

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

**Date:** 11 July 2022

**Public Authority:** Bracknell Forest Council  
**Address:** Time Square  
Market Street  
Bracknell  
Berkshire  
RG12 1JD

**Decision (including any steps ordered)**

---

1. The complainant has requested information about cycle underpasses.
2. The council provided some information in response to the request, however it withheld some information on the basis of regulation 12(5)(a) (health and safety) of the EIR.
3. The Commissioner's decision is that the council was entitled to rely on regulation 12(5)(a) to refuse the request. However it failed to inform the complainant, within 20 working days, that it was relying on non-disclosure exceptions under the EIR to refuse parts of the request, and therefore the council breached regulations 14(2) and 14(3) of the EIR.
4. The Commissioner does not require any steps.

## Request and response

---

5. On 10 March 2021 the complainant requested information from Bracknell Forest Council "the council" in the following terms:

"Under the Freedom of Information Act 2000, I am writing to request a copy of all the information that you may be in possession of regarding the town's underpasses. (Numbering added for reference.)

[1] Specifically, I require a list of all of Bracknell's cycle underpasses, including, where necessary, any underpasses that were demolished in the town centre's regeneration or any other projects post completion of the New Town (i.e. the 1960s). I would like, in particular, a list with the underpass' numbers on for the demolished ones; for example, the underpass at (51.413004,-0.760355) is number 36 (This underpass is still standing).

[2] In addition to the numbers, I would like, if held, copies of the plans of each underpass used during construction, including plans used for underpass' subsequent extension (e.g. Downshire Way's underpass) if appropriate.

Preferably I would like both paper copies and electronic copies."

6. The council responded on 9 April 2021. In terms of each parts of the request it:

[1] Provided a spreadsheet of information that identifies each subway, gives its location and structure number.

[2] Refused to provide the information on the basis of section 12 of the FOIA (cost of compliance would exceed the appropriate limit).

7. On 9 April 2021 the complainant revised the scope of part [2] of the request to reduce the cost:

"[3] I would like to rephrase my second part to better accommodate the time constraints on the Council, but thank you for the brilliant response to the first part.

As such, I am hereby making another, separate Freedom of Information request to ask for the below referenced 5-10 drawings each of the following 5 subways only that Atkins holds.

- Underpass 79

- Underpass 67

- Underpass 41
- Underpass 37
- Underpass 1

I hope the 93% reduction in the scope of the second part of the request will be better facilitated. If I am further required to supply any additional information, please do not hesitate to contact me.”

8. On 10 May 2021 the council issued a fresh response to [3]. It refused to provide the information on the basis of section 24 (safeguarding national security) and section 43(2) (commercial confidentiality) of the FOIA.
9. The complainant requested an internal review of [3] on 20 May 2021.
10. On 8 August 2021 the council wrote to the complainant with the outcome of an internal review for request [3], it maintained the decision to withhold the information. The council provided a long explanation, however the exemptions cited were unclear. The council referenced regulation 12(5)(a) of the EIR (health and safety), section 38 of the FOIA (health and safety), and section 24 of the FOIA.
11. On 1 July 2022, during the course of the Commissioner’s investigation, the council issued a revised response to the complainant. It refused to provide the information in scope of [3] on the basis of regulation 12(5)(a) (health and safety) of the EIR.

## **Scope of the case**

---

12. The complainant contacted the Commissioner on 29 June 2021 to complain about the way their request for information had been handled. Specifically that having revised the request to reduce the cost, the council then withheld the information on the basis of different exemptions which they did not agree with.
13. The scope of this case is to determine if the council was correct to withhold the information on the basis of regulation 12(5)(a) of the EIR; and whether it made any procedural breaches of the regulations.

## **Reasons for decision**

---

### **Regulation 12(5)(a) – international relations, defence, national security or public safety**

14. Regulation 12(5)(a) allows a public authority to refuse to disclose information if its disclosure would adversely affect – (a) international relations, defence, national security or public safety.
15. The council's case is that disclosing the withheld information could adversely affect national security and public safety.
16. The Commissioner's guidance<sup>1</sup> for regulation 12(5)(a) sets out that in order to demonstrate that disclosure would harm one of the interests in 12(5)(a), the council needs to:
  - a. identify a negative consequence (adverse effect) of the disclosure that is significant (more than trivial) and is relevant to the exception claimed;
  - b. show a link between the disclosure and the negative consequence, explaining how one thing would cause the other;
  - c. show that the harm is more likely than not to happen.
17. When considering whether an exception is engaged the Commissioner's approach is to consider what harm would occur if the information was placed in the public domain and freely accessible to all. The question therefore is whether making the publicly accessible would cause that harm.
18. The council described the withheld information to the Commissioner rather than providing a copy. It comprises technical structural plans for the underpasses, dating back to the 1950s-1970s. The council explained that they do not seem to provide any information in themselves that would guide the Commissioner's decision. The Commissioner agreed that there was no requirement to view the technical structural plans, and that the description of the withheld information was sufficient.

### **The council's position**

19. The council had consulted with Thames Valley Anti-Terrorist Unit (TVATU) regarding the request, who advised it not to disclose the information. The justification was that knowledge of the information could potentially facilitate a terrorist act. TVATU confirmed that whilst there was no specific threat identified, general caution around protecting

---

<sup>1</sup> [International relations defence national security or public safety \(regulation 12\(5\)\(a\)\)-v1.1- EIR guidance - 20203112 \(ico.org.uk\)](https://ico.org.uk/for-organisations/data-protection/data-protection-guidance/20203112-international-relations-defence-national-security-or-public-safety-regulation-12(5)(a)-v1.1/)

infrastructure meant that they advised against the disclosure of detailed structural drawings of underpasses.

20. The original request was for locations and drawings of all underpasses in the Council's area (approximately 80) and only the locations were disclosed. The follow-up request reduced the scope to drawings of 5 of the underpasses. These are all either on the Major Route Network (A322, A3095), which serves the Strategic Route Network (motorways & trunk roads), or were on parallel routes. Major damage to underpasses in these areas would hamper the expeditious movement of traffic on diversionary routes should they be targeted.
21. The council has a statutory duty under section 16 of the Traffic Management Act 2004<sup>2</sup> to "secure the expeditious movement of traffic on the authority's road network". Disclosure of the information requested was seen as a potential risk to its ability to comply with that duty.
22. Furthermore the council explained that the requests were received against a wider backdrop of a high national terrorist threat level, as set by MI5. At the time of the initial request the national threat level was "severe", defined as "attack is highly likely", and days before the follow-up request it was lowered but was still "substantial", meaning "attack is likely".
23. Relevant council staff attend regular briefings from the TVATU who provide advice on any threats, events, precautions, etc., and the Thames Valley police website terrorism page<sup>3</sup> also provides advice. The council advised that the requests appear to fall within the scope described by police as being a cause for concern and which staff are trained to be alert for.
24. The council belongs to a regional Thames Valley Local Resilience Forum ("the Forum") with other local authorities. The Forum maintains a Community Risk Register which lists transport emergencies as one of the top risks in the area. The council provides connections to and between the M3, M4, M25 motorways, and several strategic A roads. Also, the rail networks between Wales, the South West and London pass through the region, as do routes to both civilian and RAF airports.

---

<sup>2</sup> [Traffic Management Act 2004 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

<sup>3</sup> [Terrorism in the UK | Thames Valley Police](#)

25. The council stated that it is also mindful of recent terror attacks on bridges, and a fatal stabbing in June 2020 in nearby Reading.
26. Bearing all of the above in mind the council considers that disclosure would increase public vulnerability to a threat. This is because knowledge of the exact construction of an underpass would allow a person to target any weak construction points to achieve maximum damage to the structure and cause maximum injury and disruption. If the information were disclosed, the council would expect to face public criticism and even legal action if the underpasses were subsequently targeted. It stated "The police clearly believed the risk was more than fanciful or remote, and the Council was not in a position to contradict them."
27. The council's view is that the withholding of the drawings, is necessary for national security in this case. The underpasses are potential targets, even if there is no evidence that an attack is imminent. It reiterated the argument that disclosure of certain information could be sufficient to enable a terrorist attack even without a specific threat being present and without actual knowledge of how it might be used.
28. It follows that where disclosure of information leads to a heightened risk of a successful terrorist event, there will be a consequent greater danger of physical harm to members of the public and therefore an adverse effect on public safety. It stated that an explosive device positioned at a vulnerable structural point is more likely to cause a total collapse of an underpass, rather than damage to it, which would lead to more casualties of those in and around it.

### **The complainant's position**

29. The complainant states that the underpasses in question do not form part of any nationally significant route. They argue that whilst the A329 and A329(M) link the M3 and M4, the M25 is a far more attractive route for motorists.
30. The complainant states that they believe that the underpasses do not pass under any roads that could be treated as a terrorist target.
31. The complainant regards the council's use of example incidents, such as the stabbing, are irrelevant because there is no evidence that underpass plans were used by the attacker to their advantage.

### **The Commissioner's analysis**

32. The Commissioner has considered each of the tests outlined above to establish whether the exception is engaged

- a) The Commissioner is satisfied that the negative consequences identified by the council are significant and relate to the harm which the exception is intended to prevent. Clearly the risk of criminal damage to underpasses is a risk to public safety, and potentially national security in the event of a terror attack. The council has therefore identified relevant risks which are associated to the exception in regulation 12(5)(a).
- b) A disclosure under the EIR is considered to be a disclosure to the whole world, and should be considered from this perspective. Whilst the complainant argues that the underpasses in question are not so significant as to attract the attention of potential saboteurs, the Commissioner is guided by the assessment of the TVATU. The Commissioner is satisfied that disclosing construction details of underpasses risks individuals using that information as a means to plan sabotage, terrorism or criminal damage.
- c) The Commissioner considers that it is not necessary to show that disclosing the information would lead to a direct or immediate threat. The Commissioner is mindful of the national threat levels, and the fact that these can change in the future to be at higher levels. Whilst there is no evidence presented that an attack involving transport infrastructure is planned, the Commissioner considers that the underpasses are a realistic target. As such the Commissioner accepts the council's arguments in this respect are plausible.
33. Having considered the tests set in the Commissioner's guidance, the Commissioner is satisfied that disclosing the construction plans for the underpasses would have an adverse effect upon national security and public safety, and therefore that the exception in regulation 12(5)(a) is engaged.
34. The Commissioner has therefore carried out the public interest test required by regulation 12(1). In doing so, he has taken into account the presumption towards the disclosure of the information which is set out in regulation 12(2).
35. The test, set out in regulation 12(1)(b) is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

## **Public interest**

### **Public interest in favour of disclosure**

36. The complainant asserts that the use of regulation 12(5)(a) was inappropriate and the council's arguments are irrelevant in relation to the specified underpasses. However, no public interest arguments have been raised for disclosure.

37. The Commissioner has therefore considered the general public interest in transparency of the information held by the council.

### **Public interest in the exception being maintained**

38. The likelihood of harm from sabotage or terrorism occurring to one of the underpasses may be small, however there is potential for the effect of such an occurrence on public safety to be severe.
39. The Commissioner understands the council's concerns, based on the advice from TVATU, that knowledge of the information could potentially facilitate a terrorist act. Therefore disclosure of the withheld information to the whole world would increase the risk to public safety. There is a very strong public interest in avoiding this outcome.
40. There is a clear public interest in ensuring the safety of the underpasses for the general public, the users of the transport links above them, and in terms of providing diversionary routes in the event of a terrorist act.

### **The Commissioner's conclusion on the public interest test**

41. The Commissioner has decided that the public interest in maintaining the exception in regulation 12(5)(a) outweighs that in the information being disclosed in this case.

### **Regulation 12(2)**

42. 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).
43. As covered 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(5)(a) was applied correctly.
44. The council was not, therefore, obliged to disclose the requested information.

### **Procedural**



## **Regulation 14 – Refusal to disclose information**

45. Regulation 5(1) of the EIR states that a public authority that holds environmental information shall make it available on request. Regulation 5(2) states that it should be made available "...as soon as possible and no later than 20 working days after the date of receipt of the request".
46. The complainant submitted the revised scope, request [3], on 9 April 2021.
47. The council responded to the request in 20 working days, however it refused the request citing reasons under FOIA.
48. The council provided an internal review on 8 August 2021, however the exemptions were not clear and the council cited both the FOIA and the EIR.
49. The council verified its final position on 1 July 2022. By failing to inform the complainant, within 20 working days, that it was relying on exceptions under the EIR to refuse parts of the request, the council breached regulations 14(2) and 14(3) of the EIR.

## **Other matters**

---

50. The Commissioner is sympathetic with the complainant's dissatisfaction regarding the way their request was handled.
51. During the course of this investigation the Commissioner observed two areas of concern:
  - (a) The council did not provide advice and assistance in line with regulation 9 when refusing the initial request [2] on the basis of cost. The complainant subsequently submitted a request with reduced scope which the council then refused on different grounds not relating to cost.
  - (b) The internal review response of 8 August 2021 provided long explanations however it was not clear about which exemptions were cited.
52. Whilst not forming part of this decision notice, the Commissioner recommends that the council reviews its procedures. Particularly with regard to its request and internal review handling procedures, including

the requirement to provide appropriate advice and assistance (regulation 9). The Commissioner refers the council to the Code of Practice<sup>4</sup> issued under regulation 16, and the guidance on the Commissioner's website<sup>5</sup> regarding all aspects of handling information requests.

---

<sup>4</sup> [https://ico.org.uk/media/for-organisations/documents/1644/environmental\\_information\\_regulations\\_code\\_of\\_practice.pdf](https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf)

<sup>5</sup> [Freedom of information and Environmental Information Regulations | ICO](#)

## Right of appeal

---

53. 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)

54. 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.
55. 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 .....**

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