

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 22 September 2022

Public Authority: Bristol City Council
Address: The Council House
College Green
Bristol
BS1 5TR

Decision (including any steps ordered)

1. The complainant requested a copy of a workplace parking levy ("WPL") feasibility report to assess the readiness of Bristol City Council ("the council") to develop a workplace parking levy scheme. The council applied regulation 12(4)(d) (material in the course of completion) of the EIR on the basis that the WPL feasibility report relates to, and feeds into, a decision pathway report which is not yet complete.
2. The Commissioner's decision is that the council correctly withheld the requested information under regulation 12(4)(d) of the EIR but that it failed to respond in time and breached regulation 5(2) of the EIR.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 20 December 2021, the complainant made the following request for information:

"I asked for access to a report that has been funded by public funds and which is held by the Council. I believe it is entirely normal for reports such as this one to be released to Councillors on request. Please can you give me an explanation as to why this is not being released?"

If necessary please treat this email as a formal Freedom of Information request with a starting date of 20/12/21."

5. On 17 January 2022, the council responded to the request. It withheld the information citing section 22 of FOIA (information intended for

future publication) as its basis for doing so. On 26 January 2022, the council provided the complainant with its findings regarding the public interest test.

6. On 5 February 2022, the complainant wrote to the council and pointed out:

"In regards to your grounds for refusal there may be some confusion as the grounds for not issuing the report appear to be talking about a draft Cabinet Report. I am looking to see the Consultant's report prepared as a result of the Green Party Budget amendment in 2019.

- 1) I do not see how officers would be prevented from giving frank advice as the report should be a factual report and people can make their own conclusions on the report, including officers advising the Mayor.

- 2) The procedures for issuing a Forward Plan are irrelevant in this case, and there is no guarantee that this will be discussed by Cabinet, and therefore no guarantee that the report will see the light of day.

- 3) The public can not be misled as a result of making a consultant's report available, if need be with a clear statement that this is only a study not the administration's position. Further, if the consultant's report is still in draft form then this is an unacceptable delay for it to be properly scrutinised in good time to be able to support a healthy debate when (if) it comes to Cabinet."

7. On 14 February 2022, the council completed a review of its handling of the request and wrote to the complainant maintaining its original decision regarding section 22 of FOIA. The council accepted that it had not responded to the information request within the statutory deadline of 20 working days.

Scope of the case

8. The complainant contacted the Commissioner on 6 March 2022 to complain about the way their request for information had been handled.
9. The Commissioner commenced his investigation with a letter to the council on 3 August 2022 in which he asked a series of questions about the application of section 22 of FOIA and requested a copy of the withheld information.
10. The council responded on 2 September 2022 providing the withheld information to the Commissioner and explaining that the request had initially been erroneously dealt with under FOIA. The council amended

its position to rely instead on regulation 12(4)(d) of the EIR (information in the course of completion) to withhold the information.

11. The Commissioner considers that the scope of his investigation is to determine the extent to which the withheld information engages the exception at regulation 12(4)(d) of the EIR.

Reasons for decision

Is the requested information environmental?

12. Regulation 2(1) of the EIR defines environmental information as being information 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)...as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
13. As the withheld information relates to emissions and air quality, the Commissioner believes that the withheld information is likely to be information on a measure affecting the elements of the environment.

For procedural reasons, he has therefore assessed this case under the EIR.

14. The Commissioner notes that the council initially responded to the complainant relying on the incorrect access regime and the council should therefore be mindful of assessing information requests under the correct legislation.

Regulation 5(2) – time for compliance

15. Regulation 5(1) of the EIR states: "Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request."
16. Regulation 5(2) states: "Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request."
17. In this case the complainant initially requested information on 20 December 2021. Whilst the council issued a refusal notice on 17 January 2022, it did not provide its public interest arguments to the complainant until 26 January 2022. Therefore, the Commissioner has concluded that the council breached regulation 5(2).

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

18. 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."

19. 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.

20. 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.

The council's arguments

21. The withheld information is a document entitled "Workplace Parking Levy Feasibility Report" (the "Report") commissioned by the council in 2021 and produced by Nottingham City Council to assess the readiness of the council to develop a WPL scheme.
22. The council accepted that the Report itself is not an "unfinished document".
23. The council referenced the ICO guidance¹ on regulation 12(4)(d) which states:

"8. The fact that the exception refers to both **material** in the course of completion and 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. An example of this could be where a public authority is formulating and developing policy."
24. The council argued that the Report was part of a larger piece of work, namely, a pathway decision report to bring a proposal regarding the development of a WPL scheme (the "Proposal") to the Mayor of Bristol and his Cabinet. The council explained that the Report was one of five appendices to the Proposal and that the sole purpose of the Report was to form part of the development of the Proposal in order to bring it to Cabinet. The council explained that at the time of the request the Proposal was (and still is) in draft form and had not been (and has still not been) submitted to the Cabinet for scrutiny.
25. The council advised that, in accordance with a long-standing process whereby advance public notice of key decisions is made via a Forward Plan, when proposals are brought to Cabinet, full details of items being presented are published online ahead of the Cabinet meeting ([The Mayor and Cabinet \(bristol.gov.uk\)](https://www.bristol.gov.uk)). Therefore, the Report will be published in due course and in accordance with the normal process.
26. Therefore, for the reasons stipulated in paragraph 24 above, the council's argument is that the Report falls within the scope of regulation

¹ [eir material in the course of completion.pdf \(ico.org.uk\)](https://ico.org.uk/our-work/information-access-to-information/12-4-d)

12(4)(d) on the basis that the request relates to material which is still in the course of completion.

The Commissioner's analysis

27. The Commissioner notes that the council's argument is not that the Report itself is unfinished, it is that the Report forms part of a larger piece of ongoing work to bring the Proposal to Cabinet. That piece of work was not complete at the time the request was received as the Proposal was still being worked on and had not been put before the Cabinet for scrutiny at that stage. The council's argument is therefore that the Report relates to (because it forms part of) material which is still in the course of completion (i.e. the Proposal).
28. The Commissioner considers that 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'² 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 piece of work 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 December 2021, before the Proposal had been put before Cabinet for approval. The Commissioner notes that in June 2022 the council's Cabinet tracker lists the Proposal as still needing work before being put before Cabinet. It is clear, therefore, that when the request was made, the Proposal was not finished and had not been submitted to the Cabinet for scrutiny and that work on the Proposal was (and still is) ongoing.
31. The Commissioner is therefore satisfied that, at the time of the request, the Proposal was still in the course of completion.

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

Is the Report complete and separate in its own right?

32. In *Highways England v Information Commissioner and Manisty*³ the Upper Tribunal found that information will not “relate to” material still in the course of completion 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 not part of an ongoing process. 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 or is part of an ongoing process needs to be based on the circumstances in each individual case.
34. The Commissioner has therefore considered this point as regards this case.
35. The Report was commissioned by the council and produced by Nottingham City Council to assess the readiness of the council to develop a WPL scheme. It was signed off by Nottingham City Council in 2021 as non-statutory guidance on the process for developing and seeking approval for the implementation of a WPL scheme.
36. At the time of the Report, Nottingham City Council was the only UK local authority to have introduced a WPL scheme and the purpose of the Report was to share its skills and experience of developing and implementing such a scheme to assess the preparedness of the council to start the formal process of delivering its own WPL scheme.
37. The Report forms an annex to the Proposal which, at the time of the request, had not been completed. The council has advised the Commissioner that the Proposal remains in the development stage. The council also argued that the sole purpose of the Report was to inform and be part of the development of the Proposal and that the Proposal had not been made to Cabinet at the time of the request (and has still not been made).
38. Having no evidence to dispute the council’s position and having viewed the Report and considered the assurances provided by the council, the Commissioner has concluded that the Report relates to material in the

³ [\[2018\] UKUT 423 ACC](#) (12 Dec 2018)

course of completion because it relates to the ongoing preparation of the Proposal. Once the Proposal is ready to be put to Cabinet, the piece of work will be complete. Before that, the Proposal is still being worked on and the Report will inform and form part of that ongoing piece of work. He is, therefore, satisfied that the exception is engaged.

39. The council may continue to withhold the information where, in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing it. The Commissioner has, therefore, gone on to consider the public interest test.

Public interest in disclosing the information

40. In considering the public interest in this case, the Commissioner is mindful that regulation 12(2) of the EIR instructs authorities to apply a presumption in favour of disclosure.
41. The council has acknowledged that releasing the Report would aid transparency in decision-making and use of public funds.
42. The council also acknowledged that disclosure would support the public interest aims of EU Directive 2003/4/EC as implemented by the EIR, specifically, increased public access to environmental information and environmental decision-making.
43. The complainant's view is that withholding the Report is preventing proper scrutiny in order to have a healthy debate when the matter comes to Cabinet.
44. The complainant also believes that the public would not be misled as a result of making the Report available, if it is released with a clear statement that it is only a consultant's feasibility study not the council's position.
45. Finally, the complainant did not accept that officers of the council would be prevented from giving frank advice on the Proposal as the Report should be a factual report on which people could draw their own conclusions, including officers advising the mayor. It is the complainant's view, therefore, that there is significant public interest in being able to view the Report and potentially challenge the council's Proposal.

Public interest in maintaining the exception

46. The council argued that it needs a safe space away from external commentary to develop proposals, formulate policy, or reach decisions. In this case the proposed WPL scheme is likely to attract some level of controversy and disclosure of the Report ahead of the publication date

will attract premature scrutiny of what the council intends to do. This will have the effect of interfering with, and interrupting, the live, ongoing work to prepare the Proposal of which the Report forms a part. It is the council's view that it is in the public interest to ensure that such disruption to public resources does not occur.

47. Further, the council argued that if the Report were to be released, it would be misleading and would not reflect the council's final position in relation to the Proposal which is still an ongoing piece of work. In the council's view it would also mean that time and unnecessary expense would be spent dealing with queries and challenges about issues/decisions which have not yet been finalised.
48. The council explained that factors highlighted in the Report need to be considered further and no decisions or approval have been agreed. It confirmed that when the Proposal is brought to Cabinet, full details of items being presented are published online ahead of the Cabinet meeting. Therefore, the Report will be available to the public in due course and in accordance with the normal process.

Balance of the public interest

49. In relation to the council's arguments about maintaining a safe space around incomplete material, the Commissioner acknowledges that, in this case, these carry some weight. It is clear that the decision-making process in relation to the matters raised in the Report was incomplete at the time of the request (and remains incomplete at this time). In previous decisions, the Commissioner has acknowledged that there is a strong likelihood that the integrity of and effectiveness of the decision-making process would be harmed by the disclosure of information before the process is complete.
50. The Commissioner notes that, in cases where an authority has concerns that disclosing information might create public confusion or might misinform debate, it can be appropriate for the authority to preface such disclosures with a corrective or explanatory narrative. However, he considers that this is not always appropriate since an authority may not hold information about final decisions which allow for discrepancies to be resolved.
51. The Commissioner is not satisfied that disclosure of the Report would help the general public understand environmental decision-making because not only has no decision been made, it is not clear exactly what decision would need to be made.
52. As the council has explained, the Report forms part of a broader piece of work to put the Proposal before Cabinet. Once the Proposal is ready to be put before Cabinet (i.e. before any decision has been taken), the

council has stated that the Report will be published so that both Cabinet members and the wider public can understand what is being proposed and why it is being proposed.

53. Disclosing the Report prior to the Proposal being put before Cabinet would not assist the public in understanding any environmental decision, because it would be unclear what environmental decision the council was considering. Therefore, the council is likely to be distracted from its work by having to deal with correspondence urging the council to do something it was planning to do already or urging it not to do something it was never planning to do.
54. Once the Proposal has been made, the Report is likely to form a key part of the evidence base and will allow the public to evaluate the Proposal that has been put forward. However, no meaningful evaluation is possible until the final Proposal has been put forward.
55. The Commissioner is mindful that there is an inbuilt public interest in enabling public participation in decision-making in environmental matters.
56. However, public interest considerations should always be relevant to the exception being relied upon, to the specific nature of withheld information and to the context at the time of the request. In this case, the Commissioner considers that the council has demonstrated that the Report relates to and informs a decision-making process that is incomplete and that its disclosure would, by misinforming public debate, impede the decision-making process that it supports.
57. 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).
58. 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.

Right of appeal

59. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

60. 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.

61. 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

Michael Lea
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