

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 25 August 2022

**Public Authority:** Horsham District Council

**Address:** Parkside  
Chart way  
Horsham  
West Sussex  
RH12 1RL

#### **Decision (including any steps ordered)**

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1. The complainant requested a copy of an ecology report produced in relation to a site in Buck Barn, Horsham. Horsham District Council (the council) applied Regulation 12(4)(d) (material in the course of completion) on the basis that the report relates to, and feeds into the development of its Local Plan, which is not yet complete. It also relied upon Regulation 12(5)(f) (the interests of the person who provided the information).
2. The Commissioner's decision is that the council was not correct to withhold the ecological appraisal under Regulation 12(4)(d). He has also decided that it was not correct to apply Regulation 12(5)(f)
3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
  - to disclose the requested information to the complainant.
4. The council 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 FOIA and may be dealt with as a contempt of court.

## Request and response

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5. On 19 June 2021, the complainant wrote to the council and requested information in the following terms:

“Has a detailed/in-depth ecology report been submitted by Thakeham Homes on the Buck Barn (Weald Cross) strategic site as part of their submission to Regulation 18 consultation? If there is, when was it submitted and is it in the public domain?”
6. The council responded on 19 July 2021. It provided details on how to access the Thakeham Homes ecology report on its website. Additionally, it said that a further report had been received as part of a planning performance agreement<sup>1</sup>. However, it refused to disclose this second report on the grounds that the exception in Regulation 12(5)(f) applied (interests of the party providing the information).
7. On 24 July 2021 the complainant requested that the council review its decision and disclose a copy of the second report to her.
8. Following an internal review, the council wrote to the complainant on 8 September 2021. It amended its position to also apply Regulation 12(4)(d) (information in the course of completion etc) to withhold the second report.

## Scope of the case

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9. The complainant contacted the Commissioner on 20 September 2021 to complain about the way her request for information had been handled.
10. The complainant argues that the council was not correct to withhold the second ecology report under Regulation 12(4)(d) or Regulation 12(5)(f), and that the information should be disclosed in response to her request.
11. The requested information is a document entitled “Wealdcross, West Grinstead Ecological Appraisal”, which was submitted to the council by Thakeham Homes.

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<sup>1</sup> <https://www.gov.uk/guidance/before-submitting-an-application#planning-performance-agreements>

## Reasons for decision

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### Regulation 12(5)(f)

12. Regulation 12(5)(f) states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect:

“the interests of the person who provided the information where that person –

- i. was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
- ii. did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
- iii. has not consented to its disclosure;”

13. In its response to the complainant’s request, the council argued that the developer was not under a duty to submit the information to it, that it provided the council with a copy of the report as part of its planning performance agreement with the council, and that the Commissioner has previously accepted that information submitted as part of a pre-planning process falls within the scope of the exception.

14. In the Commissioner's initial investigation letter to the council the Commissioner asked the council to provide its justification for the applying the exception. The Commissioner also asked the council a series of questions regarding its application of the exception in order to better understand its justification for applying the exception and withholding the information. The council, however, did not respond to these questions. It said that it was relying upon Regulation 12(4)(d) and provided its arguments for this exception applying.

15. The Commissioner is clear in her investigation letters that public authorities have one opportunity to provide their full and final response to the questions which the Commissioner asks, and to justify their application of exemptions and exceptions to withhold information.

16. As the council did not submit its arguments for the application of Regulation 12(5)(f), the Commissioner’s decision is that the council was not correct to apply Regulation 12(5)(f) to withhold the information from disclosure.

## **Regulation 12(4)(d) information in the course of completion**

17. 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.”

18. 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
- provide some protection from having to spend time and resources explaining or justifying ideas that are not, or may never be, final.

19. 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 affect, but any adverse effects of disclosure may be relevant to the public interest test.

### The council's arguments

20. The council argues that the ecology report is part of the evidence base it is relying upon to inform the formation of its Local Plan.

21. Its argument is that the requested information falls within the scope of Regulation 12(4)(d) on the basis that the request relates to material which is still in the course of completion. The material in question is the council's Local Plan.

22. The council explained that an initial version of the Local Plan was completed and approved by Cabinet on 15 July 2021. This was intended to be presented to Full Council on 28 July 2021 for approval. It said that if that meeting had taken place as intended, and the plan had been agreed, then the Local Plan would have moved into the consultation period, and all supporting evidence would have been released for public scrutiny. However, it said that on 20 July 2021, the Government published a New National Planning Policy Framework without giving any prior notice. This required the council to undertake additional work to support a new 30-year vision requirement, and as a consequence, the council had no option but to delay the preparation of the Local Plan in order to complete this work.

23. It said that, in addition, in September 2021, Natural England released a Position Statement, indicating that water abstraction from an aquifer in Hardham was harming internationally designated wildlife sites in the Arun Valley. The Position Statement required that any new development in the Sussex North Water Resource Zone, which covers Horsham, must demonstrate water neutrality. It said that this means that new development and local plans preparation cannot take place unless they demonstrate that there is no increase in the demand for water above existing supply rates. This is a legal requirement in order to comply with the Habitat Regulations 2017.
24. The council argues that this, therefore, put a moratorium on all development in the area, and that all the local plans, including the Local Plan for Horsham, are on hold. It said that it is now working with neighbouring authorities and other bodies to prepare a water neutrality mitigation strategy. In the intervening period, no progress has been possible, and it remains the position that no decision on the Local Plan has been made.
25. It said that, once the above strategies have been considered and agreed, the evidence base will need to be reviewed and updated where necessary. This would include the ecology report, if necessary. The plan will then be re-presented to cabinet, and then the council, for approval. The relevant documents will then be published during the public consultation process. It considers, however, that the need for water neutrality may significantly alter the documentation presented to cabinet in July 2021.
26. Its argument is therefore that the request is for information which relates to the local plan, and that the Local Plan is material still in the course of completion.

#### The Commissioner's analysis

27. The Commissioner notes that the council's argument is not that the ecological report is unfinished. It is that it forms part of the evidence base of its Local Plan, and that this was not yet complete at the time that the request was received.

28. A document which is itself finished may still fall within the scope of that arm of the exception for 'material which is still in the course of completion'<sup>2</sup> if it effectively forms part of that 'material'. In other words, if the finished document forms part of the wider 'material' which is still in the course of completion, then the exception is engaged.
29. However, if the withheld information is a separate and complete document in its own right, then the exception will not be applicable as the information is distinct from the material which is still to be completed.
30. The complainant's request for information was made in June 2021, before cabinet approval of the Local Plan had been agreed, and before it was then approved to be submitted to the full council for sign off.
31. The Commissioner is therefore satisfied that, at the time of the request, the local plan was still in the course of completion.

Is the document complete and separate in its own right?

32. In *Highways England v Information Commissioner and Manisty*<sup>3</sup> the Upper Tribunal found that information which relates to material still in the course of completion may still be disclosed if that information is a separate and distinct piece of information in its own right. In the case, which related to route maps regarding the Oxford to Cambridge expressway, the Upper-Tribunal found that the requested 'Stage 3' report was a piece of work which was complete and separate in its own right, and, for that reason, the exception in Regulation 12(4)(d) was not applicable.
33. The tribunal highlighted that a decision as to whether a finished document is a piece of work which is complete and separate in its own right needs to be based on the circumstances in each individual case.
34. The Commissioner has therefore considered this point as regards this case.

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<sup>2</sup> *Chris Ames v the Information Commissioner and the Department of Transport* [EA/2015/0283](#) (2015),

<sup>3</sup> [\[2018\] UKUT 423 ACC](#) (12 Dec 2018)

35. The nature of the withheld information in this case is an ecological appraisal created by agents on behalf of Thakeham Homes. It was signed off in 2020 and submitted to the council as evidence of the ecological position in Buck Barn, where Thakeham Homes is proposing a new development. The document was submitted as a planning performance agreement, essentially a voluntary agreement between the council and the developer over the timescales, actions, and resources for handling particular development applications.
36. The primary purpose behind the ecology appraisal was to provide information and evidence which would identify what ecological issues had been identified in the area, and in that way, ultimately, to support the development proposals.
37. The development proposals would feed into the Local Plan as it would aid the council in identifying the capacity for additional new housing and infrastructure which might be sustainably situated within that area. The council can use this as evidence that it has a specific number of properties specified for future development over a set timescale. This is one of the primary functions of the Local Plan<sup>4</sup>.
38. Thakeham Homes had submitted the ecology appraisal to the council, and the council had relied upon its contents in evidence of its Local Plan up until the point that the request was responded to. The Commissioner is satisfied that the ecological appraisal was therefore in a final form by that point in time.
39. Whilst there may still have been scope for the document to be further amended, this would presumably be on the basis of whether further evidence was required in order to facilitate final decisions to be made to the Local Plan and/or in order to facilitate the approval of the developer's associated planning applications when they are submitted. The Commissioner also notes that the document refers to the need for further surveys to be carried out in relation to specified issues.
40. The Government's, and Natural England's new requirements came after the request had been responded to by the council. The council has highlighted that the new requirements may result in all such information needing to be reconsidered or rewritten, and further evidence may need to be collected. However, this issue did not arise until after the council

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<sup>4</sup> [Local Plan questions: What is a Local Plan and why do we need it? | Horsham District Council](#)

had provided its initial response to the complainant's request for information, and it therefore cannot be taken into account in the Commissioner's decision.

41. The ecological appraisal's primary function was to provide a detailed assessment of the ecology in the area where Thakeham Homes was proposing new development. Its purpose was therefore met with the submission of the document to the council in evidence to support Thakeham Homes future development plans. The Commissioner therefore considers that the appraisal is separate and distinct in its own right – and that its purpose had been served (i.e., that it was complete), insofar as Thakeham Homes had provided it as part of its evidence base to support its proposals, and the council had accepted and was using this as evidence in the development of the Local Plan.
42. The Commissioner therefore considers that the appraisal was complete to the standards necessary for submission to the council, and that it also stands as a complete and separate document in its own right. The Local Plan would refer to the report, be informed by it, and rely on it as evidence supporting the Local Plan, but it is nevertheless a document which is separate, distinct and complete in its own right.
43. The Commissioner's decision is therefore that the council was not correct to apply Regulation 12(4)(d) to withhold the information from disclosure.
44. The Commissioner therefore requires the council to disclose the withheld information to the complainant.



## Right of appeal

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45. 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: 0203 936 8963  
Fax: 0870 739 5836  
Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

46. 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.
47. 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 .....**

**Ben Tomes**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**