

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 1 September 2020

Public Authority: Guildford Borough Council
Address: Millmead House
Millmead
Guildford
Surrey
GU2 4BB

Decision (including any steps ordered)

1. The complainant has requested information relating to a proposed bridge over a railway line to replace a level crossing. The council refused the request on the basis that Regulation 12(4)(d) and Regulation 12(5)(e) applies.
2. The Commissioner's decision is that the council was correct to apply Regulation 12(5)(e) to some of the cost elements of the withheld information but was not correct to apply it to the withheld information as a whole. She has also decided that the council was not correct to rely upon Regulation 12(4)(d) to withhold the information. She has also decided that the council failed to comply with the time requirements for responding to requests and to requests for the decision to be reconsidered set out in Regulations 5(2) and 11(4).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose all of the withheld information to the complainant **other than** the options costings information, and the information included within paragraphs 9.1.9 – 9.1.12 of the main report. The total estimates for each road bridge option considered should however be disclosed.

4. The public authority must take these steps within 35 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

5. Following a previous request, which had been refused, in January 2019, on 20 August 2019 the complainant wrote to the council and requested information in the following terms:

"Regarding the proposed bridge over the railway line to replace the level crossing at Ash Station: GBC considered a number of possible routes for the bridge each of which were evaluated. Could you please provide me with a copy of any report with the results of the option appraisals for each of the routes. This is a Freedom of Information request"

6. The council responded on 15 October 2019 and again refused the request on the basis that the exceptions in Regulation 12(4)(d) (material in the course of completion) and Regulation 12(5)(e) (commercial confidentiality) apply. The complainant requested that the council review its decision on 25 October 2019.
7. On 28 January 2020 the council provided the outcome of its review. It again upheld its initial decision that the exceptions in Regulation 12(4)(d) and 12(5)(e) applied and refused to disclose the requested information.

Scope of the case

8. The complainant contacted the Commissioner on 21 January 2020 to complain about the way his request for information had been handled.
9. He argues that it is inevitable that the council holds a document falling within the scope of his request and that this document must be complete or finished. He says that the council has already reached a decision on a preferred option from the options it had available to it over the project.
10. He considers that in order for this to have occurred there must have been a report outlining the options which were available to the council in order that councillors and senior officers could make an informed choice as to their preferred option. He considers therefore that this document

will be a finished document as it has completed its purpose, and that the public interest rests in the disclosure of this document in response to his request for information.

11. During the course of the Commissioner's investigation, the council clarified that it did still consider that both Regulations 12(4)(d) and 12(5)(e) apply to the withheld the information.
12. The Commissioner therefore considers the scope of the case to be whether the council was correct to rely upon these exceptions to withhold the information.

Reasons for decision

Regulation 12(5)(e)

13. Regulation 12(5)(e) of the EIR provided that:

"...a public authority may refuse to disclose information to the extent that its disclosure would adversely affect... the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;"

14. The Commissioner's published guidance on this exception explains that, in order for this exception to be applicable, there are a number of conditions that need to be met. These are:
 - Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality provided to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?
15. The information withheld under Regulation 12(5)(e) is a report detailing the options available together with some associated maps. The report contains an analysis of the costs and benefits of the different options, and therefore contains itemised, estimated costings which relate to different parts of the development on the different options available to the council.
16. The report also contains detailed analysis of land ownership which may be affected by the various options which were under consideration.

17. The Commissioner is also aware that there is an executive report dated 30 October 2018 which discussed the options available, and one extract of this falls within the scope of the request for information. The council confirmed by telephone on 7 August 2020 that the remainder of the report does not fall within the scope of the request.
18. The application of section 12(5)(e) necessarily centralises around these estimated costs, rather than the wider considerations in the report, which are an analysis of the wider pros and cons of the different options.

Is the information commercial or industrial in nature?

19. The council argues that the withheld information is clearly commercial or industrial in nature as it relates to the planning and development of a road bridge.
20. The Commissioner accepts that the information is commercial in nature. It relates to the costs and budgets of commercial agreements necessary to develop the bridge. The council argues that many of these agreements were under negotiation at the time that the request for information was received. As such she considers that the information redacted from the documents is commercial in nature as it relates to the prospective costs analysis and the procurement of services to develop the bridge.

Is the information subject to confidentiality provided by law?

21. The Commissioner considers this to include to confidentiality imposed on any person by the common law duty of confidence, contractual obligation, or statute. The council argues that the information is subject to a common law duty of confidence.
22. The Commissioner notes that the main report, produced by AECOMM, is entitled *"final report (confidential: for client reference)"*, the client being the council in this case. The report also contains a confidentiality clause within it, stating:

"This Report is confidential and may not be disclosed by the Client nor relied upon by any other party without the prior and express written agreement of AECOMM."

23. The Commissioner also considers that where the EIR are concerned, it is not always necessary for there to be a formal confidentiality clause for this element of the exception to be met. If the withheld information has the necessary quality of confidence (more than trivial and not otherwise publicly known) it can be said that it is protected by a common law duty of confidence.

24. A further question which can be considered is whether the council's own employees would recognise and understand that the report should be held in confidence. In effect, if employees recognised that they would potentially be subject to disciplinary action by their employers for disclosing the information without due authority then a duty of confidence can be said to exist, even where the report was provided in circumstances which might not otherwise give rise to a duty of confidence as no obvious obligation of confidence can be identified to the provider of the information.
25. The council argues that the information is commercially sensitive, and disclosure would adversely affect the commercial interests of it and other parties involved. It therefore regards the withheld information as having the necessary quality of confidence.
26. The Commissioner considers that the withheld information is not trivial in nature, and she is not aware of the withheld information being otherwise publicly available. She is also satisfied that council employees would recognise that the sensitivity of the report is such that they would be likely to be subject to disciplinary action if they were to disclose the report without due authority to do so.
27. For these reasons she is satisfied that a common law duty of confidence is owed, and this element of the exception is met.

Is the confidentiality provided to protect a legitimate economic interest?

28. The council argues that the information is sensitive as negotiations are still ongoing with various parties. It said, for instance, that section 106 agreements and land values are currently still being negotiated and are yet to be finalised. It said that any negotiations surrounding the potential for compulsory purchase orders could also be affected by a disclosure of the information. The council also argues that the Council's ability to conduct future business with local landowners would be compromised by a disclosure of the information.
29. It also considers that a disclosure of the estimates at this stage could also have a detrimental effect on the ongoing negotiations with third parties, such as Homes England. It has subsequently been reported that Homes England has now agreed to award grants towards the project,

however this was subsequent to the request being received¹ and cannot therefore be taken into account in this decision notice. At the time of the request these negotiations were ongoing.

30. The council argues that a disclosure of the information would adversely affect its ability to successfully complete the development as it would affect negotiations and raise costs.
31. It accepts, however, that as agreements are formalised the sensitivity of the information is likely to diminish, and it therefore considers that further information will be able to be disclosed as the project moves forward. Clearly however, a delayed disclosure of this nature would be likely to undermine the complainant's purposes and motivation in seeking the information.
32. The Commissioner, however, accepts the council's arguments. If organisations negotiating to provide services are aware of the cost estimates for that service which the council is working to, it is likely that any tenders they submit, or negotiations they undertake, will centralise around those estimates, rather than being considered from the basis of actual market value for the service.
33. Similarly, if landowners are aware that the council has estimated a certain cost in order to purchase their land, they are unlikely to accept any figure which does not substantially match that estimate.
34. Having considered the council's arguments together with the withheld information, the Commissioner is satisfied that a disclosure of the estimates would affect the council's ongoing negotiations with third parties, this would affect its own commercial interests in negotiating the best value agreements it can.
35. However, the Commissioner notes that the council has applied Regulation 12(5)(e) to the entirety of the withheld information. It has not specified sections of information such as specific paragraphs, figures, or tables which it considers the exception should apply to. It only confirmed to the Commissioner that it considered that Regulation 12(5)(e) applied because of the harm which disclosing the *options costings* within the report would cause.

¹ <https://www.getsurrey.co.uk/news/surrey-news/surrey-hampshire-housing-developments-win-14233949>

36. Whilst the Commissioner is satisfied that Regulation 12(5)(e) applies to the options costings within the report, she has not been persuaded that the exception applies to the entirety of the withheld information.

Would the confidentiality be adversely affected by disclosure?

37. Although this is a necessary element of the exception, once the first three elements are established the Commissioner considers it is inevitable that this element will be satisfied. She acknowledges that disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available and would also harm the legitimate economic interests that have already been identified.
38. The Commissioner has therefore concluded that the exception at Regulation 12(5)(e) is engaged in respect of the withheld information.

The public interest

39. The Commissioner is satisfied that, the exception in Regulation 12(5)(e) is engaged by the options costings information. She has therefore considered the public interest in this information being disclosed.
40. Regulation 12(5)(e) is subject to the public interest test. This means that even when the exception is engaged, public authorities have to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Under regulation 12(2) of the EIR, public authorities are required to apply a presumption in favour of disclosure.

The public interest in the information being disclosed.

41. The council recognised the following public interest factors in favour of the information being disclosed:
- *The need for the Council to be transparent and accountable with regard to the expenditure of public funds.*
 - *The value of public input into a major local construction project.*

The public interest in the exception being maintained

42. The council identified the following public interest factors in favour of the exception being maintained:
- *Disruption of negotiations leading to loss of public confidence.*

- *The weakening of the Council's ability to obtain value for money in respect of future projects of this nature.*
 - *Prejudice to negotiations affecting outcome of project is not in the interests of local taxpayers, particularly in the light of the large amount of money involved.*
43. It also highlights that *"The economic advantages and disadvantages being played for in the negotiations with the other parties involved are weighty, involving millions of pounds. The asymmetry of power in the negotiations is a real concern, and the potential for loss to the public purse is therefore significant"*.
44. It further highlighted that as changes have been made over time, a disclosure of the cost options could be misleading. The Commissioner places little weight on this point however as the council could provide an explanation of where changes have been made, and why they have been made over the time which has passed.

The Commissioner's analysis of the public interest

45. The Commissioner acknowledges that there is a general public interest in disclosure and, given that the contract involves public expenditure and involves impact on local amenities and wider environmental impacts there is also a specific weight towards disclosure in this case.
46. The Commissioner recognises that the project has had a degree of controversy surrounding it, and the council admitted that conflicting public opinions have been aired. Local media have reported on some of the issues of concern, specifically as regards the withheld report², including that the design will push traffic to other roads within the area and suggestions that the report may not have taken some factors into consideration. A disclosure of the report would clarify whether these suggestions have any basis in fact and would help the public to clarify the factors which were taken into account by the council when deciding on its preferred option.

² <https://www.guildford-dragon.com/2019/09/25/ash-aspect-a-bridge-to-benefit-ash-a-vanity-project-or-a-key-to-more-housing/>

47. She also accepts that the development is likely to cost taxpayers a significant amount of money, and there is clearly a strong public interest in the public being aware of the likely costs of taking the development forward and the options discounted by the council in reaching its preferred choice.
48. Insofar as the Commissioner's consideration of the information relating to this request, she must consider the council's argument that disclosing a breakdown of the council's costs estimates will ultimately undermine its negotiations to move the development forward, and ultimately cost taxpayers more money to develop the road bridge. The Commissioner recognises that cost estimates were set out in detail within the report for each option. A disclosure of this information prior to negotiations being completed on various aspects of the project could ultimately affect the outcome of those negotiations in a disadvantageous way for the council, and therefore taxpayers.
49. Ultimately, further cost to the council in this manner is reflected in the overall cost of completing the development, and this takes funds away from the public purse and the resources which the council has to carry out its other functions. This is a strong argument in favour of the exception being maintained.
50. That being said, there is a strong public interest in the public knowing the financial commitment which the council has agreed to in developing the bridge. She therefore considers that the public interest in disclosing the total estimates for the completion of the development³ outweighs the public interest in the exception being maintained. The total estimate for the project is a value which has not been broken down into its separate cost estimates for each service of purchase included within it. A disclosure of these figures would not undermine negotiations given that parties in negotiations with the council would not be able to identify the estimated costs which the council has applied for that individual element, and seek to negotiate a price close to that estimate.
51. The Commissioner notes that since the request was first received, the project has continued to move forward, and some aspects of the development may now have been confirmed. For the absence of doubt, the council needed to consider the circumstances at the time that the request was received, or, at the latest, when the review of the council's response was issued on 28 January 2020.

³ Figures as stated in paragraph 9.1.5 of the report.

52. Having considered the above points, the Commissioner considers that the public interest rests in the exception in Regulation 12(5)(e) being maintained for the relevant costs and estimated costs included within the withheld information⁴.
53. She has also decided that paragraphs 9.1.9 – 9.1.12 fall within the scope of the exception and the public interest rests in the maintenance of the exception for these paragraphs in their entirety. These paragraphs provide a detailed analysis relevant to the (at the time) negotiations with Network Rail.
54. As noted above however, she has decided that the public interest in maintaining the exception for the total figures for the development options does not outweigh the public interest in that information being disclosed⁵.

Regulation 12(4)(d)

55. Regulation 12(4)(d) of EIR provides that a public authority may refuse to disclose environmental information requested if – the request relates to material which is still in course of completion, to unfinished documents or to incomplete data.
56. The aims of the exception are:
- to protect work a public authority may have in progress by delaying disclosure until a final or completed version can be made available. This allows it to finish ongoing work without interruption and interference from outside; and
 - to provide some protection from having to spend time and resources explaining or justifying ideas that are not and may never be, final.
57. For regulation 12(4)(d) to be engaged, the requested information must fall within one of the categories specified in the exception. It is not necessary to show that disclosure would have a particular adverse effect, but any adverse effects of disclosure may be relevant to the public interest test.

⁴ These are contained primarily within section 9, and appendix 9.1 of the report.

⁵ Figures as stated in paragraph 9.1.5 of the report.

58. The council considers that the exception in Regulation 12(4)(d) applies as it considers that the withheld information is incomplete data; it refers to a construction project which is still in the course of completion, and which includes information relevant to negotiations which are still ongoing.
59. It argues that the option appraisal and associated routes/ alignment costings is spread over four separate documents over a period of time (i.e., four years) and could easily be misunderstood or misinterpreted if any of it was viewed in isolation or without the history of the project development.
60. The complainant argues that his request relates to a report, or information, surrounding the options which were created for the council in order to facilitate it making a decision as to its preferred option as regards the road bridge. He argues that the report will be a distinct and completed section of work, which can be considered as a separate document to any ongoing work regarding the development.
61. The complainant has highlighted that at the time of his request on 20 August 2019 the council had already named its preferred option and provided information to the public on what this entailed, including some overview of costs and the preferred land route. He argues that the choices taken up until that point, and the information which the council considered in the report detailing the options, would be a distinct document which now relates to completed work. He therefore considers that the exception should not have been applied to this document.
62. He does however accept that the document might include some degree of cost estimates etc and has suggested that this information could be redacted whilst the overall document disclosed. As noted above, the Commissioner has accepted the application of Regulation 12(5)(e) to the options costings set out in the withheld information. This information is not therefore considered further within the analysis below.

The Commissioner's analysis

63. As regards the council's argument that the information falls within the criteria as incomplete data, she notes that the data was complete insofar as the report was finalised with those figures as they stood, and the council relied upon the figures within the report to inform their choice as to the preferred option. For this reason, she does not consider that the information falls within the arm of the exception relating to incomplete data.
64. However, the council argues that the report is part of a wider project, which is not in itself complete. It therefore argues that Regulation

12(4)(d) continues to apply as the wider project is not itself complete. This argument surrounds whether the report falls within the limb of the exception for '*material which is still in course of completion*'.

65. The question for the Commissioner is therefore whether the information is 'complete' given the wider project, which is still ongoing.
66. The Commissioner accepts that the wider project of developing the road bridge is not complete. At the time of the request, no planning application had been submitted and the council was still in the process of negotiating some elements which it needed in order to go ahead with the project, including the funding and obtaining the necessary land to go ahead with it.
67. In the case of *Manisty v Information Commissioner*⁶ the Upper Tier Tribunal considered similar arguments to this case. It considered that part of the relevant test involved in determining whether a document could continue to fall within the scope of the exception involves "*exercising a judgement on whether the information could now properly be considered as independent from the continuing work on the Expressway*"
68. At para 31 of the decision, the Upper Tier Tribunal also stated that: '*One factor that may help in applying this approach in some cases is whether there has been a natural break in the private thinking that the public authority is undertaking. Is it moving from one stage of a project to another? Another factor may be whether the authority is ready to go public about progress so far*'.
69. AECOM's report indicates that project brief it received from the council was to produce a report which was not required to be realised to the extent that a planning application could be submitted, but to prepare the document to a sufficient level of detail that it would assist the council in choosing a preferred option⁷.
70. The Commissioner is therefore satisfied that the report was produced for the purposes of enabling a decision by the council as to the best option available to it for the road bridge. That decision had been taken by the council, and the results publicised as its intended 'preferred' option. The council has not suggested that there is any intention to continue work

⁶ [2018] UKUT 423 ACC

⁷ Para 1.1.4

on this report, and the report is stated as being the '*final report*'. She therefore considers that the report was a completed document at the time of the request, and, in respect of the council's arguments for withholding the document, that that purpose had also been completed by that time in that the decision on the preferred option had been taken.

71. The Commissioner also notes the complainant's statement that some information was subsequently disclosed to the public about the preferred route, and public meetings were set in place to inform the public about the council's intentions in this regard.
72. The Commissioner is aware that if planning permission is refused for the preferred option, the option it had chosen might need to be reconsidered by the council, and the report might be relevant to that reconsideration, dependent upon the reasons for the refusal of planning permission.
73. Although the Commissioner accepts that there is a potential that the withheld information could become relevant to such a reconsideration, she considers that this potential does not have the significance to place any great weight onto her decision. Should planning permission be refused, it is likely the reasons for that refusal will tie into the reconsideration of the other options. She cannot discount the possibility that another of the options considered would be suitable without further amendments being made, however she notes that AECOMM also highlights within the document that should circumstances change the council may need a further reconsideration as a whole⁸.
74. The Commissioner is satisfied that the council's plan was decided upon, and the actions from that point were on the basis that that is the option which it had chosen from those provided in the report. It publicised information on its preferred option following this.
75. On this basis, she considers that the withheld information formed a distinct and separate process of analysis and thinking to the actions of the council in carrying out its subsequent stages of negotiation and the submission of planning documents to the council in its role as planning authority for its preferred option. As stated above, AECOM clearly states within the report that the brief it received from the council in preparing the report did not extend to the preparation of a planning application.

⁸ At Paragraph 10.3.3 of the report

76. The Commissioner has therefore decided that the council was not correct to rely upon Regulation 12(4)(d) to withhold the information in this instance.

Regulation 5(2)

77. Regulation 5(2) requires 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"*.
78. The complainant submitted his request for information on 20 August 2019. The council did not however respond to the request until 15 October 2019. This falls outside of the 20 working days required by Regulation 5(2).
79. The Commissioner has therefore decided that the council did not comply with the requirements of Regulation 5(2) in responding to the request for information.

Regulation 11(4)

80. Regulation 11(4) provides that *"A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations."*
81. In effect, where an internal review is requested under Regulation 11(1), a public authority is under a duty to respond to that request for reconsideration within 40 working days.
82. The complainant submitted his request for review on 25 October 2019. The council did not provide its response to the request until 28 January 2020. This falls outside of the 40 working days specified by Regulation 11(4).
83. The Commissioner has therefore decided that the council did not comply with the requirements of Regulation 11(4).

Right of appeal

84. 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: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

85. 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.
86. 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

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