

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 8 January 2020

Public Authority: Coventry City Council
Address: The Council House
Earl Street
Coventry
CV1 5RR

Decision (including any steps ordered)

1. The complainant has requested information relating to air quality plans relating to the City of Coventry. The council refused the request on the basis that Regulation 12(4)(d) applied (unfinished documents or incomplete material). It also refused part of the request on the basis that Regulation 12(4)(b) applied.
2. The Commissioner's decision is that the council was correct to apply Regulation 12(4)(b) and 12(4)(d) to the information, and that the public interest rests within the exceptions being maintained. However, she has also decided that the council did not comply with the requirements of Regulation 5(2) in that it did not provide the requested information which it did provide within 20 working days.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 15 July 2018 the complainant wrote to the council and requested information in the following terms:

"The scrutiny committee no3 agenda and notes for 11 July, mentions further documents. Can I please see all of them plus any others relevant to air quality? These include, but are not restricted to:

the strategic outline case, including the assumptions made.

the evolving evidence base - including all of the relevant data.

feedback from Jaqu

a wide ranging list of options - can I please see a full explanation of the options.

a multi criteria analysis

any correspondence with Jaqu"

5. The council responded on 18 June 2018. It said that the information was exempt as Regulation 12(4)(d) applied (unfinished documents or incomplete information).
6. Following an internal review the council wrote to the complainant on 27 September 2018.
 - It applied Regulation 12(4)(d) to withhold its 'evolving evidence base'.
 - It applied Regulation 12(5)(f)(iii) (interests of the person who provided the information) to the request for feedback from JAQU.
 - It applied Regulation 12(4)(b) (manifestly unreasonable) to the request for 'any correspondence with JAQU'. It said however that the majority of the relevant information relating to air quality which falls within the scope of this part of the request was contained in the Strategic Outline Case and in the detailed monitoring information and argued that this information had already been disclosed.
 - It also said that: "*The final policies will also be published, including the rationale in identifying it. However we believe that at this stage the day to day correspondence with JAQU whilst drafting this is not environmental information.*"
7. Following an internal review the council wrote the complainant on 27 September 2018:
 - It continued to apply Regulation 12(5)(f)(iii) to the feedback it had received from JAQU
 - It continued to apply Regulation 12(4)(b) to the request for any correspondence with JAQU.

- It continued to rely upon Regulation 12(4)(d) as regards its evidence base, although it did not specifically state this point in its response.
8. On 16 October 2018 the council disclosed the feedback from JAQU to the complainant, having obtained consent from JAQU to disclose the information. It therefore no longer sought to rely upon Regulation 12(5)(f)(iii). Although the complainant disputes that he has received this, he did forward to the Commissioner a letter from DEFRA to the council dated 18 May 2018 which constitutes the feedback which DEFRA provided following the council's submission of the strategic outline case.
 9. On 5 December 2018 it disclosed a copy of its options appraisal package. This also responded to the request for the 'wide ranging list of options'

Scope of the case

10. The complainant contacted the Commissioner on 3 January 2019 to complain about the way his request for information had been handled.
11. He argues that the council is not correct to:
 - continue to rely upon Regulation 12(4)(d) to withhold the information forming its 'evidence base'.
 - continue to apply Regulation 12(4)(b) to the request for any correspondence with JAQU
12. The complainant also had other concerns regarding a further 'clarification' request he had sent to the council on 16 October 2019, however the council had considered this to be a separate request, and dealt with it accordingly. The complainant agreed to this request being dealt with separately and so this is not considered further within this decision notice.

Reasons for decision

Regulation 12(4)(b)

13. Regulation of the EIR 12(4)(b) provides that

"(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

(b) the request for information is manifestly unreasonable;"

14. The council's position is that the request for its correspondence with JAQU is manifestly unreasonable on the grounds that to comply with it would impose a significant and detrimental burden on the council's resources in terms of its officer time and cost.
15. Regulation 12(4)(b) of the EIR is designed to protect public authorities from exposure to a disproportionate burden or an unjustified level of distress, disruption or irritation in handling information requests. In effect, it works in similar regards to two exemptions within the Freedom of Information Act 2000 ('FOIA'): section 12, where the cost of complying with a request exceeds the appropriate limit and section 14, where a request is vexatious.
16. The EIR differ from the FOIA in that there is no specific limit set for the amount of work required by an authority to respond to a request, as that provided by section 12 of the FOIA.
17. Specifically, the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 20041 ('the Fees Regulations') which apply in relation to section 12 of the FOIA are not directly relevant to the EIR - the cost limit and hourly rate set by the Fees Regulations do not apply in relation to environmental information. However, the Commissioner accepts that the Fees Regulations provide a useful starting point where the reason for citing Regulation 12(4)(b) is the time and cost of a request, but they are not a determining factor in assessing whether the exception applies.
18. The Fees Regulations confirm that the costs associated with these activities should be worked out at a standard rate of £25 per hour per person. For local authorities, the appropriate limit is set at £450, which is the equivalent of 18 hours work.
19. The Commissioner is satisfied that Regulation 12(4)(b) sets a fairly robust test for an authority to pass before it is no longer under a duty to respond. The test set by the EIR is that the request is 'manifestly' unreasonable, rather than simply being 'unreasonable' per se. The Commissioner considers that the term 'manifestly' means that there must be an obvious or clear quality to the identified unreasonableness.
20. It should also be noted that public authorities may be required to accept a greater burden in providing environmental information than other information.
21. Therefore, in assessing whether the cost or burden of dealing with a request is clearly or obviously unreasonable, the Commissioner will take the following factors into account:

- proportionality of the burden on the public authority's workload, taking into consideration the size of the public authority and the resources available to it, including the extent to which the public authority would be distracted from delivering other services;
 - the nature of the request and any wider value in the requested information being made publicly available;
 - the importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue;
 - the context in which the request is made, which may include the burden of responding to other requests on the same subject from the same requester;
 - the presumption in favour of disclosure under Regulation 12(2);
 - the requirement to interpret the exceptions restrictively.
22. The council has provided the Commissioner with its reasons for applying the exception to disclosure provided by Regulation 12(4)(b).
23. It said that it was unable to estimate the total time or cost which it would take to respond to this part of the request because it is not able to estimate the volume of data that may be retrieved in a search based upon a request for 'any' correspondence with JAQU. It argued that this was such a wide ranging request this would inevitably result in a large volume of information being caught within its searches.
24. It said that the only way to search for 'any' correspondence would be to conduct a full search of databases, emails, system records/platforms and all other drives in the council.
25. It argued that locating and retrieving such correspondence would require searches of individuals' email accounts, which, depending on the parameters used for the search, could potentially return a very high level of information, not all of which would necessarily relate to this particular issue. These would then have to be manually checked to determine whether they were relevant to the request.
26. It said that it estimated that around 100 to 200 people will have been involved in such correspondence within the council itself, and potentially a similar number working for the Council as seconded or contracted staff working for its consultants.

27. It said that, to put its argument into perspective, one member of the relevant service area currently has approximately 900 emails that reference JAQU. It said however that this figure does not include any e-mails that have been filed on the server and deleted from current e-mail folders on outlook. It therefore considers that the 900 figure, for that one individual, is a conservative figure, at the lower end of the spectrum than an ICT search would be expected to return.
28. It said that not all e-mails that would be identified are actual correspondence with JAQU, but may simply refer to JAQU in the context of an e-mail exchange between Council employees and consultants. Therefore, each e-mail would need to be checked to assess whether it constitutes correspondence with JAQU, as opposed to simply referencing JAQU as part of an internal discussion.
29. Further, when extrapolating the above information, this would suggest that a search would involve up to 200 council staff and would cover a minimum of 100,000 e-mails, assuming that emails that go to multiple e-mail addresses would be flagged up in a search under each individual address.
30. In addition, any emails between council staff and a third party may not be capable of release without the email recipient party's consent. It also considers that any correspondence from JAQU would also need JAQU's consent before it could be disclosed.

The complainant's position

31. The complainant he questioned the application of Regulation 12(4)(b) insofar as the estimate of the council is concerned, He argues that *"it is my view that the searches could be carried out straightforwardly in outlook, - using key words and names - as the names of correspondents will be known and there will not be a great number of them"*.
32. He considers that the importance and value of the requested information should outweigh the burden which would be placed on the council in carrying to the above searches and responding to this request.
33. He points out that: *"The council had failed to deal with it's legal obligation to remedy air quality for a very long time. In their 2007 AQAP they promised to meet EU AIR QUAL limits by 2005. The public urgently needs to understand their failure. Even now they are stoutly resisting a Clean air zone even though far more people in Coventry die from dirty air than from road crashes (168/yr from bad air 16/ yr from traffic deaths - figures from public health England)"*.

Is the exception engaged?

34. The Commissioner has no basis upon which to dispute the council's assessment of the volume of information held and the associated estimate it has provided regarding the burden of responding to the request. Whilst she notes the complainant's argument that the searches could be carried out fairly simply in email accounts, she believes that the council's response takes this point into account, and highlights that it is not able to respond without creating a significant burden upon it. Inevitably, on a long running and important issue such as air quality there will be significant correspondence and associated documents caught within the scope of the request.
35. The complainant argues that: *"In the case of Craven v ICO, the Information Tribunal interpreted "manifestly unreasonable" to mean that it would be "extremely burdensome" to fulfil the request. The Council has not come close to showing this level of additional demand on its resource. It has not told us at all, what difficulty it would face. It is a large organisation, which thinks nothing of employing consultants for tens of thousands of pounds"*.
36. The Commissioner has considered the nature of the request, taking account of the presumption in favour of disclosure and the requirement to interpret exceptions restrictively. The Commissioner accepts that the issue is of central importance as it relates to public health and the state of air quality in and around the city of Coventry, and how the council, and central government, intend to address this issue.
37. She notes however the voluminous amount of information which is estimated to be caught within the scope of the complainant's request for 'any' information. She also notes that the complainant was made aware that the breadth of such a search would in itself be a significant burden. He did not however seek to narrow the scope of his request by rewording it to be more specific as to the information he is hoping to obtain.
38. The Commissioner also notes that the majority of other information requested by the complainant has now been disclosed to him, and the council's plan is to publish its final policies, including the rationale behind them.
39. The Commissioner recognises that the Council is a large city council, and it follows that it will have significant resources available to it. Nevertheless she is persuaded by the council's argument that the burden on it in complying with the request would be significant. The volume of information estimated as potentially being caught within the scope of its searches would clearly have a significant impact upon its limited resources.

40. The Commissioner has been guided by what is considered to be a reasonable time period under FOIA, being equivalent to 18 hours of work and considers that responding to this part of the request would be likely to exceed this time period by a significant degree.
41. Although this figure is a basis insofar as requests under the EIR, she can take into account the value of the information requested when deciding whether the request is manifestly unreasonable for the purposes of Regulation 12(4)(b).
42. Having considered the significant volume of information potentially caught within scope of the request, despite the size of the council and the value of the information concerned, the Commissioner finds that it would be manifestly unreasonable to require it to respond to this part of the request. As such, the Commissioner considers that the subsequent diversion of resources from other public duties is significant enough to engage the exception at 12(4)(b).
43. The Commissioner must therefore consider whether the public interest requires the request to be responded to in spite of the fact that Regulation 12(4)(b) has been engaged. The Commissioner has therefore gone on to consider the balance of the public interest.

Balance of the public interest

44. Regulation 12(4)(b) is subject to the public interest test and therefore the Commissioner must determine whether the balance of the public interest in favour of maintaining the exception at Regulation 12(4)(b) outweighs that in the information being disclosed.

The public interest in the disclosure of the information.

45. The complainant has provided extensive arguments relating to the public interest in the disclosure of the information. He argues that the council has failed in its attempts to introduce a clear air zone.
46. He further argues that the result of the air pollution in and around the city has been scientifically proven to be having an adverse effect upon the health of its occupants to such an extent that mortality rates caused by its affect exceed those of traffic related deaths in the city. He cites a

figure of 168 from Public Health England's report '*Estimating Local Mortality Burdens Associated with Particulate Air Pollution*' to this effect¹.

47. Public Health England has also stated publicly that "*Air pollution is the biggest environmental threat to health in the UK, with between 28,000 and 36,000 deaths a year attributed to long-term exposure.*"
48. The issue which the complainant raises is clearly of importance and relevant to the city's residents, and is backed up both by scientific studies as well as government action.
- A BBC press story dated 15 May 2019 outlined how, subsequent to this request being received, the Government (in the form of the Department for environment, food and rural affairs; DEFRA) ordered the council introduce a clear air zone, and rejected the council's own plans to tackle pollution in the city.²³
 - Coventry Live reported on the same date that "*Coventry City Council has been under severe pressure to reduce its nitrogen dioxide (NO2) levels as the city is forecast to exceed legal limits in 2021*"⁴.
 - The Commissioner understands that the council has subsequently provided a further submission in the hope of amending the DEFRA requirements⁵.
49. The Commissioner therefore fully understands the urgency and the importance of the issues raised by the complainant when requesting the information.

1

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/332854/PHE_CRCE_010.pdf

2 <https://www.bbc.co.uk/news/uk-england-coventry-warwickshire-48286993>

3

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/800797/air-quality-direction-coventry-2019.pdf

4 <https://www.coventrytelegraph.net/news/coventry-news/coventry-congestion-charge-clean-air-16279258>

5 <https://coventryobserver.co.uk/news/decision-on-coventry-congestion-charge-could-be-delayed/>

50. The information exempted under Regulation 12(4)(b) is correspondence between the council and DEFRA up to the time of the request on 15 July 2018, or at the latest, at the time of the final review on 27 September 2018. Clearly the circumstances of the case provide a very strong public interest argument towards the disclosure of the information to the public. It would allow the complainant and other interested parties to fully understand the nature of the issues under discussion, could highlight issues which affected the outcome of the ongoing discussions and would provide greater transparency on the council's plans to tackle the issue of air quality in the city.

The public interest in the exception being maintained

51. In favour of maintaining the exception the council argues that responding to the request further would cause a disproportionate burden on the Council.
52. The Commissioner recognises the inherent importance of accountability and transparency within public authorities, and the necessity of a public authority in bearing some costs when complying with a request for information. However, in considering the public interest test for this matter, the Commissioner must assess whether the cost of compliance is disproportionate to the value of the request.
53. The Commissioner appreciates that the information is highly relevant to the wider public. She has highlighted above that she fully notes the scientific research which has been published on the effects of air pollution and the dangers posed by poor levels of air quality in the Coventry area.
54. However she regards the volume of work estimated as being required to provide further information to the complainant in response to this part of his request is, nevertheless, extremely difficult to justify considering the strong public interest in ensuring that limited public resources are not used disproportionately. The overwhelming volume of information estimated as falling within the scope of the request creates a significant and onerous barrier to providing a full response, and, even when balanced against the public interest in knowing the content and context of the correspondence, the Commissioner considers that the public interest weighs in favour of the exemption being maintained.
55. She has also taken into account the information already made available by the council, together with the information it intends to publish in the future, and she considers that this lessens the public interest in requiring the council to carry out the searches regardless of the burden which this would create.

56. Factors may have changed since that point in time given steps taken by DEFRA in July 2019, however the Commissioner must take into account the circumstances at the time of the request or, at the latest, at the time of the internal review.
57. Furthermore, public interest in the scrutiny and oversight of local authority decision making in the issue is met by the separate and distinct supervisory process which DEFRA has undertaken over the project. Although this in itself is not a strong factor in favour of withholding the information from the public in this case, it does demonstrate that the council is subject to both public, and formal independent scrutiny over its handling of the issues it faces.
58. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner (SGIA/44/2019)*, "*If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure...*" and "*the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations*" (paragraph 19).
59. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(b) was applied correctly.

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

60. The council applied Regulation 12(4)(d) to withhold information forming its 'evidence base'.
61. 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
 - incomplete data.
62. The exception is class-based, which means that it is engaged if the information in question falls within its scope. If the information falls into one of the three categories, then the exception is engaged. It is not necessary to show that disclosure would have any particular adverse effect in order to engage the exception. However, Regulation 12(4)(d) is

a qualified exception, so 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.

63. 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.
64. The council said that it applied Regulation 12(4)(d) because the information requested was unfinished. It said that the evidence base referred to is not a document as such, it is a collection of information required to provide an accurate picture of current air quality and a forecast of future air quality. It comprises of analysis and narrative about the required standards and is intended to conflate the council's various strands of related thinking on their position.
65. The council said that the reason that exception was applied was that the council has a statutory obligation to provide the information to DEFRA for approval, and it does not consider that the information is 'final' until DEFRA approves it. The council provides its evidence base along with its proposals, and then it will receive further feedback (in some case this is in the form of Ministerial Direction) and the process continues until a final position is identified. In essence, as time moves on the information will evolve as further evidence became available, until the final version of the report is approved.
66. It said that the evidence base, as approved by central government, will then form part of the council's Full Business Case (FBC) which will be subject to public consultation and published on its website.
67. The Commissioner notes that, subsequent to the request being received, the council has published information on its website. The council submitted its Outline Business Case to JAQU on 12th February 2019 and has subsequently published details of this on its website.

Is the information unfinished or incomplete?

68. There is an argument that in providing the evidence base to DEFRA for consideration, the evidence, although still evolving, is a finished snapshot of a period of time up until its submission to DEFRA. The council has been able to complete an analysis and provide figures and estimates which it is seeking to rely upon to DEFRA for its views.
69. The Commissioner does not accept that this necessarily the situation in this instance, however. The complainant argued to the council that:

“The council cited an updated shortlist and evidence base in the documents for the Cabinet meeting of 6 Aug 2018. Such as it was, when it went into the hands of the members, it was a finished document. Further, it will have been supplied to the Council's consultants who are preparing the Air Quality Action Plan. As per the letter from the Minister to the Council, the council is under a legal obligation to supply an Air Quality Action Plan by 31 Dec 2018. It is highly improbable that the council and the consultants had not finalised a short list and the evidence to be used by the consultants by 12 July 2018 (the date of my request)”.

70. The Commissioner notes that at the time of the request, further time to carry out additional work (and evidence collection and collation) was still available prior to the deadline date for providing that information on 21 December 2018. It is possible that the council's cabinet may have pointed out areas where it believed further evidence was needed prior to the evidence being submitted for analysis by DEFRA. The approval of the cabinet was a step towards the final position, but it is not conclusive evidence that the evidence, as it stood at that time, was complete. She also notes that it was still open to DEFRA to ask for amendments or for additional information to be included beyond that date prior to it being approved to be included within the Final Business Case.
71. For this reason the Commissioner is satisfied that the information was unfinished or incomplete at the time of the request. She has therefore gone on to consider the public interest test required in Regulation 12.

The public interest

72. The Commissioner must again determine whether the balance of the public interest in favour of maintaining the exception at regulation 12(4)(d) outweighs that in the information being disclosed. Again the Commissioner must take into account the presumption towards the disclosure of the information set out in Regulation 12(2).

The public interest in the disclosure of the information.

73. As explained above, the complainant provided extensive arguments relating to the public interest in the disclosure of the information. He argues that the council has failed in its attempts to introduce a clear air zone, and due to the repercussions of poor air quality in the area the number of deaths attributable to this exceed those caused by traffic accidents. The Commissioner has equally taken these points into account in her consideration of the balance of the public interest in regards the application of Regulation 12(4)(d).
74. The council recognised these arguments:

"...the issue of AQ [air quality] has a widespread impact on the public and therefore transparency is required. In this case CCC have acknowledged the severity and urgency of the issue and are acting on the legal mandate from Central Govt regarding identifying a solution, and the information currently in the public domain relates to where we have identified existing and likely future locations of exceedance for NO2, and an overview of the sources of emissions. Other information in the public domain clearly states that further work was requested as a result of the information published in February 2019, and this is still ongoing."

75. There is clearly a strong public interest in allowing the public access to evidence gathered which would allow them to understand the levels of current air quality in the area. A disclosure of the information at the point of time that the request was received would provide an overview of the councils own data and the figures it had been working to prior to the evidence being submitted to DEFRA for consideration.
76. A disclosure of the information would allow interested parties, including specialists in the subject, to consider and submit comments to both the council and to DEFRA, and to voice their opinions on the data from an informed position.
77. It would potentially allow greater public participation in addressing the issue prior to any final decisions being taken.

The public interest in the exception being maintained

78. The central public interest in the exception being maintained in this case relates to the thinking space required by both the council, and DEFRA, when considering their next steps.
79. The council provided the following arguments in support of the exception being maintained:

"Whilst an informed and involved public may help to promote good decision making by public bodies, public bodies may also need space and time to fully consider their policy options and reach an appropriate decision, away from public interference. We are currently in this process as there are a number of parameters that we have to work to, and get approval from Central Govt on. We have always made clear that public and stakeholder engagement is critical given the importance of this issue, however we need initial sign off from Central Govt before we release further information."

The information may be relevant to a subject of public interest, but it may not greatly add to public understanding - in such cases the public interest in maintaining the exemption may outweigh that in disclosure.

To release further information regarding something not approved in February at this time would be misleading (and therefore not add to public understanding) and would interfere with our ability to undertake future consultation in a practicable way..."

80. As noted above, the Commissioner can only take into account factors which were present at the time that the request was received, or at the latest when the review was carried out in 27 September 2018. However the council's point still has relevance. There was always the potential for DEFRA not to accept the council's proposed approach, and this possibility would have been fully recognised at that time.
81. It is clear that at the time of the request, the collection and collation of evidence by the council must have been nearing its end. However the information was still some time away from being submitted to DEFRA for its approval, and therefore it is extremely likely that steps were still being taken to finalise the data and prepare it, and any other material necessary prepared for its submission to DEFRA. The council would have been in the final few weeks of preparing its policies and arguments for addressing air quality for DEFRA to consider. DEFRA would not, at that point, have had access to the final submission.
82. A disclosure of the information at that time would have generated the interest of the public in the figures relating both to current air quality, and the council's failure to address it to the necessary degree up to that point. The result of a disclosure at the time of the request is likely to have been contact from interested parties asking questions, making suggestions, and interest from the press and media asking for further information on how the council was addressing this. This was at a time when the council may still have been finalising its position prior to issuing the report to DEFRA.
83. DEFRA's subsequent requirement that the council implement a clean air zone around the city demonstrates the importance of the council's case. The likelihood is that media interest would have been high due to the potential impact on the public if such measures were introduced. DEFRA's clean air zone requires changes to traffic flows and the potential introduction of congestion zone charges around the city, affecting all users of the city's roads.
84. The result of a disclosure of this information at a time when work on it, and its final approval by DEFRA, had not been completed, would have been the potential for significant pressure on the council, and potentially on DEFRA, to explain what it was doing to address the situation, at a time prior to that policy being fully finalised and decided upon by the council, or even considered by DEFRA. Whilst the Commissioner accepts that this would have allowed the public to better understand, and to

potentially voice opinion on the plans, given that the council did not have very long before its report was due to be submitted to DEFRA the result of increased public and media interest at the time of the request would have likely to have made it more difficult to finalise and submit its proposal on time. It would also have placed pressure onto DEFRA.

85. In effect, the situation would have tied the parties to a re-active position, rather than a pro-active, positive consideration of the facts, and time being allowed to consider the ways and means of addressing that. DEFRA, having not yet received the information, would have been placed in a position where it was reacting to media coverage and public concern on evidence it had not even had the opportunity to fully consider.
86. Once DEFRA had had the opportunity, the process had been completed and the Final Business Case published, it was open to the public and to the media to analyse and question the approach with the parties at that point. Although the information has not yet been disclosed, the council has outlined above that this is due to the fact that it is intending to take a further consultation period in the near future. Again this emphasises that at the time of the request the evidence base was unfinished and that the parties required a safe space to be able to consider the evidence prior to it being disclosed.
87. The Commissioner also considers that, at the point that the Final Business Case was published, the public interest arguments for withholding its evidence base become much less persuasive, and its 'unfinished' status drops away.
88. The Commissioner must however consider the arguments at the time that the request was received. She considers that at that time, the nature of the information and the process it was in were at a critical point in time. A disclosure of the evidence base at that point would have been detrimental to the parties' abilities to formulate a joint, pro-active approach to the problems faced by the city. It would have interfered with the parties (and in particular DEFRA's safe space) to consider the way forward, and detrimentally affected its ability to concentrate on addressing the issues raised by the findings. In effect, a disclosure of the information at that time could have proved detrimental to the process of addressing air quality issues in the city.
89. For this reason, the Commissioner considers that, at the time of the request, the public interest rested in allowing the parties the safe space to consider and address the position. The public interest therefore rested in maintaining the exception in Regulation 12(4)(d) at that time.
90. As noted above, Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of

the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019), "*If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure...*" and "*the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations*" (paragraph 19).

91. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(d) was applied correctly.

Regulation 5(2)

92. Regulation 5(2) states that such information shall be made available "*as soon as possible and no later than 20 working days after the date of receipt of the request.*"
93. The complainant made his request for information on 15 July 2018. Although the council initially applied Regulation 12(4)(d) to the entirety of the information, it subsequently disclosed some of the information falling within the scope of the request, including disclosures made on 16 October 2018 and 5 December 2018.
94. As such, the Commissioner's decision is that the council did not comply with the requirements of Regulation 5(2) in that it failed to provide information falling within the scope of the complainant's request for information within 20 working days.

Right of appeal

95. 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

96. 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.

97. 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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