

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

Date: 16 October 2018

Public Authority: West of England Combined Authority
Address: 3 Rivergate
Temple Quay
Bristol
BS1 6ER

Decision (including any steps ordered)

1. The complainant has requested information relating to a proposed Garden Village near Buckover. West of England Combined Authority initially handled the request under the FOIA, disclosing some information and withholding some information under exemptions. During the Commissioner's investigation the public authority reconsidered the request under the EIR, disclosing some information and withholding other information under the exceptions for material in the course of completion (regulation 12(4)(d)) and internal communications (regulation 12(4)(e)).
2. The Commissioner's decision is that the West of England Combined Authority breached regulation 5(1) and regulation 14 of the EIR and that it correctly withheld information under regulation 12(4)(d) and regulation 12(4)(e).
3. The Commissioner does not require the public authority to take any steps.

Background

4. The council explained to the Commissioner that four local councils are jointly working with it to prepare a Joint Spatial Plan (JSP). The JSP will cover the four Unitary Authority areas of Bath & North East Somerset Council, Bristol City Council, North Somerset Council and South Gloucestershire Council. The JSP will provide a new strategic planning context for each of the West of England Authorities to 2036 and is the first of its kind in England and Wales.
5. The council confirmed that a draft JSP was prepared and published for 6 weeks public consultation on 22nd November 2017 and public consultation closed on 10th January 2018. Under the Planning rules this is called the '*Publication Plan*.' It is not however the actual final plan. This is because as many objections have been made to it through the public consultation, these will need to be resolved through a public examination.
6. The council explained that to commence the Examination phase of the JSP, the Plan needs to be what is termed 'submitted' to the Secretary of State. This was completed on 13th April. As part of this all the comments made to the previous draft plan (Publication stage) have been registered and the key issues raised identified and passed to the Inspector. This event triggers the start of the public examination phase of the plan's production. The examination will be undertaken by a planning inspector appointed by the Secretary of State. The appointed Inspector will consider all the issues for and against the JSP and its content, along with all the technical evidence that is provided to the Examination by all parties (the West of England Authorities, supporters and objectors). Where needed the Inspector will invite parties to attend the Examination and give their response to any questions the inspector has.
7. The Inspector will report back to the West of England Authorities, identifying any proposed amendments to the plan which are required. Once satisfied that the plan meets all planning requirements and laws, the West of England Authorities will each then take a formal decision to adopt the plan giving it statutory status. This process is expected to be completed during 2019.
8. The council confirmed that, whilst as an authority, it is not a party to the JSP, it is central to its development and management. The council's geographical area includes Bristol City Council, Bath and North East Somerset Council and South Gloucestershire Council. The council's constitution includes a Joint Committee, this Joint Committee is

constituted of Bristol City Council, Bath and North East Somerset Council, South Gloucestershire Council and North Somerset Council. Collectively these parties are the parties to the JSP and have agreed as evidenced by the council's constitution that its development will be managed through the Joint Committee. As a result, the council has confirmed that it is in integral part of the JSP.

9. In relation to the specific focus of the request, the council confirmed that it has no decision making 'powers' in relation to the Buckover development.

Request and response

10. On 12 November 2017, the complainant wrote to West of England Combined Authority (the "council") and requested information in the following terms:

"1. Please supply copies of all minutes and supporting documents that mention the proposed Garden Village at Buckover from meetings attended by the Mayor or his staff between the 8th May 2017 and 11th November 2017

2. Please supply copies of all emails sent to or from the office of the Mayor (ie the Mayor and/or his staff) between 8th May 2017 and 11th November 2017 that mention the proposed Garden Village at Buckover.

11. The council responded on 8 December 2017. It disclosed some information and stated that it was withholding other information under the FOIA exemptions for information intended for future publication (section 22), prejudice to the effective conduct of public affairs (section 36), personal data (section 40) and information provided in confidence (section 41).
12. Following an internal review the council wrote to the complainant on 31 January 2018. It stated that it was maintaining its position.

Scope of the case

13. On 13 April 2018 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
14. Due to the nature of the request it occurred to the Commissioner that the information might constitute environmental information and fall to be considered under the EIR rather than the FOIA. She, therefore

invited the council to reconsider the request under the EIR. The council agreed to do this and disclosed additional information to the complainant, withholding other information under the exceptions for material in the course of completion (regulation 12(4)(d)) and internal communications (regulation 12(4)(e)).

15. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly applied exceptions to withhold the requested information.

Reasons for decision

Regulation 5 – Is it Environmental Information?

16. During the course of her investigation the Commissioner advised the council that she considered the requested information fell to be considered under the EIR. The Commissioner has set down below her reasoning in this matter.
17. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant part of the definition are found in 2(1)(a) to (c) which state that it is as any information in any material form on:
 - '(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment 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...'*
18. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.

19. In this case the withheld information relates to the use of and development of land. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information Tribunal in the case of *Kirkaldie v IC and Thanet District Council* (EA/2006/001) ("Kirkaldie").
20. In view of this, the Commissioner has concluded that the council wrongly handled the request under the FOIA and breached regulation 5(1) of the EIR. As the council corrected this during her investigation, the Commissioner does not require the council to take any steps in this regard.

Regulation 14 - refusal notice

21. In the circumstances of this case the Commissioner has found that although the council originally considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore where the procedural requirements of the two pieces of legislation differ it is inevitable that the council will have failed to comply with the provisions of the EIR.
22. In these circumstances the Commissioner believes that it is appropriate to find that the council breached regulation 14(1) of EIR which requires that a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the council issued (and indeed its internal review) failed to cite any exception contained within the EIR as the council actually dealt with the request under FOIA.
23. Since the council has subsequently addressed this failing the Commissioner does not require it to take any steps in this regard.

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

24. Regulation 12(4)(d) of EIR 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.
25. 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.
26. For regulation 12(4)(d) to be engaged, the requested information must fall within one of the categories specified in the exception. It is not necessary to show that disclosure would have a particular adverse effect but any adverse effects of disclosure may be relevant to the public interest test.
 27. The council confirmed that it considered that the withheld information constitutes information in "the course of completion" or "unfinished" information.
 28. Amongst the withheld information, the council identified specific documents that will be published as part of the body of evidence in preparation for the Examination in Public (EiP) as information in the course of completion. Included amongst the information is correspondence between the council and other constituent authorities that are party to the JSP.
 29. The council also withheld information consisting of draft evidence bases and policies falling into the category of unfinished information, which will evolve into the final wording which will be published as part of the EiP.
 30. The Commissioner is satisfied that the withheld information relates to the production of the JSP and that at the time of the request, these issues were still "live" and therefore the withheld information relates to material which is still in the course of completion and unfinished.
 31. The Commissioner therefore considers that regulation 12(4)(d) is engaged. As the regulations under the EIR are all subject to the public interest test, the Commissioner will go on to consider whether, in all the circumstances in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

Public interest in favour of maintaining the exception

32. The council confirmed that the withheld information relates directly to the ongoing preparation for the JSP. It explained that the information will form the basis of technical work to be undertaken by the authorities in preparation for the EiP. It stated that the information, therefore, remains "live".
33. The council explained that the information contains extracts of policies in draft and unfinished form. It stated that these policies will be subject to an independent examination and, only if they are deemed sound by the

Inspector will they be capable of being formally adopted by the authorities. The council explained that disclosure of the information would create unnecessary and unreasonable interference with the ability of the council and other authorities to prepare for the EiP, where the policies will be robustly tested.

34. The council further argued that disclosure at this time would have a significant and detrimental impact on the authorities, in so far as it would remove the "safe space" enabling officers to develop policy in a way that is unconstrained and not subject to undue hindrance. The council confirmed that the JSP remains a live and contentious issue and the evidence base relating to policy decisions will continue to be developed. The council has argued that disclosure of the information at this time will remove the safe space required to develop policy and would fundamentally damage the ability of the authorities to progress the matter, resulting in a less robust defence of the proposals at the EiP. The council considers that this would be contrary to the wider public interest.
35. The council has argued that the complainant, who has concerns about the proposed development at Buckover, can, along with other objectors, make their representations to the Inspector. It considers that the public interest in scrutinising and holding the council to account is, therefore, served by the EiP process.

Public interest in disclosing the information

36. The complainant confirmed that they belong to a residents' group called TRAPP'D (Thornbury Residents Against Poorly Planned Developments) which has been campaigning against speculative planning applications by housing developers.
37. The complainant has stated:

"...one of the biggest developments in the West of England was proposed for Buckover - a small hamlet on the edge of Thornbury. It was marketed as a "Garden Village" and sought financial backing from the Housing Ministry. This was refused but the proposal found favour with South Gloucestershire Council. The local MP, Luke Hall is against it as are the vast majority of Thornbury residents. The current Metro Mayor, Tim Bowles, was also against it saying in his electoral campaign that, if elected, he would "stop Buckover". He was subsequently elected as Metro Mayor and found out he had no powers to prevent Buckover from proceeding! He refused to resign but that is another matter. The Buckover plan was included in the West of England Joint Spatial Plan."

38. The complainant has argued that it is "*...of course of great local interest what the WECA is doing about Buckover - 3,000 new homes on a green field site with little or no current infrastructure to support it. A new junction on the M5 might be needed as well as upgraded road and rail links.*"
39. The Commissioner acknowledges that there is a general public interest in transparency and accountability and a specific public interest in facilitating public scrutiny in relation to the proposed significant local development.

Balance of the public interest

40. The Commissioner has considered the public interest arguments from both parties, including the public interest in transparency
41. The Commissioner accepts that there is always a general public interest in disclosing environmental information. She also considers that there may be an argument for informing public debate on the particular environmental issue that is the focus of the request.
42. The Commissioner understands that, given the impact that the JSP may have on the local community, the strength of the public interest in transparency and accountability in this case cannot be underestimated.
43. However, the Commissioner is of the view that equally, there are strong public interest arguments in favour of the non-disclosure of the relevant information.
44. In its explanation to the Commissioner about why regulation 12(4)(d) is engaged, she notes that the council has referred to the need for space for officers to be able to engage with colleagues. She considers that this argument is also relevant when considering the public interest.
45. The Commissioner considers that arguments about the need for space for officers to be able to engage with others are considered to be 'safe space' arguments. The term 'safe space' is about the need to be able to formulate policy, debate live issues and reach decisions without being hindered by external comments and/or media involvement. Whilst part of the reason for needing a safe space is to allow for free and frank debate, it is the Commissioner's view that the need for a safe space exists regardless of any impact that the disclosure of information may have on this. The Commissioner considers the 'safe space' argument to be about protecting the integrity of the decision-making process and whether it carries any significant weight will depend on the timing of the request.

46. With regard to SGC's argument that a safe space is needed to determine the final form of the model required and be able to engage with colleagues during the development stages, in the knowledge that they can express their views without the threat of their formative views being published, the Commissioner considers that this is reasonable. She considers that officers should be able to develop their ideas in the knowledge that they have the space to do so, whilst the process is still ongoing.
47. The Commissioner's view is that if the relevant information was disclosed in response to the request, there was a realistic prospect that it would interfere with the decision-making process regarding the ongoing preparation of the JSP.
48. In this case, the Commissioner is sympathetic to the complainant's concerns regarding the impact of the proposed development and why they believe it is in the public interest to disclose the requested information. She also notes the complainant's point that the proposed development had met with local opposition. Additionally, the Commissioner notes the council's explanation during her investigation that objections would be addressed via the EiP.
49. The Commissioner has considered the timing of the request and notes that the process is governed by statute and information has to be disclosed by way of public consultations and, in the case of the EiP, through hearings. She considers that this, along with the information already made available to the public goes some way to satisfying the public interest. The Commissioner would not want to undermine the JSP or the statute which governs its preparation.
50. The Commissioner therefore takes the view that the mechanisms in place allow for information to be made available at the various stages of the JSP and that this provides transparency and openness.
51. Additionally, the Commissioner considers that the formulation of the JSP is a continuous process and throughout the various stages of development, is subject to change. She notes that any interested parties have been given the opportunity to comment on the JSP and will continue to be able to do so and anybody who opposes it will be able to address the inspector at the EiP. The Commissioner is also aware that planning applications are subject to a statutory process.
52. The Commissioner also considers that at a later stage the inspector may decide that some of the information should be made available for consideration as part of the JSP process. However, she has to consider the circumstances at the time of the request and the rights of access under the EIR.

53. Taking everything into account, the Commissioner is not persuaded in this case that the arguments put forward for disclosure under the EIR are sufficient to circumvent the formal process under which the JSP is governed, at this stage.
54. In reaching a decision in this matter the Commissioner has referred to another recent decision notice issued in relation to a request for comparable information about the JSP¹. In that instance the Commissioner found that the public authority had correctly withheld the information because of the live nature of the JSP process. She finds that this decision is transposable to the facts of this case.
55. The Commissioner is therefore satisfied that regulation 12(4)(d) has been applied appropriately in this case and that the public interest in maintaining the exception outweighs the public interest in disclosure.

Regulation 12(4)(e) – internal communications

56. Regulation 12(4)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.
57. The first question to consider is whether the information is a 'communication' for the purposes of the EIR.
58. The Commissioner considers that a communication will encompass any information someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others may consult it.
59. Having examined the withheld information, the Commissioner is satisfied that the council has applied regulation 12(4)(e) to information that can properly be characterised as a communication for the purpose of the this exception.
60. In this case the information which the council has withheld in reliance of regulation 12(4)(e) constitutes internal emails sent between officers of the council. The Commissioner is therefore satisfied that the information constitutes 'internal communications' and that regulation 12(4)(e) is engaged. The council also applied the exception to email exchanges

¹ South Gloucestershire Council, decision notice issued 18 July 2018:
<https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2259474/fer0715540.pdf>

between council officers and officers of constituent authorities of WECA. As she has already found (above) that this latter information is excepted under regulation 12(4)(d) the Commissioner has not considered whether regulation 12(4)(e) has been correctly applied.

61. Where regulation 12(4)(e) is engaged, it is subject to a public interest test required by regulation 12(1). The test is whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Public interest in disclosing the information

62. The Commissioner considers that the principal public interest favouring the disclosure of withheld information relates to the requirement that planning decisions should be open and transparent. This is particularly the case where those decisions affect an entire community.
63. In the Commissioner's opinion, planning decisions and the process leading to those decisions should be as open and transparent as possible and ideally all parties should be fully informed about the issues considered by the council.
64. The Commissioner considers that the public should be satisfied that decisions are justified and disclosing the reasoning which lies behind decisions would provide this reassurance. The Commissioner believes that disclosure of publicly held and relevant information would assist the public's understanding of the issues considered by the council and they would be more inclined to actively participate in the decision making process.

Public interest in maintaining the exception

65. The council has argued that considerable information relating to the inclusion of Buckover Garden Village as a Strategic Development Location (SDL) within the JSP has been placed in the public domain.
66. It has further argued that the development of the JSP is undertaken in the wider public interest and it transcends the individual boundaries of each authority or, in this case, the boundaries of a specific SDL. The council considers that disclosing internal communications at this time risks the ongoing development of ideas and policies at a critical time in the process.

67. The council directed the Commissioner to a previous decision notice issued in relation to the subject matter (referenced above) and confirmed that it considered that the safe space arguments accepted in that instance are equally applicable in this case².
68. The council further argued that disclosing the information would inhibit its ability to share ideas and consider options in relation to the JSP. It considers that there is a real possibility that disclosure would have a chilling effect, restricting officers' ability and willingness to express developing ideas or to present challenging views. The council has argued that this would result in poorer decision making, something which is clearly not in the public interest.

Balance of the public interest

69. The Commissioner accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction.
70. The need for a safe space will be strongest when the issue is still live. Once a public authority has made a decision, a safe space for deliberation will no longer be required and the argument will carry little weight. The timing of the request will therefore be an important factor. This was confirmed by the Information Tribunal in *DBERR v Information Commissioner and Friends of the Earth (EA/2007/0072, 29 April 2008)*:
- "This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public."*
71. In this case the JSP process is live and ongoing and the Commissioner, therefore, considers that disclosure would have a direct impact on the council's ability to make decisions away from public scrutiny and interference. She acknowledges that, whilst public concerns about the JSP are real and carry their own weighting, the JSP process and the planning process provide remedies for these concerns.
72. Public authorities often argue that disclosure of internal discussions would inhibit free and frank discussions in the future, and that the loss

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2259474/fer0715540.pdf>

of frankness and candour would damage the quality of advice and lead to poorer decision making. This is known as the chilling effect.

73. If the issue in question is still live, arguments about a chilling effect on those ongoing internal discussions are likely to carry significant weight. Arguments about a chilling effect on closely related live discussions may also carry weight. In this instance, the Commissioner notes that the JSP process is live and disclosing internal communications would, therefore, directly impact on internal discussions, resulting in inhibited decision making.
74. In addition to the specific safe space and chilling effect considerations in this case the Commissioner considers that, as with her deliberations under regulation 12(4)(d), the South Gloucestershire Council decision notice (issued 18 July 2018) cited by the council features comparable and directly relevant information and context and that the decision reached in that case is transferable to the facts of this case³.
75. The Commissioner considers that the disclosure of the withheld internal communications would reduce the safe thinking space which the council had when it received the request. In the Commissioner's opinion, disclosure would have a detrimental effect on the council's decision making process, and consequently it would result in its officers providing decision makers with less full and frank advice.
76. The Commissioner is mindful that the information relates to matters which are of significant concern to the local community, however, she notes that the JSP process provides a mechanism for the public to challenge and scrutinise the council's decision making.
77. On balance, the Commissioner has decided that greater weight has to be given to those factors which favour withholding the internal communications. She is particularly persuaded by the need for council officers to operate in a 'safe space' where they can deliberate on potentially controversial issues. The Commissioner recognises the real danger of a 'chilling effect' caused by the disclosure of internal communications and the negative potential of this in respect of future planning issues and decisions.

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2259474/fer0715540.pdf>

78. The Commissioner has decided that the public interest lies in maintaining the exception in this instance and that the council is entitled to rely on regulation 12(4)(e) to withhold its internal communications.

Right of appeal

79. 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

80. 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.
81. 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
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