

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

### **Decision notice**

**Date:** 24 October 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 a copy of a report on the environment aspects of the Alignment Refinement Options relating to the Norwich Western Link Road project (NWL project). 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 4 April 2023, the complainant wrote to Council and requested information concerning the NWL project in the following terms:  
  
"Please provide a copy of the WSP Report on the Environmental aspects of the Alignment Refinement Options".
3. The Council responded on 19 May 2023 and stated that the WSP environmental review was not taken forward as a separate report and instead it was "subsumed within the work leading up to publication of the 'Alignment Refinement Appraisal' report (chapters 6 and 7)". The Council confirmed that the Alignment Refinement Appraisal Report was published with the Cabinet papers for the meeting on 4 July 2022 (from page 70 onwards), and provided a link to the document.

4. On 23 May 2023 the complainant requested an internal review of the handling of their request. They pointed out that as the Council had acknowledged the existence of the WSP environmental review, they wanted a copy of the document in question.
5. The Council provided the outcome of its internal review on 20 July 2023. It confirmed that it held a report but it was considered exempt under regulation 12(4)(d) as the document is "an unfinished draft document which was never finalised or internally approved".

### **Scope of the case**

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6. The complainant contacted the Commissioner on 24 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**

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#### **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, the draft WSP report, constitutes an unfinished document. In its internal review the Council stated that the findings of the WSP environmental review were documented in a report, but the report:  
  
"is an unfinished draft document which was never finalised or internally approved. Work on this report stopped, and there is no intention to finalise the report, because the content was developed and incorporated into the larger 'Alignment Refinement Appraisal' report".
11. The Council provided the Commissioner with a copy of the withheld information. The document is marked as a draft document and includes

a range of internal drafting and review comments and notes. Based on the content of the document and the notes attached to it, it is clear to the Commissioner that the report is a draft, unfinished document. The Commissioner notes that the Council confirmed that in the course of preparing this report it decided to move forward with the larger "Alignment refinement Appraisal" report. As such, the withheld information was never finalised and remains a draft, unfinished document.

12. As stated in the Commissioner's guidance on regulation 12(4)(d)<sup>1</sup>:

"A document may be unfinished because you are still working on it at the time of the request or because you stopped working on it before it was finalised and you do not intend to finish it".

13. Having considered the withheld information, the Commissioner accepts that the report is in draft form and is therefore an unfinished document. His decision is therefore 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**

14. 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.

15. In their complaint to the Commissioner, the complainant stated that the report was paid for with public funds and contains information on the environmental impacts of a proposed new road. The subject matter of the new road has attracted significant public interest and involves a significant amount of public money – between £300-500 million.

16. The complainant also considers that any safe space argument is not relevant in this case as the Council has acknowledged that the report was completed and used to produce a further report. In addition, the complainant asserts that the Council's argument that disclosure may give a misleading or inaccurate impression does not carry weight and referred to the Commissioner's guidance which states that in most cases

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<sup>1</sup> <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/regulation-124d-eir/#whatisan>

public authorities should be able to provide contextual information to address the possibility of information disclosed giving a misleading impression.

17. 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.
18. Whilst the Council accepts that there is a public interest in developments of this nature, it explained that the withheld information relates to the development of its approach to refining the alignment of the easternmost length of its preferred route for the scheme. The Council considers it essential for it to have a safe space to consider options, approaches, and their implications. The Council is of the view that disclosure of the withheld information would likely dissuade its officers and WSP from being candid and frank in putting forward views going forward. This would in turn have a prejudicial impact on the preparation of the application for planning permission for the project, which is currently still in the course of development.
19. The Council pointed out that there are significant areas of the withheld information which remain unfinished. As such, it does not consider that disclosure would enable or enhance public scrutiny given the document is incomplete. The Council also considers that it would lead to misleading information being put into the public domain, particularly as some elements have been superseded through development of the 'Alignment Refinement Appraisal' report. The Council stated that, due to the content and stage of the withheld information, to produce narrative or contextual information to explain the content of the report in order to address the possibility of it being misinterpreted would unnecessarily divert its resources. Instead, the Council considers that the public interest has been served through the publication of the 'Alignment Refinement Appraisal' report which sets out all the considerations that the Council took into account.

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

20. 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.
21. 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. However, the Commissioner is of the view that equally,

there are strong public interest arguments in favour of non-disclosure of the withheld information.

22. 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.
23. He 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. Whilst the Commissioner accepts that the 'Alignment Refinement Appraisal' report had been published at the time of the request, he also notes that the wider process of submitting a planning application for the NWL project was ongoing. The Commissioner also considers that putting information in the public domain about speculative proposals which were not finalised may result in the effectiveness of decision making being challenged as the Council may be forced to field enquiries about hypotheticals.
24. The Commissioner has considered the arguments provided by both parties. He recognises the legitimate public interest in disclosing information that would inform the public about decisions concerning activities that may have an impact (whether positive or negative) on the environment. He is mindful that access rights under the EIR are designed to support public access to environmental information and public participation in decision making. However, in this case, the Commissioner does not consider disclosure would satisfy this public interest as the information would not represent the final analysis or concluded position relating to the subject matter as the withheld information is incomplete and was never finalised.
25. Taking all the factors into consideration, 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.
26. 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).

27. 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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28. 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)

29. 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.

30. 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  
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SK9 5AF**