

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

**Decision notice**

**Date:** 26 July 2016

**Public Authority:** City of York Council  
**Address:** West Offices  
Station Rise  
York  
YO1 6GA

**Decision (including any steps ordered)**

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1. The complainant has requested information about a planning matter. City of York Council ('the Council') withheld all the information that it holds under regulation 12(4)(d) (material still in the course of completion). During the Commissioner's investigation, the Council released some of the requested information to the complainant. It continues to withhold some of the information which it has now said is also excepted from disclosure under regulations 12(3) (third person personal data); 12(5)(b) (course of justice); 12(5)(c) (intellectual property rights) and 12(5)(f) (not in the interests of the person who provided the information).
2. The Commissioner's decision is that, at the time of the request, the Council correctly applied regulation 12(4)(d) to the requested information and that the public interest favoured withholding this information.
3. The Commissioner does not require the Council to take any steps.

**Request and response**

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4. On 9 June 2015, the complainant wrote to the Council and requested the following information:

- a) *A copy of the full drawings of the highway works proposed to be constructed pursuant to the terms of the S278 Agreement.*
  - b) *A copy of the draft S278 Agreement.*
  - c) *Any correspondence between the Highway Authority and Persimmon Homes and its Highway Consultants in relation to (a) (b).*
5. The Council responded on 15 July 2015. It refused to release any of the information that it holds that falls within the scope of the request, under regulation 12(4)(d). The Council said it was material still in the course of completion.
  6. Following an internal review the Council wrote to the complainant on 22 September 2015. It maintained its position that the requested information was excepted from disclosure under regulation 12(4)(d). The Council also said that the public interest favoured maintaining the exception on this occasion.
  7. The Council has told the Commissioner that, since the Agreement was finalised in October 2015 and the plans have been completed, it has now voluntarily released to the complainant the information requested at part a) and has provided the complainant with a copy of the final S278 Agreement. However, the Council maintains its position that, at the time of the request in June 2015, this material was unfinished and therefore regulation 12(4)(d) applied to the request.
  8. During the investigation, the Council told the Commissioner that it considers that, in addition to regulation 12(4)(d), other parts of the EIR apply to the information requested at part c) of the request, namely regulations 12(5)(b), 12(3), 12(5)(c) and 12(5)(f).

## **Scope of the case**

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9. The complainant contacted the Commissioner on 16 October 2015 to complain that the Council had refused to provide the information she requested. The Council has told the Commissioner that the complainant considers that the Council wrongly applied regulation 12(4)(d) to the information she requested and only released some of it to her following contact from the Commissioner. The Council says the complainant has now received a copy of the final Agreement, and the associated drawings requested at part a). The Council says that the complainant still requires the correspondence requested at part c).
10. The Commissioner has focussed the investigation on whether the Council correctly applied regulation 12(4)(d) to the three parts of the

request. If necessary, the Commissioner has been prepared to consider the Council's application of 12(5)(b), 12(3), 12(5)(c) and 12(5)(f) to part c) of the request.

## Reasons for decision

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### Background

11. Germany Beck is an area near to York where a large housing development was given outline planning permission in 2013. Preparatory work for the development, including a new junction and access road, is expected to commence in 2016. The request concerns the new road junction associated with this development. The Section 278 Agreement referred to in the request refers to an Agreement between the Local Highway Authority (City of York Council in this case) and the developer (Persimmon Homes Ltd in this case) to ensure the work to be carried out on affected highways is completed to the standards and satisfaction of the Local Highway Authority.

### Is the request a request for environmental information?

12. Information is 'environmental information' and must be considered for disclosure under the terms of the EIR rather than the FOIA if it meets the definition set out in regulation 2(1)(a) to 2(1)(f) of the EIR.
13. The Commissioner considers the information in this case can be broadly classed as environmental information, as defined in regulation 2(1)(c) of the EIR. This says that any information on measures such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements or factors of the environment listed in regulation 2(1)(a) will be environmental information. Elements listed under 2(1)(a) include land and landscape.
14. The request is for information concerning a planning matter. The Commissioner is satisfied that the requested information can be categorised as a measure likely to affect the elements of the environment listed in regulation 2(1)(a) and that, therefore, the request falls under the EIR. City of York Council was correct to consider it under these Regulations.
15. Regulation 12(2) of the EIR says that a public authority shall apply a presumption in favour of disclosing environmental information.

### **Regulation 12(4)(d) – material in the course of completion**

16. Regulation 12(4)(d) of the EIR says that a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
17. The aims of the exception are:
  - to protect work a public authority may have in progress by delaying disclosure until a final or completed version can be made available. This allows it to finish ongoing work without interruption and interference from outside; and
  - to provide some protection from having to spend time and resources explaining or justifying ideas that are not and may never be final.
18. In its submissions to the Commissioner, the Council confirmed that at the time it was requested on 9 June 2015, the Council considered regulation 12(4)(d) applied to all the information.
19. The Council says that the requested information – ie the drawings, draft Agreement and correspondence - was a combination of unfinished documents or incomplete data. It says that this is because some of the documents concerned could not be considered finished documents until the S278 Agreement had been agreed. Other documents were still in draft form at the time of the request. With regard to other elements of the information, the Council says it was in the process of formulating a policy relating to the Agreement and therefore, because the Agreement had not been concluded, it considered that this was incomplete data.
20. The Council has told the Commissioner that the Agreement was finalised in October 2015 and has now been published. Because the Agreement is now final, the Council says it was able to release to the complainant the drawings requested at part a) of the request, and has provided her with a copy of the final Agreement. The first question the Commissioner has considered is whether the Council incorrectly withheld the drawings and draft Agreement when the complainant requested these in June 2015.
21. Having seen the Agreement as it was at the time of the request, and the associated technical drawings, the Commissioner is satisfied that, at the time of the request, the Agreement was clearly in draft form. The Commissioner notes that the complainant herself describes it as “...*the draft S278 Agreement*”. Since the Agreement was at that time still being prepared it stands to reason that there was the potential for the associated drawings to change.

22. The Commissioner is therefore satisfied that, at the time of the request, regulation 12(4)(d) was engaged with regard to this particular information: the drawings requested at part a) of the request and the draft Agreement requested at part b). This is because, rather than being incomplete data, this information was material in the course of completion. (Material in the course of completion is discussed later in this notice.) In the case of the draft Agreement, this information could be considered to be an unfinished document, as well as material in the course of completion.
23. Regulation 12(1)(b) provides that where regulation 12(4)(d) is engaged then a public interest test is carried out. The test is whether, in all of the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Again, regulation 12(2) provides a presumption towards the disclosure of the information.

The public interest in the information being disclosed

24. In its submission the Council summarised the public interest arguments it provided to the complainant in its internal review of 22 September 2015. It accepts that there was a strong public interest in it being transparent and accountable in its decision making so that people could understand and be involved in its democratic processes and decision making. Although it did consider them, the Council did not consider that issues such as any significant impact on the public, helping the public to understand the Council's legal obligations and suggestions of wrong doing, which would have added weight to the argument for disclosure - were relevant to any elements of the withheld information.

The public interest in the exception being maintained

25. The Council's main argument against disclosing this information was that it needed a safe space in order to formulate and develop a particular policy, including space for private contractors, ie Persimmon, to negotiate fairly with the Council. The Council says this would enable it to reach an appropriate agreement about the design of the road junction in question without unnecessary delay or confusion.
26. The Council considered that all the arguments in favour of disclosure would be satisfied once the Agreement was finalised (and published) and that withholding the draft Agreement and drawings avoided confusion and delay, which would not be in the public interest.
27. Finally, the Council explained that the negotiations for the design of the junction had no potential for significant impact on the public because the Germany Beck development as a whole had been debated widely in a

public arena and the junction concerned had already been given planning permission.

The balance of the public interest

28. Given that the Agreement would be made final and published, the Council's view is that, at the time of the request, the public interest favoured avoiding any confusion about, and possible delays to, the design of a junction on a busy main road.
29. The Commissioner has considered the Council's arguments and, in the absence of significant or unusual concerns such as evidence of wrongdoing, agrees with the Council that, on balance, in this case there is a stronger public interest in protecting the safe space within which the parties to the Agreement could discuss, negotiate and seek to agree terms.
30. To summarise, the Commissioner considers that the Council was correct to apply regulation 12(4)(d) to the information requested at part a) and b) of the request and agrees that the public interest favoured maintaining the exception. The Commissioner has gone on to consider the Council's response to part c) of the request: correspondence relating to a) and b).
31. The information the Council holds within the scope of part c) of the request is a number of emails between relevant parties, including various attachments. The Council considers that regulation 12(4)(d) can also be applied to this information; both the emails and the attachments. It says that since this correspondence concerns information that was unfinished at the time of the request (the Agreement and drawings), this means that the correspondence itself, and all the attachments, were also incomplete.
32. The Council provided the Commissioner with the information within the scope of part c) of the request, in a series of five email bundles. The Commissioner has reviewed this material and notes that it comprises emails and attachments. The content of some of the emails is routine and administrative and other emails have more substantial content. The attachments include the draft Agreement, technical drawings and photographs, a Traffic Management Plan and comments on aspects of the planning proposal in question.
33. With regard to the exception under regulation 12(4)(d), the Council maintains that, because the entire content of the correspondence in all five email bundles relates to the formulation and development of plans that, at the time of the request, were not agreed and subject to change, the email correspondence itself was, in effect, not completed.

34. The 'material in the course of completion' to which the exception under regulation 12(4)(d) can apply is related to developing policy and to administrative decisions such as planning matters. As such, email correspondence can be considered to be part of the materials in the course of completion, rather than unfinished, or draft, documents themselves.
35. The Commissioner's guidance on regulation 12(4)(d) says that "*public authorities should have the necessary space to think in private*". As thinking space is needed to develop a policy, thinking space can also be needed to make an administrative decision, such as the planning decision in this case. It may be necessary to consider different options and how the law and the authority's policies apply in a particular case.
36. Emails themselves are not draft because, once sent, they are finished documents (although an email may have a draft document attached to it), but they can be part of material in the course of completion.
37. The exception specifies 'material' as well as 'documents' and 'data'. The Commissioner considers that the fact that all three terms are used suggests that 'material' can mean something more than a specific document or dataset. The 12(4)(d) guidance says that "*while a particular document may itself be finished, it may be part of material which is still in the course of completion.*" An email chain can represent an organisation's thinking process, including communications with external bodies, prior to it making a decision – in this case to finalise a s278 highways Agreement. The 'material' in this case is the Agreement which was still in the course of completion. The Commissioner considers that the email correspondence was a necessary part of the process of finalising that Agreement.
38. The view that emails cannot be covered by regulation 12(4)(d) because, once sent, they are 'complete' documents, would lead to an unacceptable conclusion in some cases. It would mean that if a public authority were exchanging emails with an external body in order to formulate policy or make a decision on environmental matters, then (absent of any other exception) those emails could be assessable via an EIR request as soon as they were sent.
39. The Commissioner has noted earlier cases that support the view that emails can be part of material in the course of completion. In [EA/2012/0105](#) the Information Tribunal accepted that the exception applied to particular emails as the matters they discussed were proposals that were still under consideration or work in progress. In other words, while these emails were complete, in the sense that they were sent, they were part of material in the course of completion.

[FER0517476](#) also found that correspondence fell under 12(4)(d) as an associated scheme was still under discussion at the time of the request.

40. The Commissioner therefore considers that the Council was also correct to apply regulation 12(4)(d) to the information requested at part c) of the request.
41. As discussed previously, regulation 12(1)(b) provides that where regulation 12(4)(d) is engaged then a public interest test is carried out. The test is whether, in all of the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Again, regulation 12(2) provides a presumption towards the disclosure of the information.
42. The Commissioner considers that the public interest arguments and conclusion discussed at paragraphs 24 – 29, with regard to parts a) and b) of the request, also apply to part c). To summarise, the Commissioner is satisfied that regulation 12(4)(d) also applied to part c) of the request, to the emails and the attachments, and that the public interest again favoured maintaining the exception.
43. Because the Commissioner has decided that the Council correctly applied regulation 12(4)(d) to the request in its entirety, and that the public interest favoured maintaining the exception, it has not been necessary to consider the other exceptions that the Council has told the Commissioner it considers can be applied to part c) of the request; namely regulations 12(5)(b), 12(3), 12(5)(c) and 12(5)(f).
44. The Commissioner notes that the Council has now released some of the requested information to the complainant ie drawings, and has provided the complainant with the final Agreement. As the Agreement has now been finalised, the material discussed in this notice is no longer 'in the course of completion'. If the complainant were to submit a new request now, the email correspondence generated in order to produce the Agreement would no longer engage the regulation 12(4)(d) exception. However, other exceptions could apply and, as noted, the Council has referred to the exceptions under regulations 12(5)(b), 12(3), 12(5)(c) and 12(5)(f) with regard to the email correspondence.



## Right of appeal

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45. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

46. 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.
47. 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** .....

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
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