

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 5 January 2022

Public Authority: Bridge Parish Council
Address: 12, Bridge Down
Bridge
Canterbury CT4 5AX

Decision (including any steps ordered)

1. The complainant requested a draft report into a proposed Neighbourhood Plan from Bridge Parish Council, Kent ("the Parish Council"). The Parish Council withheld the information under regulation 12(4)(d) of the EIR: unfinished documents.
2. The Commissioner's decision is that the exception is engaged; however, the balance of the public interests favours the information being disclosed.
3. The Commissioner requires the Parish Council to take the following step to ensure compliance with the legislation.
 - Disclose the information to the requester.
4. The Parish Council must take this step 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 21 September 2020, the complainant wrote to the Parish Council and made the following request for information ("NP" refers to "Neighbourhood Plan"):

"I am unable to find on the Bridge Village website the call for NP sites that started on 27 June 2019 and ended on 18 July 2019. By virtue of the Environmental Information Regulations 2004, please provide:

- i) The above call for sites;*
 - ii) Responses to the call for sites;*
 - iii) Correspondence with Cantley, Savills, [name redacted] and any other agents or representatives of Cantley since 12 March 2019; and*
 - iv) The final draft version of the Independent Examiner's report on the withdrawn NP."*
6. The Parish Council responded on 22 October 2020. It responded in full to requests (i) and (ii); it stated that request (iii) was too broad, and refused request (iv) under regulation 12(4)(d) of the EIR (material in the course of completion, unfinished documents or incomplete data) since it was *"a working document that was withdrawn when the Plan to which it referred was withdrawn"*.
 7. Following an internal review, and further correspondence, including clarification from the complainant regarding request (iii), the Parish Council provided the information requested at request (iii).
 8. With regard to the information requested at point (iv), it stated that this was a draft only, and that it was not required to publish it, also saying it did not *"have ownership"* of the document nor *"hold a copy"*.

Scope of the case

9. The complainant contacted the Commissioner on 21 December 2021 to complain about the refusal of part (iv) of his information request.
10. Given the comments made in its internal review response, the Commissioner asked the Parish Council to clarify whether the requested draft report was held, and/or whether it was being withheld under an exception.
11. The Parish Council confirmed that it held a draft report, which had never been finalised and published because the Neighbourhood Plan to which it referred had been withdrawn. It was withholding the draft report under regulation 12(4)(d) of the EIR; specifically, under the limb "unfinished documents".

12. This notice covers whether the draft report is exempt from being disclosed under the EIR, under regulation 12(4)(d).

Reasons for decision

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

13. Regulation 12(4)(d) of the EIR 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, to unfinished documents or to incomplete data.
14. As the Commissioner's guidance¹ makes clear, the fact that the exception refers to both "material in the course of completion" and "unfinished documents" implies that these terms are not necessarily synonymous.
15. In this case, the Parish Council's position is that the requested information comprises a draft document, and therefore falls within the category of "unfinished documents". It explained that the independent examiner's report was never finalised, because the proposed Neighbourhood Plan to which it referred was abandoned in favour of a new Plan; there was, simply, no need for the report to be finalised, and it was left unfinished.
16. The Commissioner has considered the scope of the request, which specified the "*final draft version*" of the report. Whilst there could have been some confusion caused by this wording, in terms of whether it was a draft or a finalised version which was being requested, the Commissioner is satisfied that the Parish Council's reading of the request is correct, and that what was requested was the latest version of the report before work on it ceased.
17. In the Commissioner's guidance, it states that a document may either 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*". It also states that, furthermore, draft documents will engage the exception because a draft of a document is "*by its nature an unfinished form of that document*".

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

18. The Parish Council considers that it is clear that, since the requested information is a draft report, and since work on the document had ceased well before the date of request and there was no intention to finalise it by that stage, it remained in an unfinished state, and was therefore captured by the exception.
19. The Commissioner agrees that the report (as indeed the requester was aware) is a draft, unfinalised version. It was evidently intended that a process of fact-checking was still to take place, to address possible errors, and the Council has also advised the Commissioner that further information was intended to be added in.
20. The Commissioner has, nevertheless, considered the circumstances with regard to the status of the document. It may be the case that a document still labelled as a "draft" version is nevertheless incorporated into the day-to-day operations of a public authority, and is used, or referred to, regularly in carrying out ongoing business. In that case, it may be that the document cannot be said to be "unfinished". The Upper Tribunal considered this point in the *Manisty*² case, which, whilst it focused primarily on the "material in the course of completion" limb of regulation 12(4)(d), made the following important point in paragraph 32:

"A public authority cannot label its way out of its duty to disclose. A label like 'draft' or 'preliminary thoughts' may, or may not, reflect the reality. The scope of the exception depends on the substance, not the form in which the material is stored or presented."
21. In this case, however, whilst the Commissioner is aware that the contents of the draft report were considered by the Parish Council in the course of drafting a new Neighbourhood Plan, he is satisfied that the withheld information remains, in substance, an unfinished document.
22. He is aware that a conscious decision was taken between the Parish Council and the independent examiner that there was no need for her to finalise the report, because the Plan to which it referred was withdrawn and abandoned. The report was never presented to the principal local authority, and the document was, effectively, filed away while still in a draft state.

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https://assets.publishing.service.gov.uk/media/5fa4242be90e07042243203b/2019_AACR_17ws.pdf

23. The Commissioner is therefore satisfied that the exception at regulation 12(4)(d) is engaged. Since it is a qualified exception, he has considered the balance of the public interests in the information being disclosed.

The balance of the public interests

The complainant's view

24. The complainant has explained that there is a public interest, amongst the local community, in the disclosure of the draft report. Disclosure, he has argued, would inform local debate, since the report is likely to contain information of direct relevance to the currently proposed Plan. He explained that he considered there would be an "overlap in content" between the previous and current iterations of the Plan.

25. He commented:

"The report is required to present a full picture of how the withdrawal decision was made (to ensure transparency, accountability and democratic confidence) and to inform current debate regarding the new plan and examination: the purpose of examination is to indicate a) whether it is considered appropriate to make the neighbourhood plan, b) conservation area impact and c) contribution to sustainable development."

26. He anticipated that the Parish Council may seek to rely on arguments that a "safe space" was needed in which to consider draft documents, so as to facilitate decision-making away from the public gaze, but rebutted this by saying that, in his view: *"There's no safe space argument because the previous neighbourhood plan has been withdrawn and the new plan will be subject to examination should it proceed."*

27. He asserted that: *"the requested report relates to a major policy decision with significant environmental impact and potential future implications. In my view it should be provided."*

The Parish Council's view

28. The Parish Council acknowledged some public interest in showing where some of the advice it had received, and which it had considered when drafting the new Plan, had originated from.

29. It also noted that there may have been some interest in understanding more about why the originally proposed Plan had been withdrawn.

30. However, the Parish Council considered that the balance of the public interests lay in the exception being maintained; that is, in the document not being disclosed to the public.

31. It explained that the draft report, whilst not available to the public, is available to members of the current Neighbourhood Plan committee, and that the complainant himself has now joined that Committee: in other words, it is available to those who need to see it.
32. Away from public interest factors, it also explained there are some particular personal sensitivities which relate to individuals around disclosing the report, and provided the Commissioner with details of these.
33. Its position is chiefly that the information, being a draft report which related to a redundant Plan, is not of sufficient public interest to outweigh its concerns over disclosure. It stated: "*On balance, there was no overall public interest in releasing that information; by the time of the information request itself, the document requested related to a NP that had been withdrawn and so the draft report requested was redundant, and a new Plan had been launched and was progressing*".

The Commissioner's decision: the balance of the public interests

34. The Commissioner has considered the factors on both sides, in light of the circumstances of the case and the contents of the withheld information.
35. He is aware of the inherent public interest in being able to scrutinise how a public authority conducts its business, particularly in respect of environmental information.
36. It is also the case that regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure of environmental information, when relying on any of the regulation 12 exceptions. This matter was highlighted by the Upper Tribunal decision *Vesco v Information Commissioner (SGIA/44/2019)*.
37. In considering the balance of the public interests in the disclosure of information which has been withheld under regulation 12(4)(d), however, the Commissioner must be mindful of those matters which the exception is designed to protect. It would not be in the public interest to disclose an unfinished document if its contents, by virtue of being unfinished, were such that an ensuing public debate would significantly distract the public authority away from those core environmental matters it was seeking to address, or if its conduct of public affairs would otherwise be seriously impacted because of the unfinished nature of the information being disclosed.
38. In this case, no final version of the report was produced. It is, in the Commissioner's view, conceivable that some debate may arise from the disclosure of the draft report, insofar as it sheds light on the reasoning

behind the withdrawal of the original Plan, and from the public being able to scrutinise the extent to which the contents informed the development of the new Plan.

39. The Commissioner is also aware that, because the report remained unfinished, some fact-checking was still to take place, and some information had yet to be added in to it. The draft report could, therefore, conceivably be taken to be "misleading", since it does not fully represent the independent examiner's final findings.
40. However, as the Commissioner's guidance makes clear, his position with regard to information which could be seen as potentially misleading, in an unfinished document, is that it should, generally, be possible for the authority to put the disclosure into context. In addition, the guidance makes it clear that a public authority should be able to minimise any distraction caused by ensuing public debate, by explaining any "deficiencies" in the information.
41. In the circumstances of this case, and in light of the contents of the draft report, the Commissioner does not consider that there would be a significant impact on the Parish Council, and is not persuaded that these matters lend significant weight in favour of the exception being maintained.
42. The Commissioner considers that it is relevant in this case that the withheld information is a report prepared by a third party. It is not the case that its contents comprise internal discussions or deliberations, or confidential advice, the disclosure of which may impact on the "safe space" needed by the Parish Council to share ideas, and seek or receive advice. Rather, the contents – which appear to be almost complete – comprise the conclusions of an independent third party, and were intended for publication, once finalised.
43. The Commissioner has considered the Parish Council's view that the draft report is, essentially, redundant and of little value, because it relates to a Plan which was withdrawn. However, he finds that it is a detailed, near-complete document which, as has been acknowledged, was taken into account when preparing a new Plan. He considers that disclosure would, therefore, inform public debate around this subject, for the reasons set out by the complainant, further noting that, at the date of the request, members of the public were availing themselves of information in order to take part in the consultation process over the new Plan.
44. In the circumstances of this case, the Commissioner considers that there is a strong public interest in favour of the draft report being disclosed. It is a detailed document which, as has been acknowledged, the re-formed

Neighbourhood Plan Committee considered and acted on. He considers that there is a strong public interest in the contents being open to scrutiny, in order to inform public debate around the reasons for the withdrawal of the old Plan, and the direction of the new one.

45. Whilst he has considered the factors in favour of maintaining the exception, the Commissioner has determined that they do not outweigh the public interest in disclosure, and the balance of the public interests lies in the information being disclosed. Therefore, the Parish Council is now required at paragraph 3 above to disclose the withheld report.

Right of appeal

46. 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

47. 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.
48. 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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