

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 5 October 2017

Public Authority: Solihull Metropolitan Borough Council

Address: Council House
Manor Square
Solihull
West Midlands
B91 3QB

Decision (including any steps ordered)

1. The complainant made a request to Solihull Metropolitan Borough Council (the council) for information on a proposed new road. The council refused to comply with the request under the exception in regulation 12(4)(d).
2. The Commissioner has decided that regulation 12(4)(d) is engaged and that, in the specific circumstances of this case, the public interest in maintaining the exception outweighs the public interest in disclosure.
3. She does, however, find that the council breached regulation 14(2) as it did not provide its refusal notice within 20 working days after the date of receipt of the request.
4. The Commissioner does not require the council to take any steps as a result of this notice.

Request and response

5. On 1 April 2016, the complainant wrote to the council and made a request for information in the following terms:

“Under the provisions of the Environmental Information Regulations, please provide all information that you hold relating to such a potential new road development. This would include any reports, plans, cost-benefit analysis and possible route option information. This will include the documentation within which the claimed merits of such a road have been “identified”, and any evidence claimed to substantiate such merits.

The information may be held independently by Solihull Council or will be included in communications to or from other agencies."

6. The council responded on 4 May 2016 and confirmed that it held two documents falling within the scope of the request. It refused to disclose the documents citing regulation 12(4)(d).
7. The complainant appealed the council's decision on 18 May 2016 and the council provided the complainant with the outcome of its internal review on 25 May 2016. It upheld its original position.

Background

8. At the time of the request, the council was considering a proposal for a new road linking the A46 with either A452 or A45. The complainant set out the context of his request by providing the council with an agenda for a council meeting which stated that "proposals should take account of the potential for a new road linking the A46 Stoneleigh junction with Kirby Corner and subsequently to the A452 or A45"

Scope of the case

9. The complainant contacted the Commissioner on 4 July 2016 to complain about the council withholding the requested information and to dispute its reliance on regulation 12(4)(d).
10. The council has maintained that regulation 12(4)(d) of the EIR was applied correctly.
11. The Commissioner therefore considers the scope of the case to be whether regulation 12(4)(d) was engaged and whether, in all the circumstances of the case, the public interest lies in maintaining the exception or disclosing the information.

Applicable legislation

12. As the request is for information relating to a proposed new road, the Commissioner considers that the withheld information is caught by the definition of environmental information in regulation 2(1)(c)¹. The

¹ <http://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made>

council was therefore entitled to handle the request under the terms of the EIR.

Reasons for decision

13. Regulation 12(4)(d) provides 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”

14. This 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 disclosure may be relevant when considering the balance of the public interest.
15. The council has set out to the Commissioner that the two withheld documents comprise plans related to a proposed road scheme that, at the time of the request, was undecided upon and may be amended as debate and analysis of the proposal and related matter continues.
16. The withheld documents were created and provided to the council by the neighbouring council, Coventry City Council.
17. The council confirmed that it had liaised with Coventry City Council and the arguments put forward were accurate representations of Coventry City Council's point of view regarding the disclosure of the requested information.
18. The council explained that it considered the withheld documents to fall under the *“materials in the course of completion”* and *“unfinished documents”* limbs of the exception.

Materials in the course of completion

19. The council set out to the Commissioner that the withheld documents were created by Coventry City Council as part of the project to build the proposed new road. It explained that, at the time of the request, the project was still in its early stages and a decision had not yet been made as to the preferred option to present to the public.

Unfinished documents

20. The council explained that as the withheld documents relate to proposals for the new road project, they were likely to be updated and changed as the planning process progresses.
21. The council acknowledged that the withheld documents may be superseded by new or revised documents and may not be changed directly, however, the council explained that it had taken account of the Commissioner's guidance and considered that all draft versions of finalised documents will remain as unfinished pieces of work, whether or not the finalised document has been produced or published.
22. The complainant argued at internal review and in his complaint to the Commissioner that the documents could not fall under either limb of the exception under regulation 12(4)(d).
23. He argued that the withheld documents could not be deemed unfinished or draft documents as they had been shared by Coventry City Council, the creator of the withheld documents.
24. The complainant also argued that "*materials in the course of completion*" must be determined by the nature or format of the medium of the requested information and that the regulation applies to "*documents*" and "*material*" rather than decisions involved in the process of policy delivery.
25. The complainant explained that he considered allowing information relating to incomplete projects to be withheld "*has the effect of enabling authorities to keep information secret unless and until project development has reached a stage of their choosing*".
26. The complainant also argued that the ICO's interpretation that "*in the course of completion*" can apply to portions of the decision making process in formulating and developing policy was not substantiated in the legislation.
27. The council set out at internal review that it considered the withheld documents did not lose their unfinished status when provided by Coventry City Council. The council explained that it considered this would undermine the basis on which the exception is founded. By deeming shared documents as finished documents, public authorities would lose the space to think in private and debate options and would lose the ability to have free and frank discussions with other interested or involved parties.
28. In support, the council cited regulation 14(4) of the EIR which states:

"If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of

any other public authority preparing the information and the estimated time in which the information will be finished or completed”.

29. It explained that the wording of regulation 14(4) suggests that the requested information does not need to have been created by the public authority applying the exception.
30. The Commissioner has considered the arguments submitted by the council and the complainant and her own guidance in considering whether the exception under regulation 12(4)(d) is engaged.
31. The Commissioner considers that the withheld documents do fall under both *“unfinished documents”* and *“materials in the course of completion”* limbs of the exception under regulation 12(4)(d).
32. The Commissioner does not consider that a document must be finished or completed if it is shared with another public authority. Public authorities must be allowed space to communicate ideas and proposals to other public authorities to gain opinions and consensus before finalising documents. This is particularly important in large scale projects involving multiple public authorities.
33. The Commissioner is also mindful that the withheld documents were shared only with another public authority and were not released into the public domain or to external parties.
34. The Commissioner is satisfied that the withheld documents were subject to revisions and amendments as the project progressed and, therefore, comprise *“unfinished documents”*.
35. Regarding the complainant's arguments that *“materials in the course of completion”* does not include unfinished projects and the Commissioner's interpretation is not substantiated by legislation, the Commissioner's guidance on this matter is well established and follows the ruling of a number of tribunals and the proposal for the Directive on public access to environmental information which states:

“It should also be acknowledged that public authorities should have the necessary space to think in private. To this end, public authorities will be entitled to refuse access if the request concerns material in the course of completion or internal communications. In each such case, the public

interest served by the disclosure of such information should be taken into account". (Explanatory memorandum to COM/2000/0402²)

36. The Commissioner accepts that the withheld documents were created as part of a project that, at the time of the request, had not yet reached the decision making stage and, therefore, also fall under the "*materials in the course of completion*" limb of the exception under regulation 12(4)(d).

Public interest arguments in favour of disclosure

37. The council acknowledged to the Commissioner that there is always a public interest in the general principles of achieving accountability and transparency by disclosing information for public scrutiny. The council explained that this allows the public to scrutinise, challenge and take part in local decisions, especially those affecting the environment.
38. The complainant has stated that the public interest lies in disclosure of the withheld documents as the public needs to be given information in order to engage in the development of projects at the earliest opportunity and that public involvement is required before the plans are finalised by the council.
39. The complainant explained that he considered the public interest was further weighted towards disclosure as the relevant public authorities had failed to publish the information on time for public consultations on the local plans as required under the planning legislation.
40. The complainant stated:

"At the time of my request, those initial consultations were already past and the additional consultation in respect of modifications to the Warwick District Council local plan required by the Inspector was already underway.

That additional consultation is now concluded and the revised plan is already subject to scrutiny by the Inspector. I understand that the Inspector's re-examination of the Local Plan is timed to re-open at the beginning of September 2016. There is therefore a particular and persisting need in this case for the information to be published as soon as possible and certainly well in advance of the publication apparently intended for December 2016."

² <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52000PC0402&from=EN>

Public interest in maintaining the exception

41. The council set out that it had contacted Coventry City Council, the creator of the withheld information and Coventry City Council has explained that, at the time of the request, the proposal was in the very early stages of development and had not benefitted from a level of scheme development and appraisal, which it would reasonably require to undertake before publication.
42. The council explained that it considered disclosing information that is incomplete was not in the public interest as it may blight properties and misinform individuals about the proposed route.
43. The council also explained that public authorities need a safe space to formulate policy, debate issues and reach decision without being hindered by external queries or media involvement.
44. The council set out that the Directive on which the EIR is based recognises that public authority should have the necessary space to think in private. The council explained that if thinking space was not present and every draft or unfinished piece of work was not protected and publicly available, it would be difficult for public authorities to operate. The council further explained that decision and proposals could be challenged before they were finalised, diverting attention and resources into addressing matters that may never come to fruition.
45. The council also explained that it was in the public interest to encourage free and frank discussion and the exchange of views and ideas that may be stifled if the information is disclosed.
46. The council set out that planning legislation requires that information about planning matters to be made publicly available and involve public consultation. The council explained that regarding planning and related matters, local authorities are extremely open and transparent about the process.
47. The council explained that in the planning process, files, drawings and specifications are made freely available to members of public online and there are opportunities for the public and elected members to get involved, as well as public exhibitions and other ways in which the public are informed and given the chance to participate at the right point in time.
48. The council explained that at the time of the request, Coventry City Council anticipated that the finalised proposals would be made available in December 2016 when a public consultation exercise will take place. The council explained that at this point, the general public will be able to inspect and scrutinise proposals, challenge or support decision, to ask

for clarification and take part in public meetings. The council explained that it considered, in this way, the public interest is served.

49. During the course of the investigation, the council confirmed that the planned time scales of the project had changed and Coventry City Council had not released the information as part of a consultation in December. The council confirmed that the consultation was now planned for summer 2017.
50. The complainant acknowledged in his complaint to the Commissioner that public authorities require space to formulate policies and projects but stated that this is only allowed for in exceptional circumstances and is explicitly restricted by the requirement to interpret the exception narrowly.

The Commissioner's position

51. Under regulation 12(1)(b), public authorities can only withhold information if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Under regulation 12(2), a presumption in favour of disclosure must be applied to the consideration of the public interest.
52. The Commissioner has given some weight to the general principles of achieving accountability and transparency through the disclosure of information held by public authorities.
53. Disclosure of information can assist the public in understanding the basis on which public authorities make their decisions and this, in turn, may help foster greater trust in public authorities.
54. The Commissioner also acknowledges that disclosure of information can lead to greater public participation in the public authority's decision making processes, particularly through representations made to councillors by their constituents.
55. In this case, disclosure of the requested information may help the public understand some of the issues which are to be considered by the council in response of the particular planning aspects of the new road project.
56. The Commissioner acknowledges the impact of the planning application on the adjacent properties, the local community and its possible impact on wildlife.
57. Disclosure of the withheld information could assure the public that the council was satisfying any obligations it has in respect of its statutory functions associated with a project of this nature.

58. Regarding the council's arguments that disclosure of the withheld information may result in the public being misled or properties blighted by the release of information relating to options that are being considered, the Commissioner does not consider that this argument carries any significant weight in the circumstances of this case. It should generally be possible for a public authority to put disclosure into some form of context. The council has not provided any explanation of why it would be difficult or would require disproportionate effort for it to correct any public misconceptions about the nature of the disclosed information.
59. Having reviewed the withheld information, the Commissioner accepts that disclosure of the requested information could lead to a chilling effect on the free and frank exchange of views and opinions during large scale projects.
60. The Commissioner acknowledges that councils are under a duty to consider proposals for development and to manage their land and assets appropriately. As part of this process, plans and information must be drafted and correspondence must take place with relevant parties to identify and discuss options, draw up preliminary proposals and to discuss the viability of these proposals. The Commissioner considers that there will always be a need for correspondence and information of this nature to be created, however, the Commissioner is mindful that the project has still not been finalised and, therefore, disclosure of the information prior to a decision being made could lead to future stifling of discussions internally and with other public authorities.
61. The Commissioner places more weight on the thinking space which officers and councillors require in order to formulate proposals to take to the community. Robust proposals cannot develop without communication and involvement within the council and relevant external agencies. There must be some work carried out to ascertain the viability of individual projects prior to consultation with the public taking place.
62. The Commissioner has taken account of the council's explanation that, at the time of the request, the new road project was in its early stages and options were still being considered. The council set out that, at the time of the request, the preferred option for presentation to the public had not yet been decided upon.
63. In the specific circumstances of this case, the Commissioner considers that, at the time of the request, the public interest rested with the initial work being withheld from disclosure before it is ready to be presented for consultation. This allows the proposal to be developed to a stage where the council can confirm that, in its view, a particular option is viable and potentially preferred against other options.

64. The Commissioner accepts that, if the withheld information had been disclosed at the time of the request; the initial work could have been hindered by media and community pressure and interference. It is not in the public interest for the council, or Coventry City Council, to have to divert resources to answering queries about, or attempts to block, options that may never come to fruition.
65. The Commissioner also considers that, although there will always be a public interest in openness and transparency of a public authority's decision making process, there is little public interest in disclosing information that has not yet had the benefit of expert or professional scrutiny and analysis to ensure that the most robust and effective option is selected.
66. The council set out to the Commissioner that Coventry City Council had intended, at the time of the request, to take its proposal for a new road to public consultation in December 2016. However, during the course of the investigation, the council confirmed that the timescale for the project had been extended and Coventry City Council intended to go to public consultation in the summer of 2017.
67. The Commissioner has considered the First-Tier tribunal's decision in the case of Wirral Metropolitan Borough Council (WMBC) v Information Commissioner (EA/2012/0117). In that case, regarding a request for the draft documents of a report published on WMBC's website, the Tribunal strongly endorsed the comment made in Mersey Tunnel Users Association v ICO, EA/2009/0001, at paragraph 22:
- "We consider that there may be little, if any, public interest in disclosing a draft which is an unfinished document, particularly if a finished or final version has been or is likely to be made public..... Presenting work in a draft form before a final discussion is made allows a public authority to consider matters at an early stage and to comment upon the final form such a report would take".*
68. The Tribunal further commented that *"there may also be, as in this case, in our view, a strong public interest in protecting such draft reports from exposure because of the risk of fruitless public debate and interrogation of officials as to unadopted positions and abandoned arguments".*
69. The Commissioner places weight on the fact that Coventry City Council intends to consult with the community and at that point, the public will have the opportunity to review, scrutinise and challenge the proposal during this consultation. The Commissioner considers that the public interest is served by the planned and considered release of relevant information at the point of consultation.

70. The Commissioner has considered the complainant's assertion that the relevant public authorities have failed to publish the information in time for public consultations on the local plans under the planning legislation. The Commissioner is unable to provide decisions on a public authority's compliance with legislation outside her remit, however, she does note that the complainant did not provide her with evidence of a breach of statutory timeframes for consultation and the council has set out that there is an intention to release information as part of a public consultation.
71. The Commissioner does not consider that the complainant has presented a persuasive rationale for the benefits of circumventing the usual planning processes in place by disclosing the information to the general public under the EIR at the time of his request.
72. In due course, the public will be consulted but it is important that the council be allowed thinking space in the meantime in order to carry out this work.
73. The Commissioner considers that following the publication of the council's decision and the passage of time, the public interest in maintaining the exception could decrease and eventually might not override the intrinsic public interest in disclosure. However, the Commissioner's decision must be based on the circumstances at the time of the request.
74. The Commissioner's view is that the council correctly determined that the public interest favoured maintaining the exception under regulation 12(4)(d).
75. The Commissioner does, however, note that as the request was made on 1 April 2016 and a response issued on 4 May 2016, the 22nd working day following receipt of the request, the council has breached regulation 14(2).

Regulation 4: Dissemination of environmental information

76. Regulation 4 of the EIR states:

(1) Subject to paragraph (3), a public authority shall in respect of environmental information that it holds-

- (a) progressively make the information available to the public by electronic means which are easily accessible; and*
- (b) take reasonable steps to organize the information relevant to its functions with a view to the active and systematic dissemination to the public of the information.*

- (2) *For the purposes of paragraph (1) the use of electronic means to make information available or to organize information shall not be required in relation to information collected before 1st January 2005 in non-electronic form.*
- (3) *Paragraph (1) shall not extend to making available or disseminating information which a public authority would be entitled to refuse to disclose under regulation 12.*
- (4) *The information under paragraph (1) shall include at least-*
- (a) *the information referred to in Article 7(2) of the Directive; and*
 - (b) *facts and analyses of facts which the public authority considers relevant and important in framing major environmental policy proposals. "*
77. The complainant set out that he considered that the Council had not fulfilled its obligation under regulation 4 to proactively publish environmental information.
78. The Commissioner has considered whether she has the jurisdiction to issue a decision requiring a public authority to make available information otherwise than in a response to a request for information.
79. The First-Tier Tribunal considered the Commissioner's jurisdiction to determine this issue in case EA/2016/0310³, Dr Thornton v The Information Commissioner. Paragraph 43 states:
80. *"FOIA section 50 (as applied to EIR by regulation 18) provides that a complaint may be made to the Information Commissioner if an information request is thought to have been dealt with in a manner that is inconsistent with the requester's right to have information disclosed on request. Clearly a complaint that voluntary publication has not been effected cannot, by definition, arise from an information request. It is of course open to the Information Commissioner to consider, under FOIA section 52, whether a public authority has complied with any of the requirements of Parts 2 and 3 of the EIR (which will include obligations to publish environmental information under regulation 4). And if that*

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2008/Thornton,%20Paul%20EA-2016-0310%20\(22.5.17\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2008/Thornton,%20Paul%20EA-2016-0310%20(22.5.17).pdf)

leads to the conclusion that the public authority is in default, an enforcement notice may be issued."

81. The Tribunal did not come to a conclusion regarding the Commissioner's jurisdiction, however, the above paragraph leads to the logical conclusion that a decision notice cannot be issued for a complaint which does not originate from a request for information.
82. The Commissioner has, however, considered whether it would be proportionate to open a separate investigation with a view to determining whether an enforcement notice is required.
83. The wording of regulation 4 and article 7(2)⁴ of the Directive appears to give discretion of when and, to a certain extent, what information should be published to the public authority that holds it.
84. The Commissioner notes that information has been made available by the relevant public authorities for the stages of the proposal that it has been decided will progress.
85. In the specific circumstances of this case, the Commissioner has no concerns regarding the Council's proactive publication and will not proceed any further with this complaint.
86. Commissioner's officers review each case and request relevant information upon allocation and the Commissioner does not consider it necessary for a complainant to request submissions from a public authority on her behalf.

Other matters

87. Following submitting a complaint to the Commissioner, the complainant wrote to the Council to ask it to provide the Commissioner with the withheld information and a submission regarding the Council's decision to withhold the requested information.
 88. The Commissioner appreciates that the complainant's intention was to be helpful and assist in resolving the case in a timely manner, however, she asks that complainant to refrain from this in future cases. The Commissioner's officers review each case and request relevant information upon allocation and the Commissioner does not consider it
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⁴ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003L0004>

necessary for a complainant to request submissions from a public authority on her behalf.

Right of appeal

89. 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

90. 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.

91. 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

Terna Waya
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