

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

Date: 27 August 2019

Public Authority: Brighton and Hove City Council

Address: Kings House
Grand Avenue
Hove
East Sussex
BN3 2LS

Decision (including any steps ordered)

1. The complainant has requested from Brighton and Hove City Council (the Council) information consisting of a draft report relating to a planning application. The Council refused the request on the grounds that Regulation 12(4)(d) applied (material in the course of completion).
2. The Commissioner's decision is that Regulation 12(4)(d) is engaged in this particular case. However, she has decided that in all the circumstances of the case, the public interest in maintaining the exception at Regulation 12(4)(d) does not outweigh the public interest in disclosing the information.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - To disclose a copy of the withheld information to the complainant.
4. The Council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 23 October 2018 , the complainant wrote to the Council and requested information in the following terms:

*"In accordance with the relevant legislation this is a Freedom of Information request for an unredacted, electronic copy of all final and draft versions of a report written by **[name redacted]** recommending approval of planning application BH2016/06542.*

To help identify the report the following information may be useful:

- The property concerned is Villa Fleurs, 7 Tongdean Road, Hove, BN3 6QB.

*- The report and associated drafts were co-authored or solely authored by **[name redacted]** some time during the period September 2017 to December 2017.*

- The report recommended that the head of planning approve the application."

6. The Council responded on 16 November 2018. It stated that *"It is confirmed that **[name redacted]** authored a report in relation to application ref. BH2016/06542. However, the status of that report is that it is an unfinished document as it has not be signed off by a reviewing officer."* Therefore, the Council refused to disclose the requested draft report citing Regulation 12(4)(d) (material in the course of completion) of the EIR.
7. Remaining dissatisfied with the response received, on the same date the complainant requested the Council to conduct an internal review.
8. Following an internal review the Council wrote to the complainant on 13 January 2019. It provided a clarification as to why it decided to deal with the request under the EIR regime as opposed to the FOIA. However, it did not change its position in relation to the application of Regulation 12(4)(d) of the EIR.

Scope of the case

9. The complainant contacted the Commissioner on 15 January 2019 to complain about the way his request for information had been handled.
10. During the course of the Commissioner's investigation, the complainant confirmed the scope of the complaint, stating *"I am satisfied that there*

was no final (i.e. signed off) version of the report at the time of my request. Consequently, I can confirm that my complaint is about the Council's decision to withhold the draft [unsigned] version of the report in question."

11. The following analysis focuses on whether the Council correctly withheld information within the scope of the request under regulation 12(4)(d) of the EIR.

Reasons for decision

Is the requested information environmental?

12. Information is "environmental" if it meets the definition set out in regulation 2 of the EIR. Environmental information must be considered for disclosure under the terms of the EIR.
13. Under regulation 2(1)(c), information on any measure that will affect, or be likely to affect, the elements of the environment referred to in 2(1)(a) or the environmental factors referred to in 2(1)(b) will be environmental information. In the present case, the requested information relates to a draft report regarding a planning application. The planning process is clearly a measure that may affect several of the environmental elements and factors listed in regulations 2(1)(a) and (b). The Commissioner therefore considers it appropriate to consider the request as seeking environmental information under the terms of the EIR.

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

14. 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 in the course of completion, to unfinished documents, or to incomplete data.
15. 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.

16. The Commissioner has published guidance¹ on this topic, in paragraph 10 of which it is stated that *"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."*
17. The Council stated that draft reports, such as the subject matter of the information request in question, are required to be signed off by a reviewing officer in order to become finalised.
18. The Council explained that it is the responsibility of case officers to draft reports and make specific recommendations, which subsequently are passed to a reviewing officer *"who must be at a minimum a Principal Planning Officer."* The Council stated that *"it is often the case that reports will be sent back to the case officer for further work"*, before it is signed off. *"Sign off indicated that the report is accurate and sufficiently addresses the issues which are relevant to consider for the purpose of a planning application."*
19. The Council informed the Commissioner that in this case the planning application was withdrawn prior to completion of the report, causing work on the report to cease. Consequently, due to the fact that the document was not signed off, it remains in an unfinished state and will never be completed.
20. The Commissioner has viewed the withheld information which was provided to her by the Council as part of the investigation. The Commissioner notes that the document in question is characteristic of an unfinished document, such as the watermark which states *"Not Agreed"* and the lack of the signature of the relevant reviewing officer.
21. The Commissioner also examined the planning application's case-file in the Council's planning web-portal and can confirm that the planning application was withdrawn prior to the date when the request for information was submitted.
22. Based on the above and the Council's explanation on the procedures that a draft report of this type has to undergo in order to be considered

¹ https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf

a completed document, the Commissioner concludes that the requested information constitutes an unfinished document. Therefore, the Commissioner finds that Regulation 12(4)(d) is engaged in this case.

Public Interest Test

23. 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.
24. 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

25. The Council acknowledged the legitimate public interest in transparency of planning processes and that the default principle should be that information which forms the substance of planning decisions should be disclosed.
26. Due to its environmental implications, a planning permission does not have an impact only in relation to the person who submits a planning application, but to members of the wider public as well.

Public interest in maintaining the exception

27. The Council maintains that the draft report, requested by the complainant, was not subject to quality controls which arise through the review procedure by the responsible reviewing officer, due to the application being withdrawn at a fairly early stage.
28. According to the Council, disclosure of such a document which has never passed the sign-off procedure poses a substantial risk of misinforming members of the public and it would be detrimental to public consideration of future planning applications for the site.
29. The Council explained that considering that the requested information is a draft document, it may contain certain inaccuracies or deficiencies that normally would be corrected during the planning process until the document would reach its final form. However, due to the fact that the planning application was withdrawn and the planning process was prematurely terminated, disclosing the requested document would mislead members of the public.

Balance of the public interest

30. 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 community impact.
31. The Commissioner acknowledges that usually in relation to planning processes there is public interest in transparency, accountability and in providing information to the public which enables them to understand more clearly how public authorities make certain decisions and what factors they take into account.
32. In the specific circumstances of this case, and having considered the particular information related to a specific planning application, the Commissioner considers that disclosure of the withheld information would not cause any damage to the matter in question, since the planning application was already withdrawn. There is no live process that would suffer damage should the requested information be disclosed.
33. The Commissioner has considered the argument that the draft report may contain inaccuracies, may not provide a full picture and disclosure therefore may misinform and mislead the public. Generally, the Commissioner does not accept arguments that information should not be disclosed because it would be misleading. The Commissioner's position in relation to this question has been made clear in a number of previous cases, such as in her decision notice in case FER0636956² where it was stated that:

"A public authority should be able to publish some context or explanation with any information it releases. However, as stated in the Commissioner's guidance on the public interest test, the argument in relation to the information being misunderstood may only be used if it is not possible to provide this explanation, or if the explanation would not limit any damage caused."

34. This line of reasoning also follows the Commissioner's guidance on Material in the course of completion, unfinished documents or

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2013385/fer0636956.pdf>

incomplete data (regulation 12(4)(d))³ which provides that public authorities "*should usually be able to provide an explanation if, for example, incomplete data contained errors or provisional estimates, or a draft differed significantly from a final version.*" This guidance explains that "*the argument would only carry some weight if the information would create a misleading or inaccurate impression and there were particular circumstances that would mean it would be difficult or require a disproportionate effort to correct this impression or provide an explanation.*"

35. In the present case, the Commissioner considers that the Council is able to provide an explanation on the status of the document requested, value of the information included in that document and other necessary circumstantial information related to the planning application.
36. The Commissioners also notes that she did not receive any valid argument from the Council as to why it would be difficult or it requires a disproportionate effort to provide an explanation alongside the disclosure of the information requested by the complainant.
37. In conclusion, the Commissioner is not satisfied that in this particular case the public interest in maintaining the exception outweighs the public interest in disclosing the requested information. In line with this conclusion, at paragraph 3 above the Council is now required to disclose the requested information to the complainant.

³ https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf

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: 0300 1234504

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

Ben Tomes
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