

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

Date: 19 May 2021

Public Authority: Shropshire Council
Address: Shirehall
Abbey Foregate
Shrewsbury
SY2 6ND

Decision (including any steps ordered)

1. The complainant requested information, in a multi-part request, relating to planning matters. Shropshire Council (the Council) denied holding some information within the scope of the request and stated that it had already provided some relevant information. It withheld the remaining information within the scope of the request, citing regulation 12(4)(d) (information in the course of completion) of the EIR.
2. The Commissioner's decision is that the Council was entitled to apply regulation 12(4)(d) to the withheld information and that the public interest in maintaining the exception outweighs the public interest in disclosure.
3. She also decided that the Council did not hold further information within the scope of part (2) of the request. The Commissioner is therefore satisfied that the Council complied with its duty under Regulation 5(1) of the EIR by virtue of the exception at regulation 12(4)(a) (information not held).
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 10 January 2020, the complainant wrote to the Council and requested information in the following terms:

"1. Please supply copies of all records of communications, discussions and meetings between Shropshire Council officers and the members of the Stanmore Consortium ... in connection with the release of land from the Green Belt at Stanmore and Swancote owned/managed by them and development options and proposals.

2. A meeting was held at Shirehall on the 1st September 2017 ... at which previous correspondence indicates development proposals were discussed. The Council has stated that no notes or minutes of that meeting are held. ... Please clarify whether "no notes or minutes held" means that none were taken or that notes or minutes were taken but there is no longer any record of them? Even if no notes or minutes are held, it is reasonable to suppose that written or email correspondence ... will exist. ... Therefore please supply copies of emails or other correspondence or notes of telephone conversations relating to the meeting being set up and also copies of any emails or other correspondence or notes of telephone conversations after the meeting took place. Please redact private information if necessary to meet data protection restrictions.

3. Further to question 2 above, in an email of the 31st May 2019, [name redacted] of the Information Governance Team stated "The potential of the other Apley land to meet Bridgnorth needs was initially explored on this basis in 2017 and they were identified as available sites following confirmation by the landowner." Please also include a copy of that confirmation which presumably must be in written form. Please redact private information if necessary to meet data protection restrictions".

6. The Council provided its substantive response on 13 February 2020. It confirmed that no formal meeting notes exist of the meeting on 1 September 2017. It refused to provide the requested information within the scope of parts (1) and (2) of the request. It cited the following exceptions as its basis for doing so:

- Regulation 12(4)(d) – information in the course of completion
- Regulation 12(5)(e) – confidentiality of commercial information

7. It explained to the complainant that it had already provided him with information within the scope of part (3) of the request.

8. Following an internal review the Council wrote to the complainant on 21 May 2020. It confirmed its original position, namely that the information cannot be disclosed. It provided further arguments:

"... as to why in particular Regulation 12(4)(d) applies to the information requested..."

Scope of the case

9. Following earlier correspondence, the complainant contacted the Commissioner on 26 May 2020 to complain about the way parts (1) and (2) of his request for information had been handled.
10. He disputed that no formal notes or minutes of the meeting on 1 September 2017 were held. With respect to the information within the scope of the request that the Council confirmed it holds, the complainant disputed the Council's application of exceptions to that information.
11. In particular, he disputed that, in the circumstances of this case, the Council's reasons for refusing to release the requested information override the public interest in disclosure.
12. As is her practice, the Commissioner wrote to both parties setting out the scope of her investigation. She explained that she would look at whether the Council is entitled to rely on exceptions as a basis for refusing to provide the withheld information and would also consider whether it is correct when it says that it does not hold further information within the scope of part (2) of the request.
13. The complainant responded, agreeing the proposed scope. In the course of his correspondence with the Commissioner, in support of his complaint, the complainant also referred to a number of issues which are outside the scope of the Commissioner's remit.
14. During the course of the Commissioner's investigation, having revisited its handling of the request, the Council provided the requester with further information that, on review, it considered could be released.
15. With respect to the remaining withheld information, the Council confirmed that it was only relying on one exception, namely regulation 12(4)(d) (information in the course of completion) and that it applied to the withheld information in its entirety.
16. The analysis below considers the Council's application of the exception at regulation 12(4)(d) to the remaining withheld information, information within the scope of part (1) of the request. That information comprises emails, some with attachments. The Commissioner recognises that the information contains duplicates because some of it is in the form of email chains which overlap.
17. The Commissioner has also considered whether, on the civil standard of the balance of probabilities, the Council held information within the scope of part (2) of the request, specifically notes or minutes of the specified meeting.

Reasons for decision

Regulation 12(4)(d) information in the course of completion

18. Regulation 12(4)(d) states 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, unfinished documents, or to incomplete data."

19. 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
- provide some protection from having to spend time and resources explaining or justifying ideas that are not, or may never be, final.

20. 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.

21. In this case, the Council has applied the exception to correspondence which it described as relating to:

"... negotiations and discussions between the Council and landowners regarding an ongoing Local Plan process".

22. The Council told the complainant:

"The communications being requested will, where relevant and appropriate, form part of the Local Plan inquiry and this is the forum for effective scrutiny of finalised evidence, planning policies and site allocations. We therefore consider that the disclosure of material at this time in the course of completion would only serve as a distraction from the task of preparing the Local Plan".

23. It told him that the process of preparing the Local Plan is a statutory requirement.

24. The Council also explained that, at the time of the request, the Local Plan had not been finalised and was subject to further consultation, consideration and amendment.

25. In its submission to the Commissioner, the Council cited a previously issued decision notice (DN) (case reference FER0663603¹, issued by the Commissioner in February 2018) in support of its position.
26. That case concerned a request for planning related information, made to Colchester Borough Council, in which regulation 12(4)(d) (and other exceptions) were cited. The Commissioner upheld Colchester Borough Council's reliance on regulation 12(4)(d) and found that the balance of the public interest favoured withholding the remaining requested information.
27. The Council told the Commissioner that it had partly relied on that earlier DN in deciding to apply regulation 12(4)(d) in this case. In that regard, it specifically referred her to paragraphs 73-89 of the DN. It advised that, as in that earlier case, the Local Plan that the request in this case relates to was in the course of development through public consultation. It also advised that the Council is required to undertake public consultations at appropriate stages in the Local Plan process and that the submission of a Local Plan:

"... would be subject to examination by a Planning Inspector in an 'Examination in Public'".

The Commissioner's view

28. While the Commissioner is mindful of her decision in the previous case, she is not bound by that decision. Each case is considered on its merits.
29. In her guidance², the Commissioner recognises that regulation 12(4)(d) is engaged when the request relates to material that is still in the course of completion, unfinished documents or incomplete data.
30. She defines those categories as follows:

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2258271/fer0663603.pdf>

² https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf

"Material which is still in the course of completion can include information created as part of the process of formulating and developing policy, where the process is not complete.

Draft documents are unfinished even if the final version has been produced.

Data that is being used or relied on at the time of the request is not incomplete, even if it may be modified later".

31. The Commissioner also acknowledges that the fact that the exception 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 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.
32. The position of the Local Plan at the time the request was received is clearly relevant to the application of regulation 12(4)(d). In this case, the Commissioner understands that, at the time of the request, the task of preparing the Local Plan was in progress and in the course of development through public consultation. The Commissioner acknowledges the Council's argument that preparation of the Local Plan is a statutory requirement.
33. Having viewed the withheld information, and considered the Council's arguments, she is satisfied that the information relates to information in the course of completion, namely the Local Plan. Accordingly, she finds the exception engaged in respect of the information withheld by virtue of regulation 12(4)(d).
34. She has next gone on to consider the public interest test.

Public interest test

35. Regulation 12(1)(b) of the EIR provides that where regulation 12(4)(d) is engaged then a public interest test is carried out. The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Furthermore, under regulation 12(2), a public authority must provide a presumption towards the disclosure of the information.

Public interest arguments in favour of disclosing the requested information

36. In favour of disclosing the requested information, the complainant considered that openness and transparency in any planning process is paramount.
37. He also told the Commissioner:

"It is further submitted that the public interest in the requested information being released in respect of an issue of such major public importance affecting the lives of thousands of people vastly outweighs the reasons given by Shropshire Council for refusing to release it".

38. The Council recognised the public interest in disclosure, telling the complainant:

"We accept that there is always a general public interest favouring the disclosure of environmental information. Such disclosures inform public debate on the particular issue that the information relates to and we understand that Local Plans may have significant impact on local communities".

Public interest arguments in favour of maintaining the exception

39. In correspondence with the complainant, the Council told him:

"It is crucial that we as a public authority have a safe space to enable us to formulate policy, debate live issues and reach decisions without being hindered by external comment and/or media involvement".

40. It also told the complainant:

"... to release such communications at this stage would result in our view in the loss of frankness and candour in debate and negotiations. Not only for this process but for future similar processes".

41. The Council argued that if parties know that it will release all communications and discussions into the public domain:

"... they are less likely to provide open and honest feedback and comment, including the evidence required to allow the robust assessment of alternative development options by the Local Planning Authority; which would hinder the planning process".

42. In favour of maintaining the exception, the Council referred to both the 'safe space' and 'chilling effect' arguments. For example, it told the complainant:

"A 'chilling effect' directly concerns the loss of frankness and candour in debate which would flow from an untimely disclosure of information. This would likely lead to poorer quality advice and would produce less well formulated policy and decisions".

and

"The need for a 'safe space' is to allow free and frank debate is crucial to the planning processes both now and going forward and we cannot take action that could undermine this. The 'safe space' is 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 and in this case the Local Plan has yet to be finalised and we plan to publish the completed Local plan once the process has been concluded".

43. Similarly, in its submission to the Commissioner, the Council argued:

"... there is significant weight to the need for interested parties to engage and consult with the Council in a 'safe space' and without the 'chilling effect, which is likely to flow from disclosure of information in the course of completion".

44. It re-iterated what it had told the complainant, namely that disclosure would likely discourage the public, local businesses and landowners from engaging with the Council during the 'safe space' development of the local plan and, in turn, frustrate the process of preparing the Local Plan.

Balance of the public interest

45. The Commissioner has considered the Council's actual submissions in relation to the public interest test, as well as those it directed her to within the DN issued against Colchester Borough Council.

46. She has also consulted her guidance '*How exceptions and the public interest test work in the Environmental Information Regulations*'³. In that guidance, she recognises:

"The factors determining the weight of the arguments for and against disclosure can include: the likelihood and severity of any adverse effect; the age of the information; how far disclosing the information would serve the public interest; and what information is already in the public domain".

47. In her guidance, she also states:

³ <https://ico.org.uk/media/for-organisations/documents/2021/2619013/exceptions-pi-test-eir.pdf>

"When dealing with a complaint that information has been wrongly withheld, the Commissioner will consider the situation at the time the authority dealt with the request or internal review".

48. In determining where the balance of the public interest lies in this case, the Commissioner has given due weight to the presumption under regulation 12(2) in favour of disclosure and the specific public interest in transparency and accountability in relation to decisions that may have widespread effects on the local community.
49. The Commissioner acknowledges the comprehensive submissions provided by the complainant. She has taken into account, and is sympathetic to, the complainant's concerns that there should be complete transparency regarding the matter under consideration.
50. She acknowledges that planning related matters have the potential to have a widespread or significant impact on the public.
51. However, the Commissioner also recognises the strength of the public interest arguments in favour of maintaining the exception. She acknowledges the Council's argument that public bodies need space and time to fully consider their policy options and reach an impartial and appropriate decision.
52. In that respect, the Commissioner is mindful that the Council confirmed that, at the time of the request, the Local Plan had yet to be finalised, and that it intended to publish the completed Local Plan once the process had concluded. The Commissioner also acknowledges the opportunities for public scrutiny within the planning process itself, and the independent examination of the Plan by a Planning Inspector, which provide transparency and openness and inform public debate and thus go some way to satisfying the public interest that would otherwise be served by disclosure.
53. Having reviewed the withheld information, and considered the public interest arguments, and their relative weight, in all the circumstances of this case, it is the Commissioner's opinion that the disclosure of information relating to material in the course of completion would frustrate the process of preparing the Local Plan and inhibit the Council's ability to carry out this work. This is the very activity which the exception is formulated to protect.
54. Accordingly, the Commissioner gives more weight to the need for interested parties to engage and consult with the Council in a 'safe space' and without the 'chilling effect' which is likely to flow from the disclosure of material in the course of completion.

55. In light of the above, and mindful of the timing of the request, the Commissioner is satisfied that regulation 12(4)(d) was applied appropriately and that the public interest in maintaining the exception outweighs the public interest in disclosure.

Regulation 5(1)/Regulation 12(4)(a) – Information held/not held

56. Regulation 5(1) of the EIR states that '*a public authority that holds environmental information shall make it available on request*'. This is subject to any exceptions that may apply.
57. Regulation 12(4)(a) of the EIR provides that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
58. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information was not held, and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that the requested information was not held.
59. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
60. This is in line with the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072)* in which it stated that "*there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records*". It clarified that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities.
61. It is also important to note that the Commissioner's remit is not to determine whether information should be held, but only whether, on the balance of probabilities, the requested information was held by the Council at the date of the request.

The complainant's view

62. The complainant considered it was '*quite astonishing*' that no notes or minutes of the meeting on 1 September 2017 were held.

The Council's view

63. In correspondence with the complainant, the Council told him:

"No formal meeting notes exist of the meeting on 1st September 2017".

64. In its submission to the Commissioner, the Council maintained its position that no formal meeting notes exist of the meeting on 1 September 2017. It confirmed:

"This has been discussed with the team and the attendees of the meeting and our position remains that no minutes of the meeting were taken, therefore there is no information held in relation to this and no searches that can be made as no minutes were taken".

65. The Commissioner made further enquiries with the Council regarding who it had consulted about this matter. The Council provided her with details of the individuals who had been consulted, and, where relevant, their role at the Council at the time of the meeting. It also confirmed the nature of the meeting and who was in attendance. It further explained:

"Such meetings are normal practice for Council staff..."

66. The Council also provided the Commissioner with further information about its practice regarding minute taking. It told her:

"It would be unusual for Minutes to be taken at such an informal meeting. Meeting minutes are normally taken at formal 'board' style meetings in line with specific Governance arrangements around a specific project, although there are no strict criteria the council follow in this regard".

The Commissioner's view

67. In this case, the Commissioner has sought to determine whether, on the balance of probabilities, the Council held information within the scope of part (2) of the request, specifically, notes or minutes of the meeting.

68. The Commissioner acknowledges that the requested information is clearly of interest to the complainant. The Commissioner also acknowledges that the complainant considers that such information should be held.

69. However, having considered the Council's response, and on the basis of the evidence provided to her, the Commissioner is satisfied that, on the balance of probabilities, the Council did not hold information within the scope of part (2) of the request.

70. The Commissioner therefore considers that the Council complied with the requirements of regulation 5(1) of the EIR and that regulation 12(4)(a) was engaged.

Right of appeal

71. 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

72. 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.
73. 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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