

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

Date: 9 October 2024

Public Authority: Braintree District Council
Address: Causeway House
Bocking End
Braintree
Essex
CM7 9HB

Decision (including any steps ordered)

1. The complainant requested information about a particular planning application. Braintree District Council (the Council) provided some information and withheld other information under regulation 12(4)(d) (material in the course of completion) and regulation 13 (personal data). The complainant raised concerns about the absence of an earlier draft of the planning report. The Council confirmed that it considered the earlier draft of the planning report to be exempt under regulation 12(4)(d) of the EIR.
2. The Commissioner's decision is that the Council correctly applied regulation 12(4)(d) to the request and the public interest favours maintaining the exception. The Commissioner does not require any steps to be taken.

Request and response

3. On 3 May 2023, the complainant wrote to Council regarding a specific planning application and requested information in the following terms:

"We require copies of all documentation held by your authority in connection with the above application and that we are content to receive copies of that documentation electronically".

4. The Council responded on 2 June 2023 and provided some information but withheld other information under regulations 13 and 12(4)(d) of the EIR.
5. The complainant wrote back to the Council on 20 June 2023 and queried the absence of a number of documents, specifically an earlier report which had been considered by the Planning Committee and additional consultation responses.
6. The Council responded on 7 July 2023 and confirmed that all consultation responses had been provided. It also stated that the 'earlier Report to Committee' was considered exempt under regulation 12(4)(d) of the EIR.
7. The complainant wrote back to the Council on 10 August 2023 and confirmed that they had not received the consultation responses referred to. They also disputed the application of regulation 12(4)(d) to the earlier report.
8. The Council responded on 1 September 2023 and confirmed that all consultation responses had been included in the bundle of information originally disclosed. It also advised that an internal review was being conducted in relation to its application of regulation 12(4)(d) to earlier draft of the planning report.
9. The Council provided the outcome of its internal review on 25 October 2023 and upheld its decision that the earlier draft of the planning report was exempt under 12(4)(d) of the EIR.

Scope of the case

10. The complainant contacted the Commissioner on 16 April 2024 to complain about the way their request for information had been handled. Specifically, the complainant asked the Commissioner to consider whether the Council had correctly applied regulation 12(4)(d) of the EIR to the earlier draft of the planning report.

Reasons for decision

Is the requested information environmental?

11. 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);
12. The Commissioner interprets the definition of environmental information widely, and considers information concerning, about or relating to measures, activities and factors likely to affect the environment to be environmental information.
13. The Commissioner has viewed the withheld information and notes that it relates to a planning application. The Commissioner considers that planning and development of land 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

14. 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.
15. 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.
16. In this case, the Council's position is that the requested information is an unfinished document.
17. The withheld information in this case is a draft planning report which was prepared by the planning case officer. The report was circulated internally with planning colleagues for consideration, comment and formal sign off. The Council advised that, after consideration, the report was not taken any further and a reassessment of the planning merits of the application was undertaken. The draft report was then completely superseded by a new planning report, which was considered by the Planning Committee at its meeting on 4 October 2022 where a decision was made whether or not to grant planning permission. A copy of the final planning report and planning decision (dated 30 December 2022) is available on the Council's planning portal.
18. The complainant in this case are solicitors acting on behalf of the planning applicant for the application in question, a limited company. The Council confirmed that, at the time of the request, the planning case was still live as the planning applicant was still within the time period to submit a planning appeal. In addition, the complainant was in correspondence with the Council regarding their dissatisfaction with the general handling of the planning application. These correspondence exchanges both pre-date and post date the request for information having been submitted.
19. The Commissioner accepts the information in scope of the request engages the exception. It is clear the document is a draft document which was later superseded with a new, final report on the planning

application. As the Commissioner's guidance¹ makes clear, draft versions of documents are still unfinished even if the final version of the document has been published.

Public interest test

20. 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.

Arguments in favour of disclosure of the requested information

21. The Council acknowledges that there is a public interest in disclosure of environmental information as it will inform public debate and increase transparency into how the Council has met its legal obligations.
22. The Council also accepts that there is a public interest in openness and transparency in the planning process and how planning decisions are made.

Arguments in favour of maintaining the exception

23. In favour of maintaining the exception the Council pointed out that the purpose of regulation 12(4)(d) is to provide a safe space for officers to exchange views, take advice from colleagues and test their decisions without fear that any exchanges and documents recording early iterations and drafts being subject to public scrutiny. The Council considers that disclosure of such information would hinder the planning process and have a negative effect in the way it carries out its statutory duties.
24. The Council explained that, at the time of the request, the subject matter associated with the request was live and there was a potential for the planning decision to be appealed. As such, it considers that disclosure of the withheld information, which provides details of its internal considerations would "unfairly erode that safe space, and impact on the Council's approach to responding to any appeal, or future litigation". This could put the Council in a disadvantageous position.

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

25. The Council also argues that disclosure could have a chilling effect on planning officers as "officers would not feel free to be candid and frank in any submissions and discussions around the approach to any planning appeal, with the likelihood that those records could be disclosed".
26. The Council asserts that a key factor in considering the public interest is the value of the information in question in terms of informing public debate on the matters concerned. Whilst it accepts that there is an argument for providing as full a picture as possible as to how a planning decision has been made, in this case the original draft report was discarded and a new final report was written. The Council acknowledges that the withheld information is of interest to the complainant as they are acting on behalf of the planning applicant who submitted the application that the information relates to. However, it does not consider that disclosure of the first draft report would aid the general public in understanding the Council's decision in relation to the planning application. It also contends that there is little public interest in requiring the Council to explain a decision making thought process that never actually came to be fully considered.

Balance of the public interest

27. The Commissioner considers that there is a public interest in promoting transparency and improving public understanding about planning matters. Disclosure would also allow for greater transparency and accountability in how the Council reached a recommendation and decision in relation to this specific planning application. The Commissioner also understands that the complainant has a personal interest in the information as they are acting on behalf of the applicant who submitted the planning application in question.
28. 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.
29. 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 planning application to which the withheld information relates was considered to be still live at the time of the request as it was still capable of being appealed. The Commissioner also notes that the applicant was also involved in ongoing correspondence

exchanges with the Council about the general handling of the planning application, including a claim for compensation for wasted costs.

30. 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 planning application was still live and subject to appeal at the time the request was received. The Commissioner also considers that putting information in the public domain about initial decisions and recommendations which are not finalised and never came to fruition may result in the effectiveness of decision making being challenged as the Council may be forced to field enquiries about hypotheticals.
31. 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. This means that the Council was not obliged to disclose the requested information.
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 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.

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.

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