

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 20 December 2022

Public Authority: Erewash Borough Council
Address: Town Hall
Ilkeston
Derbyshire
DE7 5RP

Decision (including any steps ordered)

1. The complainant has requested information from Erewash Borough Council ("the Council") in relation to a specific planning application. The Council provided information for four of the five points in the request. However, for the other point, which relates to a draft report, the Council originally advised that it no longer existed as it was subsumed into the Council's committee report. The Council later advised that it was withholding the remainder of the information under regulation 12(4)(d) of the EIR – material which is still in the course of completion, unfinished documents or incomplete data.
2. The Commissioner's decision is that the Council has correctly applied regulation 12(4)(d) of the EIR (material in the course of completion) when determining the request.
3. The Commissioner does not require the Council to take any steps as a result of this decision notice.

Request and response

4. On 11 November 2021, the complainant wrote to the Council and requested information in the following terms:

"Please supply the data you hold about the following, which I am entitled to receive under the data protection law:

- DLP report for planning reference [reference number and address redacted.]
 - Confirm the names for the 6 objection letters received by planning, reference [reference number], if you can't provide the names please state why and confirm the number of households that provided the 6 objections.
 - Provide the separate dates for the 6 objections received by the planning office for planning reference [reference number].
 - Provide all the information you hold for planning reference [reference number and address redacted], including any notes, plans, any pre-planning advice etc.
 - Provide any information held by planning for reference [reference number and address redacted]."
5. The Council responded on 25 November 2021. It provided information in relation to points 2 to 5. For point 1, it advised that the report no longer existed as it was subsumed into the Council's committee report. The Council also provided a link to its website, where the committee report is published.
 6. On 29 December 2021, the Council wrote to the complainant again, explaining that it was relying on regulation 12(4)(d) of the EIR. It advised that all draft documents are unfinished, even if the final version has been produced.
 7. Following an internal review, the Council wrote to the complainant on 14 March 2022. It stated that it upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 15 March 2021, to complain about the way their request for information had been handled.
9. The Commissioner considers that the scope of his investigation is to determine if the Council is entitled to rely on regulation 12(4)(d) of the EIR to withhold the requested information.

Reasons for decision

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

10. Regulation 12(4)(d) of the 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
 - provide some protection from having to spend time and resources explaining or justifying ideas that are not, or 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.

The Council's arguments

13. The withheld information is the draft version of a decision made by the Council in relation to a planning application, which was refused. The planning application was made by the complainant.
14. The Council explained to the Commissioner that a third party was contracted to assist with a number of planning applications, due to an increased workload. The contract involved the third party investigating and processing planning applications, which were then sent for consideration by the Council's Head of Planning and the Development Control Manager; much the same way that the Council's own officers would work.
15. The Council advised that the third party confirmed that it did hold a copy of the draft report and, therefore, the Council concluded that the third party were holding it on behalf of the Council.
16. The Council explained that from the outset, its position was that any information at the consideration stage of a planning application is internal information, and it is in the best interest of the planning process for it to stay that way.

17. The Council also explained that all the supporting information for a planning application is available for public viewing, along with the final decision and it believes that this offers the transparency required for the planning process.
18. The Council noted the Commissioner's guidance which states, "Draft documents are unfinished even if the final version has been produced"¹.
19. The Council also acknowledged that the Commissioner's guidance advises that he is 'sceptical of arguments that information should not be disclosed because it would give a misleading or inaccurate impression...". It advised that this is not the case in these circumstances; the Council is simply standing behind its opinion that internal (or otherwise) discussions at early and intermediate stages of the planning process should be allowed to be carried out without impeding the overall planning process.

The complainant's position

20. The complainant has explained to the Commissioner that they consider that the Council has overwritten the third-party draft report, as the Council has refused to show the draft report to them.
21. The complainant has also explained that the Council has prevented the third party from showing them the draft report.

Public interest test

Public interest in disclosure

22. The Council has explained that there is a public interest in openness and transparency in the authority and the planning process.

Public interest in maintaining the exception

23. The Council has explained that it is confident that the final decisions in matters of planning are carried out with all the information available to them. It does not feel that publishing the opinions of individual officers (either their own employees or anyone contracted to do so) is necessary for transparency purposes.

¹ [eir material in the course of completion.pdf \(ico.org.uk\)](#)

24. The Council has explained that the information in this case may be relevant to the individual requesting the information, but it does not believe that it serves the interest of the wider public.
25. The Council has argued that the general planning process is of interest to the wider public, but it believes that their interest is already served by the wider process in publishing the final reports.
26. The Council has also argued that to provide intermediate discussions in individual cases would affect the overall planning process, which would have a negative impact on the wider public. It advised that by withholding the draft report, it allowed for more open and candid discussion at the planning stage for officers, contractors, and consultants, enabling the planning process to take place more smoothly.

Balance of the public interest

27. In considering the public interest in this case, the Commissioner is mindful that regulation 12(2) of the EIR instructs a public authority to apply a presumption in favour of disclosure.
28. The Commissioner understands that there is local interest where planning applications are concerned, and how the Council would process these.
29. However, the Commissioner is of the view that equally, there are strong public interest arguments in favour of non-disclosure of the relevant information.
30. Whilst the Council has not specifically used the term 'safe space', from the arguments provided, he is satisfied that this term relates to the wording used. The term 'safe space' is about the need to be able to formulate policy, debate live issues and reach decisions without being hindered by external comments and/or media involvement. Whilst part of the reason for needing a safe space is to allow for free and frank debate, it is the Commissioner's view that the need for a safe space exists regardless of any impact that the disclosure of information may have on this. The Commissioner considers the 'safe space' argument to be about protecting the integrity of the decision-making process and whether it carries any significant weight will depend on the timing of the request.
31. The need to maintain the safe space gives more weight to the argument for maintaining the exception. He also recognised the danger of a 'chilling effect' on future internal deliberations of planning matters being caused through disclosure of the withheld information

32. The Commissioner is satisfied that should drafts of reports in relation to planning applications be released, it could inhibit the Council's ability to carry out the work needed. Additionally, it could cause distractions, which would invade the thinking space for the Council to carry out the work needed to make its decision.
33. The Commissioner has taken into account the fact that the Council publishes the final versions of these reports online. The complainant has been provided with the final version of the report that they have requested.
34. Whilst a final version has been completed and this specific planning application is no longer live, the Commissioner is satisfied that the draft version of the report is considered incomplete.
35. The Commissioner has viewed the draft decision document and notes that whilst there are some changes, these do not have any impact on the outcome of the final draft report that has been disclosed. Amendments have been made from the draft to the final version, however, these are to make the final version clearer and more concise, as well as removing information which could be considered personal data.
36. The Commissioner accepts that there is a general public interest in transparency around decision making and in scrutiny of the procedures and practices followed by public authorities in this regard. However, in the circumstances of this case, he is satisfied that the Council has followed the procedures correctly.
37. Having considered all the factors referred to above, the Commissioner has concluded that, in this case, the public interest favours maintaining the exception. Therefore, he considers that the Council has correctly withheld the requested information and that it was correct to rely on regulation 12(4)(d) of the EIR.

Right of appeal

38. 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

39. 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.
40. 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

Michael Lea
Team Manager
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Wycliffe House
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