

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 6 June 2019

Public Authority: Welwyn Hatfield Borough Council
Address: The Campus
Welwyn Garden City
Herts
AL8 6AE

Decision (including any steps ordered)

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

Background

4. A significant part of the administrative area of Welwyn Hatfield Borough Council (the "council") is covered by a Green Belt designation. In order to be able to allocate sufficient land for much needed housing development the Council is required to assess the value and purpose of the Green Belt. That assessment will facilitate a decision as to whether land in the Green Belt should be released for development and, if so, which land should be released.
5. During the Local Plan Examination, which is a public process conducted through formal Hearing sessions held by the Inspector, it was agreed that the council would commission a further independent review of the Green Belt to be carried out by Land Use Consultants ("LUC"). The purpose of this review was to assist the Council in coming to a decision on the release of land in the Green Belt for development. It was within this context that the request below was made.

Request and response

6. On 24 September 2018 the complainant wrote to the council and requested information in the following terms:

(In relation to the Welwyn Hatfield Green Belt Study – Stage 3, prepared by LUC)

1. *The Draft Report – Introductory Chapters dated 3 May 2018;*
 2. *The Draft Report dated 21 May 2018;*
 3. *The Draft Final Report dated 20 July 2018; and*
 4. *The Final Report dated 17 August 2018.*
7. The council responded on 22 October 2018. It provided a weblink to the information in part 4 of the request and withheld the remaining information under the exception for information in the course of completion (regulation 12(4)(d)).
8. Following an internal review the council wrote to the complainant on 20 November 2018. It stated that it was maintaining its position.

Scope of the case

9. On 4 December 2018 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
10. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the information in parts 1-3 of the request.

Reasons for decision

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

11. The council withheld the information in parts 1-3 of the request under the exception in regulation 12(4)(d).
12. 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.
13. 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.
14. 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.
15. 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.

16. In this case, the council has confirmed that the withheld information consists of draft versions of the Welwyn Hatfield Green Belt Study (the "report"), the final, complete version of which has been published.
17. The Commissioner therefore considers 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

18. 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

19. The council has acknowledged that there is a general presumption in favour of disclosing environmental information. The Commissioner further considers that there is a specific public interest in transparency and accountability where decision-making has the potential for widespread impact on the local environment and local community.
20. The complainant has also submitted some specific concerns which they consider highlight the public interest in disclosure. These are set out below with summaries of the council's responses (italicised).
21. "The LUC report was intended to be an independent expert review carried out as part of a public process, namely the public examination of the Local Plan. As such, the process and the report itself should have been free, save as to matters of fact, from any influence from the council."

A number of objectors to the plan had asked for a meeting with the consultants and this was denied by the council on the basis that the consultants needed to form their own view of the harm to the Green Belt. The Inspector asked the council to commission the report and therefore the council needed to manage its production. The final report, the methodology and any inconsistencies within the report have all been subject to scrutiny. The consultants attended the hearing session and confirmed at the examination that it was their report and that they

stood by the content of the final document. Draft reports are not normally made available to public examinations.

22. "The LUC review is now listed in the council's evidence base for its Local Plan Examination. As such, that evidence base, including the draft reports which led to the final report, should properly be open to public scrutiny. This cannot be achieved at the Examination in circumstances where the draft reports are not available to those taking part in the Examination process."

Draft reports are not normally made available to public examinations as it is the final report which forms the council's evidence. The final report was subject to public scrutiny at the examination. The Inspector did not ask for a copy of the draft report to be made available at the hearing session.

23. "In the council's explanation for its decision following the internal review, the council states that it was entitled to receive drafts of the LUC report in order to ensure that the council was "happy with the work". This was not the objective of the independent review which should have reached recommendations free from any influence from the council. A requirement for the council to be "happy" with the report should not have been a condition of the LUC appointment and certainly suggests that the council was seeking to influence or control the content and outcome of the report."

The council had to be 'happy' that the report met the requirements of the brief, that it was based on a robust methodology and that it did not contain inaccuracies. It was not a requirement of the brief for the council to agree with or be 'happy' with all its conclusions.

24. "The council also states in its response following the internal review: 'The panel also took the view that releasing incomplete or unfinished documents in the public domain could potentially distract public debate away from the substantive issues, i.e., whether the Local Plan is sound. If this did occur, there is a substantial risk to the council that debate on secondary issues would seriously impact on the council's resources as a result of any additional debate on documents that would never be considered final.' This implies that there is content within the draft reports that would cause debate at the Examination. However, it is not for the council to decide whether or not such debate would be appropriate. Instead that is the role of the Inspector. Furthermore, the fact that the council considers that there is 'substantial risk' that debate would seriously impact on the council's resources is not an adequate or appropriate reason to deny the opportunity of consideration of issues which could be fundamental to the Examination process."

The Inspector did not ask to see a copy of the draft report but inevitably it would have been a distraction had it been submitted in evidence by objectors to the plan.

25. “[*The Client*] is concerned that the council is unable or unwilling to provide a reasonable or transparent explanation for why the draft LUC report issued on 3rd May 2018 was unacceptable and subsequent iterations of that report were necessary over such an extended period, until the Updated Final Report was published on 23rd August 2018 (16 weeks later). The only remedy, to allay considerable public concern about the independence and originality of the LUC report, is to publish the three draft iterations of the report and the initial final report listed above.”

The 3rd May report was not a full draft of the report. Key sections of the report still needed to be drafted.

26. “There were several other parties in addition to [*the requestor*] who also submitted statements to the Stage 5 Hearing Sessions which raised concerns about the risk of the council exercising influence over the LUC report. These concerns are entirely justifiable in circumstances where there have been several previous versions of the report produced over such a long period, particularly when the reason for that extended period and/or the need for numerous iterations of the report to make the council ‘happy’ cannot be explained by the council beyond the nebulous reasons given to [*the requestor*] in response to its FOIA request.”

This is a matter which was debated at the hearing session and the Inspector has asked LUC to respond to each concern. This has largely taken place and is published on the examination web pages.

Public interest in maintaining the exception

27. The council has argued that the overriding public interest is in facilitating the adoption of the Local Plan and that disclosing the information would have a negative impact on this process.
28. The council considers that disclosing the information whilst the process of formulating the Local Plan policy would present a level of confusion with regards to the Green Belt Study, which is an integral tool for helping to select sites for development.
29. The council has argued that disclosure of the draft documents would result in questions arising which would take up valuable officer time and distract from the substantive debate which relates to the contents of the final, published document. The council considers that the resulting elongation of the public examination process would carry a huge burden

and raise the risk of the Local Plan not being delivered in a timely manner.

30. The council has further argued that the public examination process provides for scrutiny and accountability and publication of the draft documents would refocus attention on matters not relevant to the grounds for any final decision.

Balance of the public interest

31. 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.
32. 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.
33. The Commissioner is mindful that the complainant is concerned that the fact that the report passed through different iterations suggests nefarious activity. However, the Commissioner considers that it is perfectly normal for significant documents to pass through several draft versions before being ratified, particularly where significant public funds and environmental ramifications are under consideration. Furthermore, the Commissioner considers that the complainant's arguments for disclosure are based on a false premise as the forum for scrutiny is via the public examination and any judgements formed in this regard should be founded on the final version of the (publicly available) report rather than on any hypotheticals which might be reflected in earlier drafts. In general, criticisms of elements of an earlier draft of a document or agreement with aspects an earlier draft are entirely irrelevant except where these elements also form part of the final version of the report, upon which any decision will ultimately be made.
34. Whilst the Commissioner acknowledges that drafts of the report would be of interest to the public and would provide an insight into the decision making process, she considers that there is a greater public interest in seeing the Local Plan duly processed via the existing procedure. She considers that disclosing the information at this time, whilst the process is incomplete, would hinder the progression of the Local Plan by opening channels of enquiry that would take up council time and which, in any event, would be derived from incomplete versions of the final document central to this process.

35. In light of the above, the Commissioner is therefore 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

36. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

37. 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.
38. 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
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