

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 6 October 2020

Public Authority: Essex County Council

Address: County Hall
Market Road
Chelmsford
CM1 1QH

Decision (including any steps ordered)

1. The complainant has requested information about proposed road modifications to the M25 junction 26 approaches. The Council disclosed some information but withheld the remainder citing the following regulations of the EIR: 12(5)(d) – confidentiality of proceedings; and 12(4)d – material in the course of completion.
2. The Commissioner's decision is that Essex County Council has incorrectly applied regulations 12(5)d to the withheld information. For regulation 12(4)d the regulation is engaged, but the public interest favours disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Disclose the 'concept' drawing concerning the proposed modifications to the M25 junction 26 approaches.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 4 November 2019 the complainant wrote to Essex County Council and requested information in the following terms:

'Question 1 - Proposed road modifications to the A121 Honey Lane / Dowding Way (in particular works to the M25 junction 26 approaches) - please provide all information held including drawings / layouts / emails / meeting minutes (including email of 26 December 2018).

Question 2 - Please provide data held by ECC to quantify number of HGVs currently passing through A121 Honey Lane / Dowding way junction (by M25) and any data available to quantify estimated future changes (+/-) in HGV traffic at this junction.

Question 3 - Please provide data held by ECC to quantify number of road traffic collisions on A121 Dowding Way.

Question 4 - Please provide data held by ECC in relation to dates and costs of repairs and maintenance to A121 Dowding Way.'

6. On 20 December 2019 the Council responded. It provided some information within the scope of the request but refused to provide the remainder citing the following exceptions as its basis for doing so: regulation 13(2) – third party personal data and regulation 12(5)(d) – confidentiality of proceedings.
7. The complainant requested an internal review on 14 January 2020, challenging the use of regulation 13(2) as he did not consider the withheld information, which was a drawing, to constitute personal data. The Council sent the outcome of its internal review on 20 February 2020, clarifying that it was regulation 12(5)d that had been applied to the drawing, not regulation 13(2), and that the withheld personal data had been redacted from the information already supplied to him. The Council upheld its application of 12(5)d to the drawing.

Scope of the case

8. The complainant contacted the Commissioner on 24 February 2020 to complain about the way his request for information had been handled. He did not consider that the application of regulation 12(5)d applied simply because the drawing was draft. The complainant did not challenge the Council's application of regulation 13(2).

9. During the course of the investigation, the Council also applied regulation 12(4)d – material in the course of completion, to the withheld drawing. The Commissioner considers the scope of the case to be whether the Council is correct in its engagement of regulations 12(5)d and 12(4)d and if so, whether the public interest in maintaining the exceptions outweighs the public interest in disclosure.

Reasons for decision

Regulation 12(5)d – Confidentiality of Proceedings

10. Regulation 12(5)d of the EIR states that

'For the purposes of paragraph (1)(a) a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law'

11. There is no definition in the regulations as to what exactly this covers, but the Commissioner has issued guidance to assist public authorities in determining when the exception might apply. For the regulation to be engaged, a three stage test must be met:
- Are the proceedings presented by the authority legitimate?
 - Is the confidentiality of those proceedings provided by law?
 - Would disclosing the information adversely affect that confidentiality?
12. The Commissioner considers that 'proceedings' implies a level of formality and may include formal meetings that considers matters within the authority's jurisdiction, situations where an authority is exercising its statutory decision making powers, and official legal proceedings.
13. The Commissioner does not consider that all meetings or activities, just because they are deemed formal, would be covered by the regulation. The fact the proceedings must be covered by a confidentiality of law not only supports the formality of those proceedings, but also requires that they are subject to either statute or common law that imposes a necessary confidence. It is important to note that the regulation protects the confidentiality of the proceedings, not the confidentiality of the information.

14. The Council has applied the regulation to a drawing falling within the scope of question 1 – proposed road modification. It has explained that The Planning and Compulsory Purchase Act 2004 requires each Local Planning Authority to identify their strategic priorities and have policies to address these issues in the preparation of their development plan documents, namely the Local Plan.
15. The Council states that in preparing a Local Plan the local authority is required to co-operate and engage on strategic matters as an ongoing process, including the preparation of an evidence base, through the 'Duty to Co-operate'. This includes matters such as the provision of new housing, jobs, and infrastructure, including highways. Essex County Council is a 'relevant' Duty to Co-operate body whom the local planning authority (in this case the District Council) is required to involve in plan preparation and implementation. The Council has been asked to consider possible transport schemes, and in this case it has worked to develop a potential junction improvement as a means of relieving identified transport network issues affecting the local area. The withheld drawing concerns this junction improvement. The Council has referenced decision notice FER0724150 where the Commissioner determined that the formalisation of a Local Plan concerns an Authority exercising its statutory decision-making powers and therefore relates to 'formal proceedings'.
16. The Commissioner therefore accepts that preparation of the Local Plan, of which the junction modification forms a part, constitutes proceedings, and therefore the first part of the test is met.
17. The next part of the test to consider is whether the confidentiality of the proceedings is provided by law. If there is no specific statutory restriction on disclosure, then proceedings may be protected by what is called a 'common law' duty of confidence. For this to apply, there must be a clear and reasonable expectation that the information would not be disclosed, and it must not be trivial or already in the public domain.
18. The Council has explained that as part of the process of preparing and progressing highways schemes an options appraisal will be undertaken to consider a range of ideas, some with or without merit, to then be discounted, amended or refined as discussions / work continue as to the feasibility / viability of those proposals when considered against the Local Plan requirements. An idea or concept is different from an approved scheme and the process in approving an idea as a technical scheme is subject to many factors including viability, cost, deliverability, and ability to meet requirements. Such concepts are not required to be placed in the public domain by planning legislation. These documents have informed planning policy and have assisted in identifying proposals and schemes to accommodate the planned growth in the Local Plan. The

Plan is presently at examination stage and following hearing sessions the Inspector has issued her Interim Findings, which require Epping Forest District Council to undertake additional work to make the plan 'sound'.

19. Once any supporting technical studies/reports have been signed off by relevant parties that are to be relied upon for purposes of justifying the Local Plan proposals, they become part of the evidence base and are required by regulation 26 of The Town and Country Planning (Local Planning) (England) Regulations 2012 to be placed on the Local Plan Examination website, and available for participants in hearings, and the general public. In this way, there is a clear, established, and managed process for the production, refinement, and dissemination of evidence documents, reflecting the status of that evidence throughout the stages of its development and completion. In other words, such information is shared publicly when the law denotes it is possible, appropriate and most helpful to do so. This process has already been communicated to the requestor. As the junction improvement has not yet been formally agreed, it is not at the stage where it can be shared publicly.
20. The complainant does not consider that the exemption applies as the document has already been made publicly available on both the District Council's planning portal and the its Local Plan website. The Commissioner has located the drawing on both of these websites. The Commissioner notes that the drawing varies slightly from that withheld by the Council, but considers this a result of the use of the drawing by different organisations. Significantly, the drawing has the same name, save for the word 'draft' (and this is actually used on the publicly available version, not the withheld version). In summary, the withheld document is already in the public domain.
21. However, the regulation protects the confidentiality of the proceedings and not the information itself, and so availability of the drawing elsewhere does not in automatically invalidate the Council's position, especially as documents and information made publicly available as part of the Local Plan will be released in stages.
22. The complainant made his request for information on 4 November 2019. The Council disclosed an email chain dated 26 December 2018 as referenced by the complainant, but withheld the drawing referred to therein. The email requested that the drawing be kept confidential. The document containing the drawing on the planning portal was posted on 31 October 2019. The drawing on the Local Plan website is contained within a document submitted as part of the Hearing Sessions held between February and June 2019. Both these pre-date the complainant's request.

23. The Commissioner notes that the development of the Local Plan includes proceedings and consultation that are open to the public at various stages of the process. The process is not wholly confidential until the plan is finalised; indeed the development of the Local Plan is in itself built on a process which invites representation and discussion involving delivery partners and the public. Whilst parts of the process may be deemed confidential at particular points, this will change as the plan develops. This Commissioner considers this to be the case here. The withheld drawing formed part of a process that occurred in December 2018. However, the drawing was then used by other parties as part of at least one publicly available planning application and made publicly available by Epping Forest District Council on its Local Plan website. Both occurred before the request was made. The Hearing Sessions that the Council itself refers to as part of the Local Plan development and approval process include the drawing, which also predate the request.
24. As a result of these factors she does not accept that at the time of the request, the confidentiality of proceedings required in the development of the Local Plan applied and therefore the exception is not engaged. Consequently, she does not need to consider any adversity of confidence in disclosure, or the public interest test.

Regulation 12(4)(d) - material which is still in the course of completion, unfinished documents or incomplete data

25. Regulation 12(4)(d) states 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, unfinished documents, or to incomplete data.'

26. The exception is class-based, which means that it is engaged if the information in question falls into one of the three categories. It is not necessary to show that disclosure would have any particular adverse effect in order to engage the exception.
27. However, if engaged, the public authority must consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
28. The fact that the exception refers both to material in the course of completion and to unfinished documents implies that these terms are not necessarily synonymous. While a particular document may itself be finished, it may be part of material which is still in the course of completion.
29. The Council has applied the exception to the same drawing it has applied regulation 12(5)d.

30. At the time of the request, although the drawing was already publicly available, the Commissioner has not seen any formal agreement of the proposed junction modifications. She has seen reference to it in several documents which show support, but this does not constitute final approval. She therefore accepts that the drawing falls within the scope of 'material in the course of completion', and 'unfinished document'.
31. Satisfied that regulation 12(4)(d) is engaged for the drawing, the Commissioner now turns to the public interest test. A public authority must consider, in all the circumstances of the case, whether the public interest in maintaining the exception outweighs the public interest in disclosure. When assessing this, the public authority must apply a presumption in favour of disclosure.
32. The EIR implements the EU Directive 2003/4/EC on public access to environmental information. The public interest in disclosure is emphasised in the preamble to the directive:

"Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment."
33. The Directive derives from the 'Convention on Access to Information, Public Participation' in Decision-Making and Access to Justice in Environmental Matters', known more commonly as the Aarhus Convention. The Objective of the Convention is that:

"In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and wellbeing, each Party shall guarantee the rights of access to information ... in accordance with the provisions of this Convention."
34. It is therefore clear that there is a strong, general interest in the disclosure of environmental information to promote public participation in decision-making and facilitate better living environments. There are also other aspects of public interest in transparency, accountability, integrity and value for money that are promoted through the disclosure of information by public authorities. However, this must be considered in the context of what the exception is protecting, in this case a safe thinking space for public authorities to debate and make decisions.
35. The Council's public interest arguments have been provided for regulation 12(5)d, but the Commissioner also considers them to be

(more so) relevant for its application of 12(4)d and so presents them here.

36. The Council has described the withheld drawing as 'concept' and 'work in progress'. It has explained that the adoption of the Local Plan is a statutory process set out in planning legislation and that it is:

'necessary for public authorities to be able to explore, develop and test concepts and ideas through a managed process, and to discuss them openly and frankly internally, with public scrutiny provided for by formal public consultation processes at a prescribed time.'

37. It goes on to say that

'disclosure of drafts or drawings prior to the public consultation period would be likely to inhibit planners from drafting a wide range of options, some of which may be perceived to be unpopular with some residents or businesses leading to challenges for the public authority who drafted them. Any resulting complaints or challenges would remove focus from other core services. Given that we are not the lead planning authority for this initiative, and no decisions or approvals have been made, we would likely be unable to resolve any issues raised due to premature disclosure of conceptual information.'

and

'The impact of providing an unfinished drawing prior to an approval or completion would create confusion and be misleading for external parties, potentially cause blight, and undermine the Local Plan process. The term 'blight' in a planning context refers to where the negative impacts of proposed / planned / potential developments affecting property in the vicinity (such as the need to acquire or demolish such property or adverse effects on someone's living environment, e.g. as a result of a new major road or junction being constructed in close proximity) might occur through proposals being considered but in practice that development / proposal is not or may not be actually going to proceed anyway. Emerging evidence work that has not been completed and signed off (as in the case of the information requested here) may not yet be able to soundly and justifiably support a Local Plan and is therefore premature to publish. Again, confusion, misunderstandings, concern among affected parties and unnecessary conflict between parties are likely to arise as a result. All those things would undermine a Local Plan preparation process. It is therefore not appropriate to provide conceptual ideas with no footing unless the approval has been completed through the formal mechanism.'

38. The Council recognises that there will be public interest in any development in a locality and acknowledges residents and businesses will be concerned about any adverse impacts on their properties, the local landscape, the community, and the environment. More generally, the Council accepts the natural public interest that disclosure would have on efficiency and effectiveness in complying with planning legislation and policy; transparency on spending and decision making processes; and informing public debate on changes affecting businesses and the environment.
39. The complainant considers that as the drawing was already publicly available at the time of the request, that there can be no public interest in withholding the drawing.
40. The Commissioner understands the Council's arguments in principle but is not convinced when considered in the context of the withheld drawing, largely because it was already publicly available at the time of the request and so the anticipated harm caused by its disclosure under this request is extremely unlikely to happen. Combined with the presumption of disclosure under regulation 12(2) of the EIR, the Commissioner determines that the public interest in disclosure of the information outweighs the public interest in maintaining the exception.

Right of appeal

41. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

42. 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.
43. 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
Head of FOI Complaints and Appeals
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF