

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

### **Decision notice**

**Date:** 29 August 2023

**Public Authority:** Norfolk County Council  
**Address:** County Hall  
Martineau Lane  
Norwich  
Norfolk  
NR1 2DH

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

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1. The complainant requested correspondence between Norfolk County Council (the Council) and the Bat Advisory Group for a specific period. The Council withheld the information requested under regulation 12(4)(d) of the EIR. 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**

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2. On 20 February 2023, the complainant wrote to Council and requested information in the following terms:  
  
"All emails and letters passing between Norfolk County Council's Norwich Western Link Road Project Team's and the NWL Bat Advisory Group that concern bats covering the period 1st March to 1st November 2022 and to include all reports and records referred to within the said written communication".
3. The Council responded on 6 April 2023 and stated that the information requested was exempt under regulation 12(4)(d) of the EIR.

4. At the time of its internal review on 2 June 2023, the Council disclosed copies of emails falling within the scope of the request, subject to personal data being redacted under regulation 13 of the EIR. However, the Council maintained that the minutes attached to the emails were exempt under regulation 12(4)(d).

### **Scope of the case**

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5. The complainant contacted the Commissioner on 2 June 2023 to complain about the way their request for information had been handled.
6. 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**

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

7. 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.
8. 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.
9. In this case, the Council's position is that the requested information constitutes material in the course of completion.
10. The Council advised that the withheld information, ie the minutes of discussions and meetings between itself and the BAG, forms part of ongoing work relating to its Bat Mitigation Strategy for the Norwich Western Link Road project (NWL project). The Bat Mitigation Strategy is currently a working draft which is being worked on and developed. It will form part of the planning application for the project in question.
11. The Council accepts that the minutes of the meetings themselves are not incomplete. However, the information within the minutes feeds directly into the development and finalisation of the Bat Mitigation Strategy for the project. The Council advised that:

"The work being undertaken by the BAG is solely focused on supporting and influencing the process of developing the planning application documents, working through the outstanding actions, developing robust solutions, and documenting these in an effective and appropriate manner, specifically, the Bat Mitigation Strategy.

The BAG minutes document discussions which are inextricably linked to this purpose – discussing elements of the mitigation strategy, outlining the works being progressed to support its drafting and development, and agreeing elements to be incorporated".

12. In their internal review request and their complaint to the Commissioner, the complainant explained that they were unable to understand how emails, letters and reports could be fairly categorised as unfinished or incomplete. In addition the complainant pointed out that information about the Council's Bat Mitigation Study is publicly available in the Council's Outline Business Case Addendum to the Department for Transport (DfT)<sup>1</sup>.
13. The Council addressed this point in its internal review and confirmed that the document had not been shared with the DfT. The Council was only required to provide the DfT with sufficient information to demonstrate that the project is potentially deliverable. The document has not, therefore, been relied upon to make a case to secure funding for the project. It added that:

"Any confirmation of funding from the DfT is then subject to a Final Business Case stage, for which the County Council must undertake detailed design work, demonstrate that all statutory approvals have been secured (planning consent, compulsory land order, highways order), and procure the scheme before seeking final funding approval through submission of a Full Business Case to the DfT".
14. The Commissioner notes that very limited information about the Council's bat mitigation strategy is referred to in the Outline Business case for the project. He also notes that the Business Case confirms that the bat mitigation strategy is under development, likely to be updated and is subject to consultation prior to it being finalised.
15. The Commissioner acknowledges the fact that the exception under regulation 12(4)(d) 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

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<sup>1</sup> <https://www.norfolk.gov.uk/-/media/norfolk/downloads/roads-and-transport/nwl/obc-and-appendices/nwl-addendum-to-the-obc.pdf>

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.

16. The Commissioner has viewed the withheld information which was provided to him by the Council as part of the investigation. Having reviewed the evidence provided along with his own guidance, the Commissioner is satisfied that the information withheld by the Council relates to the development of the Bat Mitigation Strategy, and the subject matter was under discussion and development both at the time of the request and at the present time. In addition, the strategy forms part of documentation required for a planning application for the NWL project which is to be submitted in the future.
17. In light of the above, the Commissioner accepts that the withheld 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**

18. 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.
19. In their internal review request the complainant suggested that even if regulation 12(4)(d) is engaged in relation to the requested information, they could:

“...see no public interest in delaying the production of the documents when a) a date has yet to be fixed for the determination of the planning application, b) advanced disclosure would assist the public in preparing for the planning hearing and also in seeking legal advice and c) some or all of the material has already been shared with a Government Department as part of your application for Large Local Majors programme funding. Sharing suggests that purpose behind the creation of all or some of the document has been fulfilled”.
20. The complainant pointed out that the project involves a significant amount of public money – around £300 million. In addition the project will have a significant impact on the whole population of Norfolk as expenditure on the project will affect other areas of Council spending in areas such as social and child service budgets.

21. The complainant also suggests that there are major question marks over the Council's approach to environmental protection matters relating to the project and referred to a particular online article<sup>2</sup> and BBC programme<sup>3</sup>.
22. The complainant advised that the Council does not have a proven track record of transparency in respect of planning matters. It held a public pre-planning consultation about the project between August and October 2022, and to date it has still not published the results of that consultation.
23. Finally the complainant pointed out that the BAG representatives are paid out of the public purse and as such they should be held accountable for any work they have undertaken. They also stated that, in their view, disclosure of the minutes would or should not prejudice the purpose of the BAG, particularly as much of the work undertaken to date has been published.
24. The Council acknowledges the general public interest in accountability and transparency in relation to decisions taken by public authorities and the spending of public money. The Council also confirmed that it has taken into account the presumption in favour of disclosure under the EIR.
25. Whilst the Council accepts that there is a public interest in developments of this nature, it pointed out that a planning application in respect of the project will be submitted in the future and there is also likely to be an inquiry into the proposals. The final version of the Bat Mitigation Strategy will be published as part of the formal planning process. As such, the public will at that time have the opportunity to understand and participate in debate in relation to issues which relate to the Bat Mitigation Strategy at a time when the policy has been finalised and fully develop.
26. The Council contends that members of the BAG require a safe thinking space to discuss views on live matters in order to develop and finalise the Bat Mitigation Strategy, away from public scrutiny during the drafting stage. Premature disclosure of the withheld information would erode this safe space.
27. The Council argues that disclosure of the minutes of the BAG meetings would discourage members from being candid and frank in providing

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<sup>2</sup> <https://www.edp24.co.uk/news/local-council/20752859.heavy-handed-accusation-council-forced-suspend-western-link-bat-survey/>

<sup>3</sup> <https://www.bbc.co.uk/programmes/m000dwf3>

views on the issues under consideration. The Council is of the view that this would in turn have a prejudicial effect on the development of the Bat Mitigation Strategy, which is still in the course of completion.

28. The Council accepts that it provided a very limited amount of information about its bat mitigation strategy to the DfT to allow the project to progress. However, the strategy requires further consideration and detail in order to get the project to the next stage of the planning process.
29. The Council also contends that disclosure of the minutes before the Bat Mitigation Strategy has been finalised could result in the release of misleading and inaccurate data. The Council advised that the minutes provide an indication of how certain matters would be dealt with at a particular point in time, but this position may change as the planning process proceeds. Disclosure of the information "could prematurely engage public debate in an unstructured and ineffective manner, focused on, for example, out of date opinions of strategies on the best way to deal with the issues arising". It would also mean that the Council would need to divert resources to respond to external comments and this would affect the development and progress of the project. The Council argues that it is not in the public interest to impede its efficiency ability to deliver its statutory functions.

### **Balance of the public interest**

30. 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.
31. The Commissioner understands that there is a significant local public interest in both the project itself, and in any effect it may have on the environment.
32. However, the Commissioner is of the view that equally, there are strong public interest arguments in favour of the non-disclosure of the relevant information.
33. The Commissioner considers that arguments about the need for space for officers to be able to engage with others are considered to be 'safe space' arguments. The term 'safe space' is about the need to be able to formulate policy, debate live issues and reach decisions without being hindered by external comments and/or media involvement. Whilst part of the reason for needing a safe space is to allow for free and frank debate, it is the Commissioner's view that the need for a safe space exists regardless of any impact that the disclosure of information may

have on this. The Commissioner considers the 'safe space' argument to be about protecting the integrity of the decision-making process and whether it carries any significant weight will depend on the timing of the request.

34. With regard to the Council's argument that a safe space is needed by the BAG in order to finalise the Bat Mitigation Strategy, the Commissioner acknowledges that the strategy is still under development and subject to change. He also notes that the wider process of submitting a planning application for the project is ongoing. The Commissioner accepts that a disclosure of the information could provide a distraction which would invade the thinking space and inhibit the ability of the BAG to finalise the Bat Mitigation Strategy. This is the very activity which the exception is formulated to protect.
35. The Commissioner has taken into account the timing of the request in this case and is mindful that matters relating to both the Bat Mitigation Strategy and the wider project were live at the time of the request and the time of this notice. Accordingly, the Commissioner gives more weight to the argument that disclosure would present a real risk of prejudice to the 'safe space' to consider issues in relation to the Bat Mitigation Strategy, away from public scrutiny.
36. In terms of balancing the public interest, the Commissioner has also had regard to the nature of the information withheld. Whilst the minutes themselves are in effect completed documents, he accepts that the withheld information relates to the development of a Bat Mitigation Strategy for the project, and that the strategy has not yet been finalised and is likely to be amended.
37. The Commissioner also notes that the Council plans to publish the final version of the Bat Mitigation Strategy when a planning application for the project is submitted, at which time the public will have an opportunity to comment on the application, the strategy and engage in the planning process.
38. Whilst he accepts that the arguments in favour of disclosure in this case carry weight the Commissioner does not consider that they outweigh the arguments in favour of withholding the information.
39. 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).

40. 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

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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.

**Signed .....**

**Joanne Edwards**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**