

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

**Date:** 14 November 2023

**Public Authority:** Lincolnshire County Council  
**Address:** County Offices  
Newland  
Lincoln  
LN1 1YLX

**Decision (including any steps ordered)**

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1. The complainant has requested from Lincolnshire County Council (LCC) all documentation (both internal and external) related to the updating of the Lincolnshire Minerals and Waste Local Plan between 10 November 2022 and 6 April 2023.
2. LCC confirmed that it held the information requested for parts 1 and 2 of the request but refused to disclose it, citing its reliance on EIR regulation 12(4)(d) of the EIR - Material in the course of completion, unfinished documents and incomplete data - as its basis for doing so. LCC also cited its reliance on regulation 12(4)(a) - Information not held - for the remainder of the request (part 3).
3. The Commissioner's decision is that LCC has correctly applied regulation 12(4)(d) of the EIR to parts 1 and 2 of the request, and that on the balance of probabilities, LCC does not hold the information for the remainder (part 3) and has correctly applied regulation 12(4)(a) of the EIR.
4. The Commissioner does not require further steps.

## Request and response

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5. On 7 April 2023, the complainant wrote to LCC and requested information in the following terms:

“1. All Lincolnshire County Council internal documentation including notifications, forms, letters, emails, minutes of meeting, date of telephone calls, note of telephone calls, file notes, diary notes, reports in respect to the Updating of the Lincolnshire Minerals and Waste Local Plan.

2. All documentation between Lincolnshire County Council and all external organisations, consultants and legal firms including notifications, forms, letters, emails, minutes of meeting, date of telephone calls, note of telephone calls, file notes, diary notes, reports in respect to the Updating of the Lincolnshire Minerals and Waste Local Plan.

3. All updates of the Updating of the Lincolnshire Minerals and Waste Local Plan that have been issued.

I would request the information were possible is provided in electronic format.

The information requested is limited to the period between 10 November 2022 and 6 April 2023.

The request is to exclude all correspondence that relates to requests for information, concerns or objection between Lincolnshire County Council and the public.

6. LCC responded on 11 May 2023. It refused to provide the requested information stating that the information was currently still a work in progress and incomplete and that once complete it would be published on the LCC website. It cited the following procedural sections of the EIR:

“ Requests for environmental information must be considered for disclosure under the terms of the EIR, rather than the FOIA and we have therefore considered your request under the EIR.

The Council considers that the requested information is exempt from disclosure under

1.Regulation 12(4)(d) of the EIR- Material still in the course of completion.

2. Regulation 12(4)(d) of the EIR- Material still in the course of completion. The Council has therefore determined that the information will not be disclosed.

3. This information is not held. A public authority may refuse to disclose environmental information if it does not hold that information when an applicant's request is received under Regulation 12(4)(a) of the EIR.

7. The complainant requested an internal review on 11 May 2023 as follows:

"To clarify, the purpose of the information request is to establish if the decision by LCC to remove the consented and approved MS29 with a plant and bagging site north of the A1175 from the proposed "Updating of the Lincolnshire Minerals and Waste Local Plan" and replace it with SG17 which has a plant and bagging site south of the A1175 in close proximity to the village of West Deeping which will have a negative impact upon the quality of life of the West Deeping residents and is in violation of LCC's duty of care and statutory obligations as set out in the Human Rights Act and the Health and Safety at Work Act and supporting Regulations.

To refine and simplify my request, I require all recorded information relating to the decision by LCC to delay the decision on which sites in the "Updating of the Lincolnshire Minerals and Waste Local Plan" was delayed by a year to 2024, from the publication of the report on 10 November 2022 to the date the decision was approved by LCC including a copy of the report which would appear to be before 6 April 2023."

8. Following an internal review LCC wrote to the complainant on 11 July 2023. It upheld its original position.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 12 July 2023 to complain about the way their request for information had been handled. They believed that LCC had already made a decision to replace the consented and approved MS29 site with SG17. This is a site in close proximity to West Deeping, which they considered placed residents at unnecessary health risk and was in breach of the Health and Safety at Work Act.
10. In its responses to the complainant, LCC stated it had considered that the exceptions at 12(4)(b), 12(4)(e), 12(5)(b) and 12(5)(f) of EIR were also engaged but had not gone on to consider these exceptions separately.
11. Given the above, the Commissioner considers the scope of his investigation is to determine whether LCC correctly applied regulation

12(4)(d) to withhold information for parts 1 and 2 of the request and whether, on the balance of probabilities, LCC holds no further information for part 3 of the request.

## Reasons for decision

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### Would the requested information be environmental?

12. As the request relates to measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements of the environment, the Commissioner is satisfied that the information would be environmental. For procedural reasons, he has therefore assessed this case under the EIR.<sup>1</sup>

### Regulation 12(4)(a) - information not held (Part 3 of request)

13. When there is some dispute between the information held by a public authority and the information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request).
14. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
15. LCC explained to the Commissioner that it is required to undertake a more in-depth review of the Lincolnshire Minerals and Waste Local Plan (LMWLP) within five years from its date of adoption. The plan was reviewed during 2020, and a detailed report setting out the conclusions of this review was published in February 2021.

<https://www.lincolnshire.gov.uk/downloads/file/5049/lincolnshire-minerals-and-waste-development-scheme-19-1-21-accessible-v->

16. LCC's position is that the process for updating the LMWLP does not require or include the issue or publication of updates and that there is

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<sup>1</sup> <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/regulation-2-1-what-is-environmental-information/>

no more information available and consequently it does not hold this information. However LCC stated,

“In response to the conclusions of the LMWLP Review, Lincolnshire County Council has commenced work on a new, updated LMWLP. The new plan, once completed, will eventually replace the existing document. In line with national policy and legislation, it is proposed to produce the new LMWLP as a single document, which will include both strategic and criteria-based policies, along with site allocations where required.”

17. The Commissioner accepts that, on a balance of probabilities, LCC did not hold the requested information for part 3 of the request and it was therefore correct to rely on regulation 12(4)(a).

### **Public interest test**

18. Technically, regulation 12(4)(a) contains a public interest test. However the Commissioner cannot conceive of a public interest argument that would require a public authority to disclose information that it did not hold.

### **Regulation 12(4)(d)- Material in the course of completion, unfinished documents and incomplete data**

19. 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.<sup>2</sup>
20. Regulation 12(4)(d) is a class-based exception, which means that if the information falls within its scope, then the exception is engaged. It is not necessary to demonstrate that disclosure would have any particular adverse effect in order to engage the exception. However, regulation 12(4)(d) is subject to the public interest test.
21. In this case, LCC’s position is that the updating of the LMWLP is still in the process of completion and is still in the draft stages.
22. In its submission to the commissioner LCC stated that the LMWLP is still subject to a number of stages of public consultations and a formal examination process to ensure the views of communities, stakeholders and other interested parties are taken into account during the

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<sup>2</sup> <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/regulation-124d-eir/>

formulation of the plan, ensuring that it will meet all necessary legal and procedural requirements.

23. LCC provided the Commissioner with a link to its website where a proposed timetable for consultations and all published information to date is located:

<https://www.lincolnshire.gov.uk/planning/minerals-waste>

<https://www.lincolnshire.gov.uk/planning/minerals-waste/2>

24. The Commissioner additionally notes that page 2 confirms,

“The timetable for updating the plan, as set out in the Lincolnshire minerals and waste local development scheme, has been delayed. This is due to the large number of comments and site nominations that have been received. As a result, we anticipate that public consultation on the draft plan (preferred approach) will not take place until 2024.”

25. The Commissioner has not seen the draft LMWLP, as the process of gathering and consulting on information for the report is still ongoing. However, he accepts that the LMWLP is an unfinished document, is therefore in draft and that the exception at regulation 12(4)(d) will be engaged.

### **Public interest test**

26. Regulation 12(1)(b) requires that where the exception under regulation 12(4)(d) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. The Commissioner is mindful of the provisions of regulation 12(2) which state that a public authority shall apply a presumption in favour of disclosure.

### **Arguments in favour of disclosing the requested information**

27. LCC acknowledged that there would be significant public interest on the impacts on the community from disclosure of the Lincolnshire Minerals and Waste Local Plan providing a greater awareness of all issues that may impact on them and their community.
28. Additionally disclosing the information would provide accountability and transparency on how public resources are spent and allow for greater public participation in the decision-making process.
29. The complainant in his correspondence with the Commissioner has argued that LCC has already made decisions about the site, and

therefore the public interest favours disclosure as the document cannot therefore be in draft. However the Commissioner has not seen any evidence to support this.

### **Arguments in favour of withholding the requested information**

30. LCC acknowledged that the public and affected communities required the opportunities to have any relevant factual information in time for them to participate effectively in environmental decision processes. However LCC argued that the LMWLP is already subject to a number of statutory public consultations. This enables the public to fully contribute and make a difference at the right time in the process. LCC has also published significant amounts of relevant information on its website:

<https://www.lincolnshire.gov.uk/planning/minerals-waste>

31. In its submissions to the Commissioner LCC argued that to release this information into the public domain would adversely affect the premise of having a safe space to think, deliberate and discuss current internal matters that lead to critical decisions for the authority. LCC stated

“The need for officers to have private thinking space to consider new ideas and to be able to debate lives issues and reach decisions away from external interference and distraction was also considered a significant factor in favour of maintaining the exception.

Good governance also requires that officers are able to fully engage with third parties, including statutory consultees, in order to exchange views away from public scrutiny. If this exchange of views is required to be made public, this is likely to inhibit the process and lead to less rigorous exploration of options. The loss of frankness and candour would damage the quality of deliberation and lead to poorer decision making which would not be in the public interest.”

32. In addition LCC argued that premature disclosure would result in a small number of officers spending a significant amount of time and resources collating the requested information and then managing the effects of the disclosure, resulting in delays in the updating of the LMWLP.

### **The Commissioners Analysis**

33. The Commissioner has considered the arguments provided by both parties. He recognises the legitimate public interest in disclosing information that would inform the public about changes to existing mineral and waste locations and the details of new proposed sites which may have an impact (whether positive or negative) on the environment and the local communities.



34. The Commissioner is also mindful that access rights under the EIR are designed to support public access to environmental information and public participation in decision making.
35. The Commissioner recognises the complainant's concerns about this matter, in that that decisions have already been made with regards to the locations for the waste sites. Therefore there is a public interest in this regard and any differences in the draft version of the LMWLP from earlier published versions can be identified and disputed. However, the Commissioner is required to consider matters as they stood at the point LCC issued its refusal notice.
36. A key factor in assessing the weight of public interest arguments is the extent to which the information itself would inform public debate on the issue concerned. There is always an argument for presenting a full picture of how a decision was made or arrived at. If disclosing incomplete material or draft documents would support this, then it increases the weight of the argument for disclosure.
37. The Commissioner also recognises that authorities will need a safe space to develop ideas, debate issues and reach decisions away from external interference and distraction. This may carry significant weight in some cases, particularly when the issues in question are still live or only recently decided.
38. He considers that the extent to which disclosure would have a detrimental impact on internal processes will be influenced by the particular information in question and the stage the process had reached at the point the request was responded to. There will always be a stronger public interest in protecting a process that is ongoing than one that has concluded.
39. In this case, the Commissioner does not consider disclosure would satisfy this public interest as the information would not represent the final analysis or concluded position relating to the updating of the LMWLP. The withheld information is incomplete and still at draft stages, with the public and third-party consultations ongoing and no firm decisions made as to the locations for waste sites.
40. The Commissioner has a well-established position in cases such as this. A full explanation of the exemption can be found in a previous decision notice setting out the correct response from a public authority faced



with such a request and explaining why it could withhold the requested information.<sup>3</sup>

41. The Commissioner has concluded that the public interest in maintaining the exception at regulation 12(4)(d) outweighs the public interest in disclosing the information. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(d) was applied correctly to parts 1 and 2 of the request.

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<sup>3</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4027202/ic-247015-f4b8.pdf> <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4026412/ic-238829-d4y5.pdf>

## **Right of appeal**

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42. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

43. 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.
44. 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**

**Cressida Woodall**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**