the commissioner. The only instance found amongst ICO Decision notices that required disclosure of Pre application advice under Regulation 12(5d), [FS50640768](#), the clearly distinguished between the minority of local authorities, like South Downs National Park, that openly publish pre-application advice, and those who don't. In Paragraph 26 of FS50640768 the commissioner stated “the council distinguishes itself from the Majority of other councils by disclosing this data.” This shows that Cornwall council are in the

minority when it comes to this process, and this is not a position that is supported by other authorities. This should therefore not be considered a valid point.

To address the claim made that Appendix 2, the letter sent to a council officer inquiring about pre application advice, shows an expectation that pre-application advice will be placed in the public domain. The council believes this incorrect for a number of reasons: firstly, the letter does not show any advice offered or received, it is simply a letter inquiring about advice for an application. It is not unreasonable to assume that any further information would not be fundamentally different, more detailed and therefore confidential in nature. Secondly information provided for the purposes of legal proceedings do not amount to open disclosure and such a letter being placed within a bundle should not be considered as such.

In reference to appendix 3, it is the understanding of the council that this relates to a new planning application, but not to the planning application In question here. Nor does it refer the pre-application advice specifically. It refers to the inspectorate as the decision made and should not be considered to hold any weight when assessing information under EIR regulations. And may only provide circumstantial support in the public interest test, this will be discussed later.

The Council supports the position held by the commissioner in a number of cases, that confidential Pre Application advice and communications that have not been placed in the public domain, should not be disclosed under EIR. The Commissioner believes, as can be seen in the decision notices of all three cited above. That the council allowing disclosures of confidential pre application advice would discourage full engagement with pre application advice process. This would be by current and future applicants who would hold concerns of public dissemination of such information. While the requester may not feel this is a satisfactory reason, numerous Commissioner Decisions show that the deciding authority disagrees. The providing pre-application advice under EIR would set a precedent that would have a wider impact on the planning process itself.

Is there a Public Interest argument for disclosure?

This review has assessed the public interest argument in the original response. The Review has agreed with all the arguments presented. There is always a public interest argument in favour of disclosure. Planning applications often facilitate a higher level of transparency. In the submission of the review it appears that the public interest argument should be favoured due to the fact this is a pending appeal. The council contests this being a legitimate argument when analysing public interest. While it may create a general public interest around favouring disclosure. This also creates arguments against disclosure. If this is indeed a pending appeal case, then the impact of wider disclosure could have a broader impact on other applications. It strengthens the potential damage to the pre-application procedure itself. It is also believed that this is an integral part of an appeal then standard disclosure will be made. Therefore there is little to gain for the wider public. The planning application process itself is transparent and the public interest is alleviated with this wider disclosure of the application process. Pre-application does little to support this.

Reviewing decision notices shows that the commissioner supports the position that public interest does not support disclosure of pre application advice as a precedent. While the council appreciates the ICO will review decisions on their own merit. We have provided examples of decision notices that show the level require for Pre application advice be disclosed.

Is there a Public Interest argument for non-disclosure?

In Paragraph 41 of decision [IC-282440-Y7D8](#), the commissioner states that applications that involve pending decisions, including appeals, would potential inhibit this process and therefore strengthens the argument against disclosure. In this instance the Commissioner found the public interest favoured non-disclosure.

Decision [IC-292887-Z7J4](#), involved a large and controversial decision relating to a large scale solar farm. In this instance, despite the Commissioner defining the position as marginal, still found that the public interest did not favour disclosure. This is an example of a controversial decision that had a strong public interest position favouring disclosure not being sufficient to

circumvent the importance of maintaining the confidentiality of proceedings in the Pre-application process.

[IC-253477-S4D1](#) Applied a public interest relating to pre-application on a site that was currently under appeal. In Paragraph 25 identified this as a reason that strengthens the argument against disclosure.

While the commissioner would review all cases on their own merit, it is highly unusual the commissioner to side with disclosure in cases relating to pre-application advice has been exempted under Regulation 12(5d).

Considering the above case notes, your submission and the Public Interest test provided in the original response we can only conclude that the test was applied correctly in this instance.