

**Freedom of Information Act 2000 (FOIA) / Environmental
Information Regulations 2004 (EIR)**

Decision notice

Date: 16 December 2022

Public Authority: Warwick District Council
Address: Riverside House
Milverton Hill
Leamington Spa
CV32 5HZ

Decision (including any steps ordered)

1. The complainant requested information regarding Coventry Airport in relation a planning matter. Warwick District Council (the "council") provided some information, confirmed that some information was not held and withheld other information under the exception for the course of justice (regulation 12(5)(b)).
2. The Commissioner's decision is that the council correctly confirmed that some information was not held and correctly withheld other information under regulation 12(5)(b) but that in initially handling the request under the FOIA it breached regulation 5(1) and regulation 14 of the EIR.
3. The Commissioner does not require the council to take any steps.

Request and response

4. Between 1 June 2022 and 29 July 2022, the complainant wrote to Warwick District Council (the "council") and requested a range of information regarding Coventry Airport in relation to planning consent for a Gigafactory¹. The full text of the requests is appended in the annex to this decision notice.
5. The council disclosed some information, confirmed that some information was not held and withheld some information under the exemption for legal professional privilege (section 42 of the FOIA).
6. During the Commissioner's investigation the council reconsidered the request under the EIR. The council's final position is that, in relation to information identified as being not held, regulation 12(4)(a) applies and, in relation to information previously withheld under section 42 of the FOIA, the exceptions for internal communications (regulation 12(4)(e)) and for the course of justice apply (regulation 12(5)(b)).

Reasons for decision

Is it environmental information?

7. During the course of his investigation the Commissioner advised the council that he considered the requested information fell to be considered under the EIR.
8. In this case the requested information relates to a planning matter. In keeping with regulation 2(1)(c), the Commissioner considers, therefore, that the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information Tribunal in the case of *Kirkaldie v IC and Thanet District Council* (EA/2006/001) ("Kirkaldie").

¹ <https://www.coventry.gov.uk/invest-coventry/businessblog/2>

9. In view of this, the Commissioner has concluded that the council wrongly (initially) handled the request under the FOIA and breached regulation 5(1) of the EIR. As the council subsequently corrected this the Commissioner does not require the council to take any steps in this regard.

Regulation 14 – refusal to disclose information

10. In the circumstances of this case the Commissioner has found that although the council originally considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore, where the procedural requirements of the two pieces of legislation differ, it is inevitable that the council will have failed to comply with the provisions of the EIR.
11. In these circumstances the Commissioner believes that it is appropriate to find that the council breached regulation 14(1) of EIR which requires a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the council issued (and indeed its internal review) failed to cite any exception contained within the EIR as the council actually dealt with the request under FOIA.

Regulation 12(4)(a) – information not held

12. Regulation 12(4)(a) provides that a public authority may refuse to disclose information to the extent that it does not hold it when an applicant's request is received.
13. With reference to the annex to this Decision Notice, the council has stated that it has applied regulation 12(4)(a) to information requested in "Request No. 1", "Request No. 2", "Request No. 4" and "Request No. 5". In other words, the council considers that it does not hold any information falling within the scope of the named requests.
14. The Commissioner has viewed the requests and considered the council's responses and submissions. He notes that the requests take the form of statements and applications for the council to provide justifications for a position.
15. Whilst queries can be considered to be valid requests for information under the EIR, authorities are not required to generate new information in order to answer a request. In other words, where pre-existing information held does not address a specific query made, authorities do not have to create bespoke information to satisfy a requester's queries.

16. In this case, having considered the very specific construction of the complainant's enquires, which relate to a narrowly defined scenario, the Commissioner is satisfied that it would be possible for the council to establish, with a high degree of certainty, whether relevant information is held.
17. In view of the council's responses to the request, its subsequent submissions and the formulation of the requests, the Commissioner has concluded that, on the balance of probabilities, the council has correctly confirmed that it does not hold relevant recorded information. He has, therefore, decided that the council correctly applied regulation 12(4)(a) in this case.

Regulation 12(5)(b) – the course of justice

18. Regulation 12(5)(b) of the EIR provides that a public authority may refuse to disclose information if to do so would adversely affect:

"the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature."
19. As explained in the Commissioner's published guidance², the exception encompasses any adverse effect on the course of justice, and is not limited to information only subject to legal professional privilege (LPP). As such, the Commissioner accepts that "an inquiry of a criminal or disciplinary nature" is likely to include information about investigations into potential breaches of legislation, for example, environmental law.
20. The council has confirmed that it is applying regulation 12(5)(b) to the information in Request No. 3., specifically legal communications relating to the use of Coventry Airport in a planning context.
21. The Commissioner has had sight of the withheld information and he is satisfied that it consists of confidential communications between a client and professional legal advisors, made for the dominant purpose of

² <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/regulation-12-5-b-the-course-of-justice-and-inquiries-exception/>

seeking and/or giving legal advice. The information is, therefore, covered by LPP on the basis of advice privilege.

22. The Commissioner's established view is that disclosure of information subject to LPP, particularly legal advice which remains live and relevant, will have an adverse effect on the course of justice.
23. Having regard to the council's arguments, the nature of the withheld information and the subject matter of this request, the Commissioner is satisfied that disclosure of the requested information would have an adverse effect on the course of justice and, therefore, finds that the exception at Regulation 12(5)(b) is engaged
24. Regulation 12(5)(b) is a qualified exception, and the Commissioner has therefore considered the balance of the public interest to determine whether it favours the disclosure of the information, or favours the exception being maintained.
25. In relation to the public interest in disclosure, the Commissioner recognises that there is a general public interest in transparency and accountability around public authority decision making. He acknowledges that there is a specific public interest in openness regarding matters which have a potential impact on the environment.
26. The Commissioner is mindful that the complainant has genuine concerns about the council's position in these matters and with the implications associated with this in relation to the National Planning Policy Framework³.
27. The Commissioner's role does not include commenting on or making a decision in relation to the merits of any planning application submitted which may be relevant to the information requested. His role is limited to deciding whether the Council was correct to refuse to provide the requested information for the reasons it has stated.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1005759/NPPF_July_2021.pdf

28. LPP is a fundamental principle of justice, and it is the Commissioner's well-established view that the preservation of that principle carries a very strong public interest. The principle exists to protect the right of clients to seek and obtain advice from their legal advisers so that they can take fully informed decisions to protect their legal rights.
29. The Commissioner acknowledges the complainant's concerns and is aware of the wider concerns reported in the media around decisions taken in relation to Coventry Airport in respect of the Gigafactory. However, he does not consider that these factors in themselves represent a blanket justification for disclosing all information associated with these matters.
30. Where individuals or groups disagree with planning or other statutory decisions, there are other mechanisms and remedies for addressing such concerns which do not require the disclosure of information subject to LPP. In order to justify the disclosure of such information there would need to be a specific public need for disclosure which counterbalances the damage done to the principle of LPP. In this case, the Commissioner does not consider that such a need exists because other remedies for challenging or holding the council to account, other than global disclosures of information subject to LPP under the EIR, are available.
31. As noted above, the Commissioner recognises the complainant's genuine concerns about this matter and, with reference to his consideration of regulation 12(4)(a) above, acknowledges the possibility that differently formulated requests for information on this issue might result in a different outcome or public interest weighting. However, he does not consider it has been shown how, in this case, disclosing the specific information requested would directly serve the public interest.
32. 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).

33. 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 council has correctly applied regulation 12(5)(b) to the withheld information and that the balance of the public interests favours the exception being maintained.
34. The council additionally relied on the exception in regulation 12(4)(e) to withhold the information withheld under regulation 12(5)(b). As he has determined that the council correctly relied on regulation 12(5)(b) in this case the Commissioner has not gone on to consider its application of regulation 12(4)(e).

Right of appeal

36. 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

37. 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.

38. 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

Christopher Williams
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex – full text of requests

Request No. 1:

1. I challenge the legal right of the Case Officer to exclude Cov Aero from the OPA process (noting the above considerations) and request that WDC provide me with the legal confirmation and documentation that allows this exclusion to have taken place.

2. Furthermore, I question whether the Case Officer instructed the Planning Committee that Cov Aero was to be so excluded from the OPA process?

Request No. 2:

I challenge the assertion of the Case Officer that Cov Aero is not a GA facility under the auspices of the NPPF and also the definition provided within the ICOA and request the legal documentation to prove otherwise.

Request No. 3:

1. I now require the WDC to provide the legal confirmation and documentation to support their stance that the airport is a 'commercial' airport rather than a GA facility.

2. Should the legal documentation be provided, as per (1) above I require WDC to provide the legal confirmation and documentation that potentially allows WDC to exclude Cov Aero from any entitlement to support under Paragraph 99 of the NPPF.

Request No. 4:

1. Please confirm that WDC accept the validity and content of the submission by Sport England within the NPPF and the OPA process.

2. Please confirm that WDC accept that Paragraph 99 of the NPPF is valid with respect to the OPA and therefore the content of Paragraph 99 should be enforced within the Section 106 process.

3. Assuming that WDC do not accept (2) above please provide the legal submission / facts and basis the by which this has been refused.

Request No. 5:

I challenge the legal right of the Case Officer to exclude Cov Aero from both the OPA and Section 106 processes (noting the above considerations) and request that WDC provide me with the legal confirmation and documentation that allows this exclusion to have taken place.