

Freedom of Information Act 2000 ('FOIA')
Environmental Information Regulations 2004 ('EIR')
Decision notice

Date: 13 September 2016

Public Authority: Hungerford Town Council
Address: The Library
Church Street
Hungerford
Berkshire
RG17 0JG

Decision (including any steps ordered)

1. The complainant has requested a copy of the Ashburn Planning Report from 2013. The Commissioner's decision is that Hungerford Town Council has correctly applied the exception at regulation 12(4)(d) to the requested information. However, she has decided that in all the circumstances of the case, the public interest in maintaining the exception does not outweigh the public interest in disclosing the information.
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Disclose the requested information.
3. The public authority must take this step 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

4. On 29 January 2016, the complainant wrote to Hungerford Town Council ('the council') via the WhatDoTheyKnow website¹ and requested information in the following terms:

"Following recent publication of the updated Ashburn [sic] Planning Report

<http://www.hungerford-tc.gov.uk/blob/doc...>

please could you provide under the provisions of the Environmental Information Regulations a copy of the report originally prepared, received and distributed to Councillors and LDF working group members in 2013."

5. The council responded on 11 February 2016 and stated that the decision to refuse to disclose the draft report under regulation 12(5)(d) of the Environmental Information Regulations 2004 still stands.²
6. On the same day, the complainant requested an internal review.
7. The council provided an internal review on 15 March 2016 in which it maintained its original position in relation to regulation 12(5)(d) stating that the draft is incomplete data and has been superseded by the final published version.

Scope of the case

8. The complainant contacted the Commissioner on 15 March 2016 to complain about the way her request for information had been handled.
9. During the Commissioner's investigation, the council revised its position stating that it wishes to withhold the document under regulation 12(4)(d).

¹ https://www.whatdotheyknow.com/request/ash_burn_planning_report_2013#incoming-782715

² The Commissioner's decision notice dated 12 January 2015 for case reference FS50560611 upheld the council's refusal of the Ashburn Planning Report under regulation 12(5)(d). The First-Tier Tribunal (Information Rights) upheld the Commissioner's decision on 18 June 2015 (Appeal No: EA/2015/0029).

10. The council also said that it would like to withhold the document until after the Examination in Public process has been concluded which is likely to be towards the end of this year, beginning of next year, but could be subject to delays.
11. The complainant has said that after the Examination in Public process has been concluded is not the appropriate time in the proceedings for publication and expressed her concern that the council will not follow through on the proposal to publish the report. Therefore the Commissioner has considered whether the council is entitled to rely on the exception at regulation 12(4)(d) as a basis for refusing to provide the requested information.

Reasons for decision

12. Regulation 12(4)(d) of the EIR states that a public authority may refuse to disclose information to the extent that it relates to material still in the course of completion, to unfinished documents or to incomplete data.
13. The exception is often engaged relatively easily since if the withheld information falls into one of the categories described above, then the exception is engaged. It is not necessary to show that the disclosure would have any adverse effect in order to engage the exception, however any adverse effects of disclosures may be relevant to the public interest test.
14. The Commissioner understands that a final version of the requested report dated December 2015 was published prior to the request in this case being made.
15. In line with the decision of the Tribunal in *Secretary of State for Transport v the Information Commissioner*³, and the Commissioner's published guidance on regulation 12(4)(d)⁴, it is the view of the Commissioner that drafts are unfinished documents for the purposes of regulation 12(4)(d), and remain unfinished even upon completion of a final version. The Commissioner is therefore satisfied that the exception is engaged in respect of the requested information.

³ Appeal number EA/2008/0052

⁴ https://ico.org.uk/media/1637/eir_material_in_the_course_of_completion.pdf

The public interest test

16. The effect of regulation 12(1)(b) is that all the exceptions in the EIR are subject to a public interest test. This means that a public authority can refuse to disclose information under these exceptions only if “in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information”. In assessing this, under regulation 12(2), the authority must also apply a presumption in favour of disclosure.

The public interest arguments in favour of disclosure

17. The Commissioner considers that there is always a general public interest in disclosing environmental information, derived from the purpose of the EIR. She considers that some weight must always be attached to the general principles of achieving accountability and transparency which in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities. There may also be an argument for informing public debate on the particular environmental issue.

The public interest arguments in favour of maintaining the exception

18. The council said that arguments regarding the publishing of incomplete or unfinished information that would distract public debate away from the substantive report are relevant to the exception. It explained that the substantive document is the published report and the draft report differs from the final version to such an extent that the release of this whilst the Examination in Public (being carried out by an independent inspector of West Berkshire Council’s Housing Site Allocations Development Plan Document) is not concluded would be likely to direct the public attention away from the substantive report.
19. The council also submitted that the information in the report is likely to mislead local residents and that it is not accurate and is incomplete. It said that the draft report does not need to be read for the final report to be understood and its presence in the public domain may actually mislead residents.

The balance of the public interest test

20. As stated above, the Commissioner accepts that there is always a general public interest in disclosure of environmental information and that there is a presumption in favour of disclosure.
21. The Commissioner considers that the timing of the request may well be a factor that affects the relative weight of the arguments in the public

interest test. If a final version of a draft document exists when the public authority receives the request, the public interest in withholding the incomplete or draft version is likely to be reduced.

22. In relation to the argument that disclosing the requested information would distract public debate away from the substantive report, as stated in the Commissioner's aforementioned guidance on regulation 12(4)(d), it should generally be possible for a public authority to minimise any distraction by providing an explanation of any differences. When this is not possible and there is a real risk that public debate would be distracted and therefore seriously impact on the public authority's resources, this may be a public interest argument for maintaining the exception. However, this has not been argued by the council in this case. It has merely said that publication of the draft report 'would be likely to direct the public attention away from the substantive report'.
23. In relation to the argument that the information is likely to be misleading, the Commissioner does not consider that this argument in itself carries any significant weight, because it should generally be possible for a public authority to put the disclosure into context. It should usually be possible to provide an explanation if, for example, a draft differs significantly from a final version.
24. As stated in the Commissioner's aforementioned guidance on regulation 12(4)(d), the misleading argument would only carry some weight if the information would create a misleading or inaccurate impression and there were particular circumstances that would mean it would be difficult or require a disproportionate effort to correct this impression or provide an explanation. Examples of this could include where the explanation could only be provided by an employee who has left the public authority, or the authority does not hold the final or corrected information. The Commissioner notes that the council did not provide any reasons as to why the council could not in this case put the disclosure into context by providing an explanation as to the differences between the requested draft and the final published version.
25. The Commissioner considers that the council has not provided specific detailed reasons, why the draft report should not be exposed to public scrutiny after the final publication of the document. Although it has said that the reports 'differ' it is not clear to the Commissioner why the first draft should not be disclosed.
26. The Commissioner also appreciates that the overall issue remains live, as the Examination in Public has not yet been concluded. Therefore, release of information which could add to the public debate on the issue is in line with the purpose of the EIR.

27. For the reasons stated above and taking into account the timing of the request, the nature of the information and the EIR's emphasis on disclosure, the Commissioner has found that the public interest weighs in favour of the release of the requested information.

Other matters

28. On 10 May 2016, the complainant asked the Commissioner to consider the matter under regulation 19 of the EIR as she believes that the council's refusal was without merit and was done to purposefully block disclosure of the requested information.
29. Regulation 19 mirrors section 77 of the FOIA, so the same criminal offence is included in the EIR.
30. Section 77 makes it a criminal offence to alter, deface, block, erase, destroy or conceal information with the intention of preventing disclosure of information to which an applicant would have been entitled. The Commissioner wrote to the complainant on 30 June 2017 and explained that the council is at liberty to rely on a previously supported exception to withhold information that continues to be withheld. It was explained that the Commissioner is obliged to provide a further decision notice if the complainant wishes to challenge the council's position after a fresh request is made and it is in this format that the Commissioner would undertake the analysis, rather than starting with a presumption of concealment on the part of the council. It was also explained that the council are also able to apply alternative exceptions if it wishes and that the complainant is able to challenge the position if she feels that the passage of time, for instance, has altered the balance of factors affecting the exception used and that it is just this aspect that the complaint against the council that will be considered and a decision notice issued.

Right of appeal

31. 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

32. 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.
33. 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