

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

**Date:** 6 August 2024

**Public Authority:** Bridgend County Borough Council  
**Address:** Civic Offices  
Angel Street  
Bridgend  
CF31 4WB

**Decision (including any steps ordered)**

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1. The complainant requested information about a public right of way. Bridgend County Borough Council (the Council) withheld the information requested under section 22 of the FOIA. During the course of the Commissioner's investigation, the Council agreed that the correct access regime for the request is the EIR as opposed to the FOIA. Following a reconsideration of the request under the EIR, the Council agreed to disclose some of the information it originally withheld and stated that it was relying on regulation 12(4)(d) (material in the course of completion) to withhold other information.
2. The Commissioner's decision is that the Council has correctly applied regulation 12(4)(d) to some of the information. However, the Commissioner also finds that the Council has breached regulation 5(2) of the EIR in failing to provide the information it agreed was not exempt during the Commissioner's investigation.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
  - Disclose the emails to which the draft plans of the public rights of way were attached.

4. The Council must take these steps within 30 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 the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 27 September 2023 the complainant wrote to the Council and requested information in the following terms:

“I request all correspondence and emails between [name of officer redacted] Country Access Maintenance Officer – Highways Services for BCBC and Kenfig Nature Corporation Ltd, Ton Kenfig, Bridgend, from July 2022 to 12 November 2023”.
6. The Council responded on 16 December 2023 and provided some information and stated that the remaining information held relevant to the request was exempt under section 22 of the FOIA.
7. On 12 November 2023 the complainant wrote to the Council and requested information in the following terms:

“I request all correspondence and emails between [name of officer redacted] Country Access Maintenance Officer – Highways Services for BCBC and the Pyle and Kenfig Golf Club Waun-y-Mer, Kenfig, from July 2022 to 12 November 2023”.
8. The Council responded on 18 December 2023 and stated that the information requested was exempt under section 22 of the FOIA.
9. On 15 November 2023 the complainant wrote to the Council and requested information in the following terms:

“I request all correspondence and emails between [name of officer redacted] Country Access Maintenance Officer – Highways Services for BCBC and Kenfig Corporation Trust, Ton Kenfig, Bridgend, in regard to the diversion or closure of public footpaths and bridleways on Kenfig Common from July 2022 to 14 November 2023”.
10. The Council responded on 13 December 2023 and stated that the information requested was exempt under section 22 of the FOIA.
11. On 7 January 2024 the complainant requested an internal review of the refusal of all three requests.

12. The Council provided the outcome of its internal review on 6 February 2024 and upheld its decision that the remaining information held relevant to the request was exempt under section 22 of the FOIA.

### **Scope of the case**

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13. The complainant contacted the Commissioner on 12 February 2024 to complain about the way their request for information had been handled.
14. During the course of the Commissioner's investigation, the Council acknowledged that the correct access regime for the request was the EIR, as opposed to the FOIA. It reconsidered the request under the provisions of the EIR and confirmed that some information could be disclosed, namely a number of emails. However, the Council stated that it considered regulation 12(4)(d) to apply to the draft plans attached to the emails in question.

### **Reasons for decision**

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#### **Is the requested information environmental?**

15. 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);
16. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.
17. The information requested in this case relates to a review of public footpaths and bridleways in a particular location. The Commissioner considers that a right of way or the usage of land in a particular way is a "measure", as defined in regulation 2(1)(c) of the EIR which affects or is likely to affect the element of the environments outlined in regulation 2(1)(a) of the EIR. Therefore, the Commissioner considers that the request was for environmental information as defined by regulation 2(1) of the EIR.

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

18. 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.
19. 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.
20. The information that the Council has withheld under regulation 12(4)(d) comprises draft plans which represent a survey of routes for the making of rights of way within the area in question. At the time of the request and at the time of this notice, the Council advised that the matter is under consideration and no decisions have yet been made about any rights of way.
21. The Commissioner notes that the fact that a public authority has not completed a particular project or other piece of work does not necessarily mean that all the information the authority holds relating to it is automatically covered by the exception. In this case, however, the

information relates to the making of rights away and possible changes in the rights of way. This is a legal process and will involve discussions with landowners and public consultation.

22. Having considered the withheld information and the Council's representations, the Commissioner accepts that the requested information constitutes material in the course of completion and he finds that regulation 12(4)(d) is engaged in this case. He has gone on to consider the public interest test.

### **Public interest test**

23. 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.
24. The Council acknowledges that there is a public interest in transparency and accountability. It also accepts openness increases "public trust in, and engagement with government".
25. The complainant advised that, in 1971 following a land dispute between Margam Estate and the Burgesses and Trustees of Kenfig Corporation, the High Court granted the whole of the freehold of Kenfig Common (which incorporates the land in question) to the Trustees and inhabitants of Kenfig, allowing unrestricted access for everyone. They advised that a number of public rights of way cross various sections of the land, some of which have fallen into a poor state of repair through lack of maintenance.
26. Kenfig Common comprises of two main sections, one of which is leased to Pyle and Kenfig Golf Club. There is also a nature reserve section which is the subject of a lease agreement by the Council from 1976 to 2019. As well as holding the lease for the site for the bulk of the last 47 years, the complainant advised that the Council has a statutory responsibility to maintain the local rights of way network and for maintaining the register of common land.
27. The complainant advised the Commissioner that the request was made in order to uncover and understand the reasons why the Council is undertaking a review of the rights of way in the area in question. The complainant also pointed out that the Council has a group which is known as the Local Access Forum which is responsible for reviewing any proposed changes to rights of way. However, the complainant does not

consider that this Forum is completely impartial and believes that a number of its members have potential conflicts of interests.

28. The complainant alleges that the Council has a history of not looking after the best interests of the site in question. As an example, they advised that, despite having responsibility for regulating development on the land in question, the Council failed to control two recent developments on the land which should have been subject to a section 38 Planning application consent to be in place before consent was given. The complainant advised that this did not happen.
29. The complainant is of the view that the only group/organisation that would benefit from any plans to rationalise the rights of way in the area is the Council itself because it would then not be required to maintain the rights of way and/or remove any obstructions. The complainant feels strongly that the local community should be involved in the process at an early stage, particularly as the land is vested in the deed of charity on behalf of local residents.
30. In favour of maintaining the exception the Council pointed out that the making or changing of rights of way is a legal process. The Council is currently involved in discussions regarding possible changes with local landowners. Once agreement has been reached with the landowners and they become proposed routes, the matter will then be the subject of a public consultation. This will allow members of the public to submit comments and views, which will be considered prior to any formal rights of way orders being made. Once formal orders are made, there is an opportunity for objections to be made which will then be considered by the Planning Inspectorate for determination.
31. The Council argues that disclosure of the plans, in their current state, prior to the legal process being completed is likely to lead to misunderstanding and individuals submitting views and/or objections outside of the proper legal process.
32. The Commissioner considers that there is a public interest in promoting transparency and improving public understanding about rights of way in the Council's area. Disclosure would also allow for greater transparency and accountability in how the Council is conducting its review into rights of way in the area. The Commissioner understands that the issue of rights of way is one that is of interest to the public, particularly those living near to them or wishing to use them.
33. However, the Commissioner also recognises the strong public interest arguments in favour of maintaining this exception. The Commissioner believes that there are occasions when a 'safe space' is needed by public authorities to allow them to formulate policy, debate live issues and reach decisions without being hindered by external comment and/or

media involvement. The need for a 'safe space' is to allow free and frank debate and it is the Commissioner's view that this is required regardless of any impact that the disclosure of information may have.

34. The Commissioner considers the 'safe space' to be about protecting the integrity of the decision making process and whether it carries any significant weight will be dependent on the timing of the request. In this case, the timing of the request is important. The Council advised the Commissioner that the review into rights of access is currently ongoing and is subject to a formal legal process. This process involves opportunities for the public to be consulted on, and to raise objections about any proposed new rights of way.
35. In reaching a view on the balance of the public interest in this case and deciding the weight to attribute to each of the factors on either side of the scale, the Commissioner has considered the circumstances of this particular case and the content of the withheld information. The Commissioner considers that the timing of the request in this case weighs heavily in favour of maintaining the exception given that the review of rights of way was ongoing at the time the request was received. The Commissioner accepts that disclosure would present a real risk of prejudice to the 'safe space' to the decision making process associated with the rights of way review. The Commissioner's decision is, therefore, that the balance of the public interest favours the exception being maintained. This means that the Council was not obliged to disclose the requested information.
36. 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 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.

## **Procedural matters**

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### **Regulation 5(2) – Time for compliance with the request**

37. Regulation 5(1) of the EIR states that:

"a public authority that holds environmental information shall make it available on request."

38. Regulation 5(2) of the EIR states that:



“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.”

39. From the evidence available to the Commissioner in this case, it is clear that the Council did not deal with the requests in accordance with the EIR. The Council initially provided some information and withheld other information under section 22 of the FOIA. During the course of the Commissioner’s investigation the Council reconsidered the request under the EIR and confirmed that some of the information it originally withheld could be disclosed, specifically the emails to which the draft plans (the withheld information) were attached. However, to date, the Commissioner has not been provided with any evidence that this information has been disclosed to the complainant.
40. The Commissioner’s decision is that the Council breached regulation 5(2) by failing to disclose the non exempt information within 20 working days of the date of the request. As the Council has confirmed that this information is not exempt under the EIR, the Commissioner has ordered disclosure of this information at paragraph 3 of this notice.



## Right of appeal

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41. 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)

42. 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.
43. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Joanne Edwards**  
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