

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

Decision notice

Date: 29 September 2022

Public Authority: Wirral Council

Address: PO Box 290
Brighton Street
Wallasey
CH27 9FQ

Decision (including any steps ordered)

1. The complainant has requested information from the Council relating to an Air Quality Modelling Study. The Council refused to disclose the requested information, citing section 22 of FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that the Council has incorrectly applied section 22 of FOIA as the requested information is environmental and therefore the Council should have responded to the request under the appropriate legislation, i.e. the Environmental Information Regulations 2004 (EIR).
3. The Commissioner also finds that the Council has breached regulation 5(2) of the EIR as it failed to make the information available within 20 working days. or to cite a valid exception under the EIR at the time of the request.
4. As the information has now been published, the Commissioner does not order any steps to be taken by the Council.

Request and response

5. On 27 February 2021 the complainant wrote to the Council and requested information in the following terms:

“The Wirral Environment Sensitivity Study sub-section 5.3, in making dismissive claims about Air Quality issues in Wirral, refers to the ‘Wirral Local Plan Air Quality Modelling Study 2020’ as being part of the evidence base documents reviewed. However this document does not seem to be accessible on the WMBC website. It is not possible therefore for the public to assess the quality of the evidence in the report, nor to respond to it in the current, formal WESS public consultation.

This is a very unusual situation for what is supposed to be an official document which is part of the formal evidence base shortly to be submitted as part of Regulation 19 of the Wirral Local Plan. I request that a link to or the location of the report be provided under FOIA immediately, given the current tight LP consultation time limits set by WMBC. I further request that this report, if not already issued, should be made public on the WMBC local plan website for general examination.”

6. The Council responded on 8 July 2021. It stated that the complainant had requested a copy of a study which was due to be published later in 2021. It applied section 22 of FOIA (information intended for future publication) to the complainant’s request.
7. Following an internal review the Council wrote to the complainant on 18 August 2021. It stated that its decision to apply section 22 of FOIA remained unchanged.

Scope of the case

8. The complainant contacted the Commissioner on 21 August 2021 to complain about the way his request for information had been handled.
9. When the case was allocated to a case officer, they contacted the Council and were informed that the requested information had now been published and were provided with a link to it.
10. The complainant was not satisfied with this and stated that they wished to continue with their complaint. The reason they gave was that the Council should have disclosed the information at the time of the request as the report formed part of key evidence, the withholding of which was

damaging to the local residents' ability to fully and democratically participate in consultation regarding the local planning development process. They also stated that they had no way of knowing whether the published report was the same as the one originally requested, or if changes had been made to it.

11. The Commissioner wrote to the Council in this regard. The Council clarified that the published information was not the same report as originally requested by the complainant as changes had been made. The draft unpublished 2020 study was prepared after the public consultation, some sections of it were also included in a separate '[Environmental Sensitivity Study](#)' that is also available in the Local Plan evidence base.
12. The Council stated that the specific summary of air quality information in the draft 2020 study which was included in the environmental sensitivity study is replicated in the 2021 study. The 2021 study assesses the preferred Local Plan option with the latest housing and traffic numbers therefore superseding the draft 2020 study, however comprising all the information from the draft 2020 study requested by the complainant.
13. The complainant still wished to pursue their complaint as they stated that the information should have been disclosed at the time of the request as it was of great public importance and formed key evidence in the local planning process.
14. The Commissioner has considered the Council's handling of the complainant's request, in particular whether the request should have been responded to under the Environmental Regulations 2004 (EIR).

Reasons for decision

Is the requested information 'environmental'?

15. Regulation 2(1) of the EIR defines 'environmental information' as any information in any material form 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) and (b) 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).
16. The Commissioner considers that the phrase “any information...on” should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner’s opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question. In other words, information that would inform the public about the matter under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.
17. In the circumstances of this case, the Commissioner has examined the now published requested information and has determined that it is environmental, as it is information on the state of one of the elements of the environment, i.e. air, therefore falls under regulation 2(1)(a) of the EIR as outlined above.
18. The Council has indicated to the Commissioner that it agrees that it should have handled the request under the terms of the EIR.
19. As the information is environmental, it is excluded from consideration under the FOIA by virtue of section 39 and therefore section 22 of FOIA cannot apply.
20. As the requested information has now been published, the Commissioner has not ordered the Council to take any steps.

Regulation 5 of the EIR – duty to make environmental information available

21. Regulation 5(1) states that, subject to certain provisions, a public authority that holds environmental information shall make it available on request.
22. Regulation 5(2) states 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.
23. In this case, the Council failed to disclose the requested information or to cite a valid exception under the EIR, therefore it has breached regulation 5(2) of the EIR.

Other matters

24. As there is no direct equivalent in the EIR of section 22 of FOIA, the Council, had it treated the request at the time as being for environmental information, would have had to either disclose the requested information or provide its arguments as to why it could not be disclosed and outline the relevant section of the EIR together with public interest considerations.
25. The Council, following correspondence with the Commissioner, did carry out an exercise in applying the EIR to the circumstances as they were at the time of the request, and concluded that it would have applied regulation 12(4)(d) (material still in the course of completion).
26. The Commissioner has not made any judgement as to whether the Council would have been correct in applying that regulation, however he trusts that for future requests for information the Council will consider thoroughly and carefully the legislation under which it deals with those requests.

Right of appeal

26. 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

27. 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.
28. 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

Deirdre Collins
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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Wilmslow
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