

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

**Date:** 26 February 2020

**Public Authority:** Elmbridge Borough Council  
**Address:** Civic Centre  
High Street  
Esher  
Surrey KT10 9SD

**Decision (including any steps ordered)**

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1. The complainant has requested information relating to a Local Plan. Elmbridge Borough Council disclosed some information and withheld other information under the exception for information in the course of completion – regulation 12(4)(d) of the EIR.
2. The Commissioner's decision is that Elmbridge Borough Council has correctly applied regulation 12(4)(d) to withhold the requested information.
3. The Commissioner does not require the public authority to take any steps.

## Request and response

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4. On 13 May 2019, the complainant wrote to Elmbridge Borough Council (the "council") and requested information in the following terms:

*"Please state what discussions have taken place in 2018 and 2019 regarding the Local Plan, the Green Belt and the Core Strategy with the following Companies. Please state the cost of any such advice.*

*Ove Arup and Partners*

*Environmental Agency*

*Dixon Searle LLP*

*Aecom Infrastructure*

*Troy Hayes Planning"*

5. The council responded on 10 June 2019. It stated that it was withholding the information under the exemptions for information intended for future publication and commercial interests - section 22 and section 43(2) of the FOIA
6. Following an internal review the council wrote to the complainant on 23 July 2019. It disclosed the requested costs of advice and confirmed that it had reconsidered the request under the EIR, withholding the outstanding information under the exception for information in the course of completion - regulation 12(4)(d).

## Scope of the case

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7. On 2 September 2019 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld information under the exception in regulation 12(4)(d).
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## Reasons for decision

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### Regulation 12(4)(d) – material in the course of completion

9. The council withheld information relating to discussions in 2018 and 2019 regarding the Local Plan, the Green Belt and the Core Strategy with the parties named in the request.
10. Regulation 12(4)(d) of 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.
11. 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.
12. 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.
13. A document may be unfinished because the authority is still working on it at the time of the request or because work on it ceased before it was finalised and there is no intention to finalise it. Furthermore, draft documents will engage the exception because a draft of a document is by its nature an unfinished form of that document. A draft version of a document is still an unfinished document, even if the final version of the document has been published.
14. The council has stated that the withheld information includes email correspondence between the parties in question and comprises discussion and refinement of evidence. It confirmed that the information relates to the Local Plan which is in the course of development through public consultation. The council explained that the Local Plan will in due course be examined by an Independent Local Plans Inspector in a public process. It clarified that an evidence base has been prepared with the assistance of consultants and other parties.

15. The council confirmed that it considered that the withheld information takes the form of discussions around emerging options and draft documents and that it all constitutes material in the course of completion. The council explained that the material in question will be likely to form part of a final policy document, namely, the Local Plan.
16. Having considered the council's submissions and referred to the withheld information the Commissioner is satisfied that regulation 12(4)(d) is engaged. As the regulations under the EIR are all subject to the public interest test, the Commissioner will go on to consider whether, in all the circumstances in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

### **Public Interest Test**

17. As with the other exceptions in the EIR, when regulation 12(4)(d) is engaged, the public authority must still carry out the public interest test in order to decide whether the information should be withheld. Under regulation 12(1)(b), the public authority can only withhold the information if, 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), it must apply a presumption in favour of disclosure.

#### *Public interest in disclosing the information*

18. The council has acknowledged that there is a general public interest in disclosing information relating to the Local Plan, given its potential impact on the local community and that there is a specific public interest in transparency and accountability present.
19. The complainant has argued that, as a resident they do not see why residents should not be privy to what advice the council have been given so they can be made aware of all the facts and also make informed comments during the course of the public consultation.
20. The council has explained that the new Local Plan will set out the spatial strategy for the Borough for a 15 year plan period to deliver the council's vision for places and communities. It confirmed that the Local plan will, amongst other things, set out how it wants to develop and support its key employment areas and protect and enhance its historic and natural environment. In addition, the council clarified that the Local Plan will establish a new housing target for the Borough and allocate sites to meet that target as well as designate key areas, such as Strategic Employment Land and Local Green Space.

21. The Commissioner notes that the Local Plan is a substantial undertaking which will have a significant impact on the local community and environment. She considers that there is, therefore, a marked public interest in transparency and accountability in relation to the council's decision making in these respects.

*Public interest in maintaining the exception*

22. The Commissioner acknowledges that the sensitivity of information falling within the scope of this exception will generally be relative to the timing of the request and the stage that a relevant decision making process has reached.
23. The council explained that the preparation stage of the Local Plan was extended following the publication of the revised National Planning Policy Framework in July 2018 and its updated version in February 2019. It confirmed that various supplementary planning documents are in the course of preparation, including a draft for the Review of Developer Contributions and Parking which is currently undergoing public consultation. It confirmed that a draft Charging Schedule for Community Infrastructure Levy will be consulted on in late 2020, to be examined in public in Spring/Summer 2021; and adoption of the Local Plan is intended to be in the Autumn of 2021.
24. The council has argued that there is a strong public interest in maintaining the exception at this time because the process is incomplete and disclosure would hinder progress by opening up channels of enquiry that would take up council time and be a distraction from the overall course of the process.
25. The council has further argued that exchanges between its officers and consultants / external parties need to be conducted in a spirit of candour. It has submitted that proposals need to be tested, weighed and, where necessary, challenged and for this to happen effectively, a safe space away from public scrutiny is needed. The council has argued that, should discussions in relation to live options be made public, candour and frankness in debate would be discouraged and there would be a chilling effect which would deter parties from engaging fully.

26. The council also highlighted a number of decision notices issued by the Commissioner in relation to comparable requests and suggested that the same conclusions were applicable to the facts of this case<sup>1</sup>.
27. In addition, the council also directed the Commissioner to its website and a range of published information associated with the Local Plan which it considers is sufficient to satisfy the public interest in accountability and transparency and facilitates public engagement at this time<sup>2</sup>.

*Balance of the public interest*

28. 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.
29. With regard to the council's argument that a safe space is needed to develop its approach to the Local Plan, the Commissioner acknowledges that the process is ongoing and that disclosure of the information would provide a distraction which would invade this space and inhibit the council's ability to carry out this work. This is the very activity which the exception is formulated to protect.
30. The Commissioner is sympathetic to the complainant's concerns that, in the face of a project that has significant repercussions, there should be complete transparency in order that the public can engage with the consultation process and scrutinise the council's decision making. However, the Commissioner is mindful that, whilst the process is in train, it would not serve the public interest to restrict or damage the council's ability to develop the Local Plan in the best interests of the local community. Whilst she accepts that the concerns of the local community carry significant weight, the Commissioner also acknowledges that the developing nature of the Local Plan is such that

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<sup>1</sup> The relevant decision notices are published on the ICO website here:

<https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2172856/fer0664339.pdf>; <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2258271/fer0663603.pdf>.

<sup>2</sup> <https://www3.halton.gov.uk/Pages/planning/policyguidance/planningplans.aspx>

disclosure at this time would vmore likely than not damage the public interest in ensuring it is an effective exercise.

31. The Commissioner also recognises that, in addition to relevant information being published on the council's website, there is a formal timetable for consultation and for the public to engage with the process of developing the Local Plan. She does not consider that interfering with this process by disclosing deliberations at this time would serve the public interest.
32. In light of the above, and having considered previous decision notices issued in comparable case, the Commissioner is satisfied that regulation 12(4)(d) has been applied appropriately in this case and that the public interest in maintaining the exception outweighs the public interest in disclosure.

## Right of appeal

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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: 0300 1234504

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)

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.

**Signed .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**