

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

Decision notice

Date: 15 July 2015

Public Authority: Cheshire East Council
Address: Westfields
Middlewich Road
Sandbach
Cheshire
CW11 1HZ

Decision (including any steps ordered)

1. The complainant has requested information on information held relating to the potential for travellers and travelling showpeople accommodation in Cheshire East.
2. The Commissioner's decision is that Cheshire East Council was not correct to apply Regulation 12(4)(e) and 12(4)(d) to the information, The council was however correct Regulation 12(4)(a) to other sections of the information. The Commissioner has also decided that the council did not comply with Regulation 5(2) as it did not provide the information which it did disclose within 20 working days.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose copies of the three previous versions of the '*Gypsy Traveller and Travelling Showpeople Site Identification Study*' to the complainants.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 8 July 2014, the complainant wrote to the council and requested information in the following terms:
 1. *"Copies of the three previous versions of the 'Gypsy Traveller and Travelling Showpeople Site Identification Study'*
 2. *Any correspondence (including letters and emails) and documents passing between the Council and the authors of the study relating to the commissioning and drafting of the study*
 3. *Any documents, proformas, etc referred to in the study and any documents relied on by the authors in preparing for it.*
 4. *Any correspondence (including letters and emails) and documents passing between the Council and the authors of the 'Gypsy, Traveller and Travelling Showpeople Accommodation Assessment' relating to the commissioning and drafting of that Assessment*
 5. *Any documents, proformas, etc referred to in the Assessment and any documents relied on by the authors of the Assessment in preparing it."*
6. The council responded on 25 July 2014. It applied the exception for Regulation 12(4)(e) (internal communications).
7. Following an internal review the council wrote to the complainant on 24 September 2014. It applied Regulation 12(4)(e) and also applied Regulation 12(4)(d) (material in the course of completion) to the withheld information in question 1.

Scope of the case

8. The complainants contacted the Commissioner on 6 October 2014 to complain about the way their request for information had been handled.
9. During the course of the Commissioner's investigation the complainants and the council agreed to initially concentrate on one area of the request (part 5). The complainants said that they wished the council to concentrate on information held on travelling showpeople rather than information on gypsies and travellers.
10. Following on from this the parties met on 7 January 2015 to discuss the case and the council disclosed a large amount of information to the complainants which fell within the scope of their request. This included all the emails which the council holds, and sections of the draft reports requested in part 1 of the request which are relevant to the prospective site that they were most interested in.

11. The council also wrote to Cheshire West and Chester Council (Cheshire West) asking it to consider disclosing some of the requested information for part 5 of the request. This was because Cheshire East Council said that it did not hold the information itself. Cheshire East and Cheshire West councils (and others) had set up a joint project board to consider the issue of travellers and travelling showpeople accommodation in the county. Cheshire West Council contracted with Opinion Research Services (ORS) to carry out a survey to provide information to feed into their overall project. It held the resultant research findings as a proprietary right. The Commissioner did however suggest that the complainant's make a similar request to Cheshire West for the information and he understands that they have done this.
12. Once the council had done this the complainants asked the Commissioner to consider the council's response to all of the questions. The Commissioner's decision therefore relates to all of the requested information.
13. As regards the information which was disclosed to the complainant's in January the Commissioner has not considered this further other than in his consideration of Regulation 5(2) below.
14. The council has confirmed that as regards question 1 it has provided the complainants with sections of the draft reports it holds relating to the proposed site which they have an interest in. The council confirmed that it wishes to rely upon Regulation 12(4)(e) for the remainder of the draft reports. It also did not rescind its reliance upon Regulation 12(4)(d) which it applied at the review stage of the process.
15. The Commissioner considers that he needs to address 3 factors within this decision notice:
 - a) Whether the council is correct to apply Regulation 12(4)(e) and 12(4)(d) to the remaining sections of the draft reports requested in part 1
 - b) Whether the council holds any other information which the complainants have requested.
 - c) There is also a procedural issue relating to the delay before the council provided the complainants with the information it did hold which the Commissioner needs to consider.

Reasons for decision

Regulation 12(4)(e)

16. Regulation 12(4)(e) of EIR states "a public authority may refuse to disclose environmental information requested if –

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

17. The exception has been applied to the draft reports which were requested in part 1 of the request.

18. The Commissioner has considered the withheld sections of the draft reports which have been provided to him. The report is titled as a Cheshire East document and provides an overview of the sites available which might be suitable for gypsies, travellers and travelling showpeople within the council's area of the county. The final copy of the report was published by Cheshire East and is available from its website.

19. The question which the Commissioner must consider is whether the sections of the draft versions which have not been published are exempt under Regulation 12(4)(e) or not. There are 3 copies of the draft report held by the council.

20. The report was produced on behalf of the council by Peter Brett Associates. The entry pages provide the names of the employees at Peter Brett Associates who produced and reviewed the report. Paragraph 1.1.1 of the report states:

"The Council have appointed Peter Brett Associates LLP (PBA) to carry out research to identify Gypsy, Traveller and Travelling Showpersons sites across the Borough. The report identifies specific sites where the provision of Gypsy and Traveller pitches and Travelling Showperson plots would meet the needs of families living in the Borough."

21. The Commissioner has therefore considered whether the preparation and production of the reports by an external consultancy agency constitutes an external source which would prevent copies of the draft reports from being internal communications.

22. In *DfT v Information Commissioner (EA/2008/0052, 5 May 2009)*, the First-tier Tribunal found that communications with an unpaid independent adviser was embedded within the public authority was internal communications due to the close relationship which the employee had with the public authority. This is not the situation with these reports.

23. In *South Gloucestershire Council v Information Commissioner and Bovis Homes Ltd (EA/2009/0032, 20 October 2009)* the Tribunal considered whether 12(4)(e) could be applicable to the preparation of a report by an organisation external to the council. It decided that there were no grounds to consider that the organisation could be considered to be part of the council, and therefore the communication was not 'internal' for the purposes of the exception.
24. Having considered the nature of the consultants in this case, it is clear that Peter Brett Associates is a completely separate organisation which was contracted by the council to produce the report on the council's behalf. There is no suggestion that any employee of Peter Brett Associates who produced the report had any further links with the council in this case other than through a contractual relationship to produce the report in a similar way to the Bovis Homes case.
25. The Commissioner is therefore satisfied that the reports were produced externally and cannot constitute an internal communication. As such the Commissioner's decision is that the council was not correct to apply Regulation 12(4)(e) to the draft reports in this case.

Regulation 12(4)(d)

26. The Commissioner notes that in its internal review the council applied Regulation 12(4)(d) to the draft copies of the report in addition to Regulation 12(4)(e). Regulation 12(4)(d) relates to information which is which is still in the course of completion, to unfinished documents or to incomplete data.
27. Whilst the council did not repeat its reliance upon this exception to the Commissioner during the course of his investigation, the Commissioner has considered the application as it was clear that the council's intention was to apply the exception at the time of the review, and it has not specifically rescinded its reliance upon this exception. For the absence of doubt therefore the Commissioner has considered the application of Regulation 12(4)(d) to the information.
28. The requested copies of the reports are draft versions – they were documents which were therefore unfinished. Whilst the final version of the report had been completed and published the request was for the draft copies of the report, and the Commissioner accepts that these were unfinished documents. In *Secretary of State for Transport v the Information Commissioner (EA/2008/0052, 5 May 2009)* the First-tier Tribunal confirmed that a draft version of a document is still an unfinished document, even if the final version of the document has been published. The exception in Regulation 12(4)(d) is therefore engaged.

29. As that is the case the Commissioner must carry out a public interest test into the application of Regulation 12(4)(d). The test is whether, in all of the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in the information being disclosed.

The public interest

The public interest in the information being disclosed

30. There is always a general public interest in disclosing environmental information. This is derived from the purpose behind the EIR. In addition, there may be an argument for informing public debate on the particular environmental issue that the information relates to. Certainly where planning matters are concerned there is often a degree of contentiousness about planning projects due to the effect on the environment and on surrounding communities and it is no different in this case. Travelling showpeople will potentially need to store and work on large equipment near to, or on their site for part of the year and this may affect the surrounding houses and neighbours. The approval of sites for gypsies and travellers will lead to an increase in the local population and therefore greater pressure on the local infrastructure.
31. The Commissioner notes that as the final copy of the report had been published this narrows any public interest in the draft reports being disclosed – the final decisions on the report, and the basis for the actions and decisions which the council subsequently took are already available to the public in the published report.
32. The Commissioner is satisfied however that there may sometimes be a public interest in disclosing draft copies of reports. Disclosing the drafts would allow the public a better understanding of how such reports are developed and formulated over time. It would also possibly provide details of prospective plans which were excluded from the final version of the report but which may reappear in future studies of a similar nature. There is also a public interest if the draft reports show changes in policy and decision making in the council, perhaps by demonstrating changes in emphasis of the report etc and there may be a public interest in explaining why those changes occurred.

The public interest in the exception being maintained

33. The Commissioner recognises that there is a public interest in maintaining the exception on the disclosure of draft reports. During the creation of such report thinking space is often required as officers develop the policies or plans, and others make comments which result in changes to the final version prior to the publication of a final report. It is

quite possible draft versions of reports may contain inaccurate information or contentious plans which are removed or changed in the final version of the report as unwanted or unviable.

34. Clearly if disclosure of the report occurs prior to the publication of the final report there is a risk that the public or the media will react to the contents, forcing the council to address this. Concerns might be raised whereas the final published document would not have raised such concerns. The potential for such objections is that limited council resources are expended on addressing an issue when the final version of the report might not have raised the issue in the first instance. The final copy of the report might be clearer on the plans and alleviate local concerns, policy might change to that at the time of the draft, or they may simply be rejected during the course of preparing the document, as further information is gathered and considered about each potential site.
35. The contents of the report had the potential to be controversial. As with all potential planning development, the public living in the surrounding areas might want to express an opinion on the potential for individual sites near to their homes, and their reaction in the first instance might be to object or begin to raise awareness amongst others in the local community to lobby the council to change its policy.
36. In general, the intentions of the council will be that stated in the final published document. Local authorities have limited resources and are better using these to respond to concerns which relate to their actual plans rather than on concerns which result from initial drafts of a report which include potential policies which the authority has decided not to take forward.
37. The council argued that the draft documents were working documents which have now been superseded by the final published version. It considered that disclosure could have a future negative effect on internal deliberation and decision making processes. The council's argument is presumably that if draft versions are disclosed it will place it in a difficult position when producing draft reports in the future. Although it was not stated specifically, the council's argument may potentially be that it would need to ensure that in the future draft documents do not contain potentially controversial suggestions as a subsequent disclosure of these might cause it to have to defend prospective policies which had little actual likelihood of appearing in the final draft of the report. Excluding these from the draft copies however might hold back council decision making as in the initial stages of producing a report there is a value in highlighting even weak prospects for these to have an initial consideration before they are discarded or taken forward.

38. The Commissioner notes however that the reports were drafted by Peter Brett Associates, not the council. The decision making and deliberative process in producing the final version of the report was therefore carried out externally to the council, by Peter Brett Associates. The deliberative process undertaken by the council would have been to consider the results of the report and to consider what action it should take as a result of it.
39. In addition, the council argued that disclosing draft versions of a document already published can cause confusion. The Commissioner is however satisfied that as the final copy of the report has been published this argument would be relatively easy to respond to. The reports were draft, and the council relied upon the completed version to make its decisions. When disclosing the draft copies the council can clarify that that is the case and issue an explanation for any major differences between the draft and the final version of the report if it has that information available to it.

Conclusions

40. Clearly it would be possible for the council to disclose the reports and clarify any matters which might result by stating why the report was amended, what factors were taken into account to exclude any potential sites or to clarify what inaccuracies were recognised if it has that information available to it. It can also clarify that the draft copies were not copies which the council itself worked from when making its decisions.
41. The Commissioner considers that the need for thinking space ended with the publication of the final version of the report. The council has published the final version of the document. The deliberative process which required thinking space for the production of the documents was carried out by Peter Brett Associates, not the council.
42. The council did not provide either the complainants or the Commissioner with arguments demonstrating why there would be significant issues which would arise by publishing the drafts of the reports after the final report had been published. Whilst the Commissioner accepts that there may be cases where the publication of draft reports might raise issues which would allow an authority to argue that the reports should be withheld, the council did not provide specific arguments to him regarding the reports in this case. Its arguments were general rather than specific to the information withheld in this case. Regulation 12(4)(d) does not provide a blanket exemption for all draft documents.
43. Given the lack of specific examples provided by the council demonstrating how the disclosing the draft reports would be likely to

create a chilling effect on future reports of this nature the Commissioner can place little weight on this argument. The Commissioner is not able to speculate on the issues which disclosing the draft copies might give rise to, and Regulation 12(4)(d) does not provide a 'blanket' exemption for all draft reports. He has not therefore been provided with specific arguments which he can take into account as regards these specific draft reports which might have tipped the balance of arguments towards the public interest resting in the exception being maintained.

44. The Commissioner is therefore satisfied that the public interest in the disclosure of the information outweighs the public interest in the exception being maintained.

Regulation 12(4)(a)

45. Regulation 12(4)(a) applies where the authority does not hold the information which has been requested.
46. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. He will also consider the actions taken by the authority to check that the information was not held, and he will consider if the authority is able to explain why the information was not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held. He is only required to make a judgement on whether the information was held "on the balance of probabilities"
47. The council has said that the information it does hold has already been disclosed to the complainant's. It has confirmed that other than full copies of the 3 draft reports it does not hold any further information falling within the scope of the complainant's requests. As regards part 5 of the request the Commissioner is aware that the council went so far as to make a request to Cheshire West for relevant information on the complainant's behalf.
48. The complainant's however still believe that further information may be held. Their view is based upon information they received from other requests which suggest that Cheshire East Council had at some point held or at the least had access to interview records which have not been disclosed to them. They have provided emails which demonstrate that one council officer who sat on the project board had access to interview information at one point. The Commissioner recognises that these were in an anonymised form as the reference refers to an interview with "Showperson Interview 5" etc.

49. The complainants also argue that Cheshire East argues its position citing on its website that the report provides “robust” and “defensible” evidence about accommodation needs. They argue however that when that statement is questioned and the evidence requested the council seems to contend that it does not hold the information with which the findings of the report might be defended. The complainant's therefore argue that Cheshire East’s response to their requests would suggest that that claim is either not true, or that the council does hold evidence which has not been disclosed to them in response to their request.
50. The Commissioner asked the council to consider whether any further information was held, and also asked the council to specifically ask the officer concerned whether he held, or knew where any further information falling within the scope of the request might be held.
51. The council carried out searches for relevant information, and asked the relevant officer whether he holds, or is aware of any further information which the council holds which falls within the scope of the request. The council confirmed however that no further information is held.
52. The council demonstrated that the survey in question for part 5 of the request was carried out by a third party organisation, Opinion Research Services (ORS). ORS confirmed that it carries out interviews in confidence and said that it could not disclose the records of interviews on without breaching the provisions of the Data Protection Act 1998. Interviews were carried out by ORS and the results anonymised and collated before the outcome was provided to the councils. The council also provided copies of a contract which demonstrated that the proprietary right to the information which was obtained from ORS was held by Cheshire West rather than Cheshire East.
53. Although it does seem apparent from the information which was provided to the Commissioner that at least one Cheshire East Council officer had access to anonymised interview records (or a breakdown of these) the council has said that it has now disclosed all of the information which it holds. The fact that one officer held relevant information at one point in January 2014 does not mean that that information was retained beyond the point at which the final report was published. As stated the searches for this information included searches of its archive and asking the relevant officer whether any further information would be held.
54. The Commissioner must therefore conclude that on a balance of probabilities the interview records falling within the scope of part 5 of the request are not held by Cheshire East Council.

55. Of the information which was disclosed to the complainants, in November 2014, many of the emails are incomplete. The council explained that its archiving process had failed and it was unable to retrieve all of the details from the emails. Effectively, where information no longer retrievable by an authority it cannot be said to hold that information for the purposes of the Regulations. The council has disclosed the information it was able to retrieve to the complainants.

Conclusion

56. Bearing in mind the above the Commissioner considers that on a balance of probabilities no further information is held by the council falling within the scope of the complainants' request.

Regulation 5(2)

57. Regulation 5(2) requires that "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."
58. The complainant's made their request for information on 8 July 2014. The council initially withheld the information but on 7 January 2015 it provided the majority of the information it held to the complainants.
59. This falls outside of the 20 working days required by Regulation 5(2). The Commissioner's decision is therefore that the council's response did not comply with the requirements of Regulation 5(2).

Right of appeal

60. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

61. 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.
62. 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

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