Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **30 October 2019**

Public Authority: **Gloucestershire County Council**
Address: **Shire Hall,**
Westgate Street,
Gloucester,
Gloucestershire,
GL1 2TG

Decision (including any steps ordered)

1. The complainant has requested consultation responses received by the council regarding its Cheltenham Transport Plan Phase 4 - Boots Corner. The council refused the request on the basis that section 22(1) of the Freedom of information Act applied. It continued to rely upon this after its review. During the course of the Commissioner's investigation however it applied Regulation 12(4)(d) (unfinished or incomplete information) to withhold the information.

2. The Commissioner's decision is that the council was not correct to apply Regulation 12(4)(d) to withhold the information from disclosure. She has also decided that the council failed to comply with the requirements of Regulation 14(2).

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

    - To issue a fresh response to the request under the EIR, without relying upon Regulation 12(4)(d) to withhold the information.

4. The public authority 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 18 January 2019 the complainant wrote to the council and requested information in the following terms:

> *"Under the Freedom of Information Act I would like to request access to view the responses to the survey for the Cheltenham Transport Plan Phase 4 – Boots Corner. I would like to review all responses submitted to date, due to potential data protection issues I require these results to be desensitised not to include personal data of name, number email and address but allowing for time, date and response detail and whether formal or general.*
>
> *I will prefer the responses to be in an Excel table, but would accept Word or pdf format."*

6. The council responded on 20 February 2019. It said that section 22(1) of FOIA applied (information intended for future publication).

7. The complainant requested that the council review its decision on 21 February 2019. The council wrote to the complainant upholding its decision on 20 March 2019.

Scope of the case

8. The complainant contacted the Commissioner 11 April 2019 to complain about the way his request for information had been handled.

9. During the course of the complaint the Commissioner highlighted that the request was likely to be environmental information and the request should therefore have been considered under the Environmental Information Regulations 2004.

10. The council therefore wrote to the Commissioner on 26 September 2019 informing her that it was now applying Regulation 12(4)(d) to withhold the information.

11. The Commissioner therefore considers that the complaint is whether the council was correct to apply Regulation 12(4)(d) to withhold the information.

Reasons for decision

Regulation 12(4)(d) - material which is still in the course of completion, unfinished documents or incomplete data

12. Regulation 12(4)(d) states 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;
    - unfinished documents; or
    - incomplete data.

13. The exception is class-based, which means that it is engaged if the information in question falls within its scope. If the information falls into one of the three categories, then the exception is engaged. It is not necessary to show that disclosure would have any particular adverse effect in order to engage the exception. However, Regulation 12(4)(d) is a qualified exception, so the public authority must consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

14. The fact that the exception refers both to material in the course of completion and to unfinished documents implies that these terms are not necessarily synonymous. While a particular document may itself be finished, it may be part of material which is still in the course of completion. The council has argued that this is so in this case.

15. The requested information relates to consultations of a Highway scheme. The council argues that it is still in the process of trialling different formats of the roads system and that the information which has been requested feeds into, and will inform the next part of its consultations and deliberations over the project.

16. It said that the scheme remains incomplete as the changes to the highway are being undertaken as a trial using an Experimental Traffic Regulation Order (ETRO) and subject to ongoing monitoring and data collection. It argued that as the scheme remains live and comments are still being considered following modifications made on 3 June 2019.

17. It said that during this period it is conducting a public consultation which remains open to the public to comment until December 2019 when it will make a final decision regarding the Cheltenham Transport Plan, phase 4.

18. It said that:

    "These modifications are part of the same legal process and experiment as stated above and therefore we feel that all comments

received are seen as in response to CTP Phase 4 as an entire scheme. The scheme remains live and comments are still being considered following the modifications made on 3rd June 2019. Therefore the information requested is being exempted under regulation 12(4)(d) – incomplete data.

19. The trial period is not yet complete, and decisions have not yet been made as to the form in which the scheme is finally implemented. It therefore argues that the requested information is incomplete when viewed as part of the process as a whole.

20. The complainant argues that the initial phase is however complete. He provided a copy of a letter he received from the council dated 29 May 2019 as evidence of this. This letter states that:

"What will happen to the formal representations made so far, before the amendments?

We have used all formal representations we have received so far to inform the amendments to the scheme outlined in this letter. There is now the opportunity to comment on the altered scheme. Comments made before 3rd June will be retained for our reports, however these will not be used to assess the Phase 4 amendments.

We encourage those who have further comments about the amended trial to submit new formal representations if you wish your feedback to be considered."

21. Similarly, in its published update on the intended actions it was taking in phase 4 of the scheme, the council stated in paragraph 5:

"Please note that any formal representations made regarding the Phase 4 Original experimental orders will not be used to assess the Phase 4 Amendment experimental orders. You will need to make a new formal representation regarding the Phase 4 Amendment experimental orders if you wish your comments to be considered towards making a final decision on what is introduced permanently."[1]

22. The complainant argues that as that is the case, the information cannot be incomplete for the purposes of Regulation 12(4)(d). The Commissioner understands that his argument is that the council's

[1] https://www.gloucestershire.gov.uk/media/2089761/ctp-p4-formal-representation-responses-10.pdf

statement in this letter demonstrates that responses received about this phase are distinct from the overall changes being implemented. The council has treated the initial phase as a distinct section, and therefore its arguments in respect of the application of Regulation 12(4)(d) are unsupportable.

23. The council however argues that its statement and intentions do not affect the application of the exception. It said that the comments received on the 'Original phase 4 of CTP' will be used to provide a context for the 'Amendments to phase 4 of CTP' that were implemented subsequent to 3 June 2019.

24. It said that a detailed report is intended to be put to the Traffic Regulation Order Committee to consider the latter and recommend a way forward in December 2019. This meeting will be open to the public and the report is intended to be published on the council's website.

The Commissioner's conclusions

25. The Commissioner firstly notes that the fact that a document will be used to provide context to a future meeting does not prevent that document being 'unfinished' or 'incomplete'. In fact, the opposite is the more likely scenario – in order to provide context, it is at least preferable that the document is complete and is not still subject to further amendments.

26. The council's published document also states that:

"This document provides Gloucestershire County Council's responses to comments made as formal representations to the Cheltenham Transport Plan Phase 4 Original Experimental Traffic Regulation Orders (TROs) in Cheltenham town centre…

…Following consideration of all the formal representations received, Gloucestershire County Council and Cheltenham Borough Council have decided to run revised experimental TROs in the town centre for 6 months from Monday 3rd June 2019."

27. Taking note of the council's statements in this respect, it appears that the initial consultation, 'Original phase 4 of CTP' was completed and the council then made changes, based upon its analysis of the data, in June 2019. This led into the second consultation period, which is intended to consider the further changes that were made following the analysis of the first phase, and the first consultation period.

28. Although the consultation responses for the initial period will provide context to the ultimate decision, this does not prevent it being considered a distinct phase, which fed in to the current phase, and the

impact of the further changes it implemented on 3 June 2019 are due to be considered, and the scheme as a whole in December 2019.

29. The Commissioner's published guidance on Regulation 12(4)(d) states, on page 2, that *"Data that is being used or relied on at the time of the request is not incomplete, even if it may be modified later"*[2].

30. The Commissioner is therefore satisfied that the original phase work has been completed, and although the results may feed into, and provide context to its deliberations in December 2019, that information is both finished and complete insofar as the consultations for this period/phase.

31. The council argues that the process should be seen as a whole, and therefore the initial stages of the consultation process are still incomplete until the decision has been made regarding the whole of the process. Given the evidence that previous consultation responses will not be considered again however, together with the fact that it states that it has already considered and used these consultations when implementing the new phase on 3 June 2019, the Commissioner has not been persuaded by the council's argument in this case.

32. The Commissioner's decision is therefore that the council was not correct to apply Regulation 12(4)(d) to withhold the information

33. As she has found that the council was not correct to apply Regulation 12(4)(d) there is no requirement to go on to consider the public interest test required by Regulation 12 where the exception is engaged.

34. Although her decision is that the council was not correct to apply Regulation 12(4)(d) to withhold the information, the Commissioner is aware that the council received over 1500 consultation responses to the original phase. She is also aware that consultation submissions often contain personal data within individual submissions, even where direct names and contact details have been redacted as per the complainant's request. Some of the information may not therefore be able to be disclosed without breaching individuals' rights under the Data Protection Act 2018, and it would therefore be exempt under Regulation 13 of the EIR. Whilst the complainant's request specifically excluded personal data from within its scope, the council will need to reconsider the consultation responses to consider whether any personal data remains, even where contact details and identities have been redacted.

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[2] https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf

35. Given the number of consultation responses which the council will therefore be required to reconsider, this raises the prospect that responding to the request may potentially attract the consideration of other exceptions within the EIR. She would however expect the council to provide full and detailed arguments in respect any further exceptions it decides are applicable.

36. The Commissioner must therefore provide the opportunity for the council to reconsider a disclosure of this information, without seeking to reply upon the application of Regulation 12(4)(d) further in this respect.

Regulation 14(2)

37. Regulation 5(1) provides that a subject to certain conditions, a public authority that holds environmental information shall make it available on request.

38. Regulation 14(2) provides that where a public authority is refusing a request for information then the refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

39. The complainant made his request for information on 18 January 2019. The council acknowledged receipt of the request and informed the complainant that it was due to respond by 15 February 2019 to comply with the requirements of Regulation 14(2). It did not however provide its response to the complainant's request until 20 February 2019.

40. Accordingly the Commissioner's decision is that the council failed to comply with the requirements of Regulation 14(2).

Right of appeal

41. 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

42. 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.

43. 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
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SK9 5AF