

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

Decision notice

Date: 29 August 2012

Public Authority: Derby City Council

Address: Saxon House
Heritage Gate
Friary Street
Derby
DE1 1AN

Decision (including any steps ordered)

1. The complainant requested any business plans and financial forecasts related to a proposed multi-use arena, velodrome and aquatics centre development. Derby City Council (DCC) identified the information as environmental and refused to provide it relying on regulation 12(4)(d) – information still in the course of completion.
2. The Commissioner's decision is that DCC correctly identified the requested information as environmental and was correct to apply regulation 12(4)(d) concerning information still in the course of completion when refusing to comply with the request.
3. The Commissioner does not require DCC to take any remedial steps to ensure compliance with the legislation.

Request and response

4. On 20 January 2012, the complainant wrote to DCC and requested information in the following terms:

"1) Any and all business plans and financial forecasts, draft or final, for the Multi Use Arena/velodrome development.

2) Any and all business plans and financial forecasts, draft or final, for the aquatics centre/50m swimming pool development."

5. DCC responded on 8 February 2012. It stated that the requested information fell under the remit of the Environmental Information Regulations 2004 (the EIR). DCC refused to provide the requested information citing regulation 12(4)(d) – information still in the course of completion.
6. Following an internal review DCC wrote to the complainant on 12 March 2012. It maintained its original position and upheld its decision that the public interest found in favour of withholding the information.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He did not accept that the information requested fell under the remit of the EIR or that it should be withheld as unfinished and incomplete.

Reasons for decision

8. Regulation 2(1) of the EIR states that environmental information is:

"...any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites...biological diversity and its components...and the interaction among those elements;*
- (b) factors, such as substances, energy, noise, radiation or waste...emissions...and other releases into the environment, affecting or likely to affect the elements 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;..."*

9. DCC argued that the requested information is environmental information in that it falls within the definition of environmental information provided in Regulation 2. It stated that the requested information relates to an

element of the environment as defined in regulation 2(1)(a), namely "land and landscape". DCC also stated that the information relates to measures (including administrative measures) and activities as defined in regulation 2(1)(c) affecting or likely to affect the elements of the environment, in this case the plans and procedures governing the development and building of the arena and aquatics centre.

10. The Commissioner interprets environmental information in a broad fashion. He considers that information such as business plans and even financial reports can be defined as environmental information if it relates to a measure or activity that has an effect on the environment. It can be argued that the multi-use arena and aquatics centre in this case will have an effect on the environment, and the business plan which would involve decisions or considerations into its size, layout, facilities and parking for instance will relate to this. The Commissioner agrees with DCC that the definitions found at regulation 2(1)(c) apply to the information in this case.

Regulation 12(4)(d) – information still in the course of completion

11. Regulation 12(4)(d) of the EIR states that:

"...a public authority may refuse to disclose information to the extent that-

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data..."

12. In its response to the request and in later correspondence to the Commissioner, DCC stated it had applied the exception at regulation 12(4)(d) as *"the information is not in a finalised state and it will be added to between now and its finalisation..."*.
13. DCC provided the Commissioner during the course of his investigation with two copies of the business plan relating to the multi-sport arena and aquatics centre. One of the reports would have stood as a draft paper when the complainant made his request in January 2012. The other report was a later, updated and reviewed draft of the business plan post-dating the information request. DCC provided both copies of the business plans to demonstrate to the Commissioner that at the time of the request the report was unfinished and that further work had subsequently been carried out and various amendments made.
14. After viewing the withheld information, the Commissioner is satisfied that the requested information was unfinished at the time of the request and that the exception is therefore engaged.

Public interest test

15. Regulation 12(1)(b) requires the Commissioner to carry out a public interest test to decide whether the information should be disclosed in spite of the fact that the exception has been found to be engaged. The test is whether the public interest in maintaining the exception outweighs the public interest in the information being disclosed.
16. When considering this public interest test he must take into consideration the presumption of disclosure which Regulation 12(2) provides. If the public interest is balanced then the information should be disclosed.

The public interest in the information being disclosed

17. DCC accepts that *"there is an underlying public interest in information being disclosed"*. It went on in its submissions to the Commissioner that: *"doing so creates transparency where substantial development proposals...that...have a significant impact on the public purse and the well-being of stakeholders, are being proposed"*.
18. DCC made the point that the Press *"as an interested party, is entitled to understand the basis of the proposals, the implications of their being carried through and their impact...on stakeholders within the Council's administrative area"*, but went on to explain that it considered that enough information was already in the public domain.
19. The Commissioner accepts DCC's arguments around general transparency and to an extent its arguments in this case about the Press being entitled to understand the basis of the proposals. However, the Commissioner would point out that the EIR are designed to be both applicant and purpose blind. Therefore, rather than considering whether the press in particular is entitled to understand the basis of the proposals, the implications of their being carried through and their impact on stakeholders, the relevant consideration is the public interest in the public being informed on these matters.

The public interest in the maintenance of the exception

20. DCC stated in its response to the complainant in relation to the unfinished information: *"also, the information cannot be safely relied upon as definitive or a corporate statement of our firm intentions. If the information were released it could therefore misinform members of the public..."*.
21. The complainant raised this issue with the Commissioner, making the point that DCC should not consider what the Press would use the

information for; whether the information would, if published, misinform the public would be for the Press to decide.

22. The Commissioner's view is that in most cases where a public authority is concerned about information being misunderstood that it can provide a requester with an explanatory note to accompany disclosed information, in order to explain any inaccuracies. The Commissioner would accept that there may be particular cases where the work involved in providing such an explanatory note is so extensive that this is not really a viable option. However, the DCC has not provided arguments as to why it would not be viable to provide such an explanation in this case and so he has not taken this argument into account.

23. In submissions to the Commissioner, DCC offered stronger arguments as to why the balance of the public interest found in favour of maintaining the exception. It stated that:

"disclosure of the withheld information [the business plan drafts] prior to their being completed will result in findings being presented that do not represent the Council's settled position. Disclosure in that state could result in interference and pressure from interested parties and the media when the Council has not made decisions on the issue".

24. Regulation 12(4)(d) recognises the need for public authorities to have a 'thinking space' or 'safe space' in order to carry out their functions effectively. It recognises the need for public officials to be able to discuss plans or policies, circumstances surrounding decisions and findings in private and this includes evaluating and amending draft information.

25. There are significant differences between the two reports given to the Commissioner by DCC. The latter business plan in particular contains various updates and amendments. The Commissioner considers that this is evidence that as at the date of the request DCC was utilising the safe space in order to discuss, amend and finalise its plans in relation to the multi-use arena.

26. The Commissioner considers that there is a strong public interest in DCC having this space to think and consider its recommendations or plans and take advice from knowledgeable professionals. Without this safe space any final decisions made are likely to be less well informed and robust and this would ultimately not be in the public interest. .

The balance of public interest test

27. The Commissioner considers that the balance of the public interest test finds in favour of maintaining the exception. He recognises the value in

public authorities being open and transparent, especially where public developments are concerned, such as in DCC's case. However, the Commissioner considers there is more weight to the argument that DCC should be allowed safe space in which to finalise its business plan and that therefore the information should be withheld.

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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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.

Signed

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