

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 21 December 2023

Public Authority: Derbyshire County Council
Address: County Hall
Matlock
Derbyshire
DE4 3AG

Decision (including any steps ordered)

1. The complainant requested appendices to an Outline Business case (OBC) for the Chesterfield-Staveley Regeneration Route (CSRR). Derbyshire County Council (the Council) withheld the information requested under regulation 12(4)(d). The Commissioner's decision is that the Council correctly applied regulation 12(4)(d) to the request. He does not require any steps to be taken.

Request and response

2. On 19 February 2023 the complainant wrote to the Council in respect of the Chesterfield Staveley Regeneration Route (CSSR), and the discussion about the issue at the Cabinet meeting on 8 December 2023 and requested information in the following terms:

"I still haven't been able to access Appendix A - I misread your email and didn't realise it was going to be uploaded later. Please could you resend the link?"

Alternatively if Appendix A is included in the OBC would it be possible to provide a link to Appendix 2 or a direct link to the OBC, as discussed at the December 2022 Cabinet meeting - as that Appendix is restricted on

the DCC website Agenda for Cabinet on Thursday, 8 December 2022, 10.00 am ?”.

3. The Council responded on 14 April 2023 and stated that the information requested was exempt under regulation 12(4)(d).
4. On 16 April 2023 the complainant requested an internal review of the Council’s handling of the request.
5. The Council provided the outcome of its internal review on 14 June 2023 and upheld its position that regulation 12(4)(d) applied to the request.

Scope of the case

6. The complainant contacted the Commissioner on 3 July 2023 to complain about the way their request for information had been handled.
7. The scope of the Commissioner’s investigation into this complaint is to determine whether the Council correctly applied regulation 12(4)(d) to the request.

Reasons for decision

Regulation 12(4)(d) – material in the course of completion

8. Regulation 12(4)(d) of the EIR provides 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, to unfinished documents, or to incomplete data.
9. Regulation 12(4)(d) is a class-based exception, which means that if the information falls within its scope then the exception is engaged. It is not necessary to demonstrate that disclosure would have any particular adverse effect in order to engage the exception. However, regulation 12(4)(d) is subject to the public interest test.
10. In this case, the Council’s position is that the requested information is an unfinished document and also constitutes material in the course of completion.
11. The Council advised that, at the time of the request, the OBC was still being formulated and was subject to ongoing development. The Council submitted the document to the Department for Transport (DfT) for comment and DfT asked for further information before the document was re-submitted to them. In light of this the Council maintains that, at the time of the request, the OBC was subject to amendment, review and

changes by the project team in response to comments and requests for further information from the DfT. At the time of the request, therefore, the Council confirmed that the OBC was a 'work in progress'. Once it is approved by Government the OBC will be finalised and will form the basis of a planning application for the CSSR, at which point it will be subject to public consultation.

12. As the OBC is an unfinished document the Council is of the view that its disclosure would "give an inaccurate impression as it relates to a scheme which may not progress either on the basis of current information contained within the OBC or indeed at all if it is not funded".
13. The Commissioner has viewed the withheld information which consists of the OBC and a number of appendixes, excel spreadsheets and supporting documents.
14. The Commissioner accepts that, at the time of the request the OBC was still being formulated and subject to change following comments and observations received by the Council from the DfT. He is therefore satisfied that the OBC constitutes material which is both an unfinished document and material in the course of completion. Whilst the Commissioner notes that some of the documents within scope of the request appear to be completed documents, he is satisfied that all of the information which has been withheld forms part of the wider CSSR project and as such these documents would also be caught by regulation 12(4)(d).
15. In light of the above, the Commissioner's decision is that the exception at regulation 12(4)(d) is engaged by this information. The Commissioner has therefore gone on to consider the public interest test.

Public interest test

16. Regulation 12(1)(b) requires that where the exception under regulation 12(4)(d) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. The Commissioner is mindful of the provisions of regulation 12(2) which state that a public authority shall apply a presumption in favour of disclosure
17. The Council accepts that there is a general public interest in transparency, accountability and openness.
18. The Council also acknowledges that disclosure of the withheld information would encourage debate about the environmental impact of the project in question and encourage public debate about the scheme

in question and its impact. This would increase public understanding of decisions taken in relation to the project.

19. However, the Council considers that, as the project is still live, it requires a safe space to review proposals away from public scrutiny. It pointed out that much of the information caught by the request is still "within draft form awaiting final reports and checks from DCC officers".
20. The Council is of the view that the public interest favours maintaining the exception until such time as a final or completed version of the OBC can be made available, should the project proceed. This will allow the Council to complete ongoing work without interference from the public or press.
21. The Council considers that placing the requested information into the public domain now whilst the scheme is still live, and subject to change could also lead to misunderstanding. If the information is disclosed prematurely the Council would likely expend unnecessary resources explaining or justifying ideas or plans that are not, and may never be finalised.
22. The Council confirmed that if the project is approved, it will require planning approval, which will include public consultation.

Balance of the public interest

23. In determining where the balance of the public interest lies, the Commissioner has given due weighting to the general presumption in favour of disclosure and the specific public interest in transparency and accountability in relation to decisions having a significant community impact.
24. The Commissioner understands that there is a local public interest in both the project itself, and in any effect it may have on the environment. However, the Commissioner is of the view that equally, there are strong public interest arguments in favour of non-disclosure of the withheld information.
25. The Commissioner is mindful that the purpose of this exception is to provide authorities with a safe space within which decisions, discussions and exchanges of view can take place without the process being frustrated or hindered by premature public scrutiny.
26. The Commissioner considers that the extent to which disclosure would have a detrimental impact on internal processes will be influenced by the particular information in question and the stage the process had reached at the point the request was responded to. There will always be a stronger public interest in protecting a process that is ongoing than one that has concluded.

27. In the Commissioner's view the timing of the request is important in this case. The Commissioner accepts that the Council was still developing the OBC at the time of the request. In light of this the Commissioner considers there is a greater public interest in the Council having the 'safe space' they needed to formulate the OBC and reach decisions away from public scrutiny and distraction. That is particularly the case here given that the OBC is not finalised and likely to be subject to change. He also notes that once the OBC has been finalised it will be subject to planning approval, which will include public consultation on the proposals.
28. The Commissioner also considers that putting information in the public domain about speculative proposals which are not finalised and may not come to fruition may result in the effectiveness of decision making being challenged as the Council may be forced to field enquiries about hypotheticals.
29. The Commissioner accepts that disclosure of the withheld information would frustrate the process of developing the OBC and the Council's ability to carry out the necessary work to complete it. This goes to the heart of the activity which regulation 12(4)(d) is designed to protect.
30. In summary, whilst the Commissioner accepts that the arguments in favour of disclosure in this case carry weight, he does not consider that they outweigh the arguments in favour of withholding the information in this case.
31. 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).
32. As covered above, the Commissioner has concluded that the public interest in maintaining the exception at regulation 12(4)(d) outweighs the public interest in disclosure of the information. 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

33. 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

34. 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.
35. 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

Joanne Edwards
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