



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL  
(INFORMATION RIGHTS)  
UNDER REG.18 OF THE ENVIROBNTMENTAL INFORMATION RIGHTS**

**EA/2019/0225**

**ARMAGH CITY, BANBRIDGE AND CRAIGAVON BOROUGH COUNCIL**

**Appellant**

and

**THE INFORMATION COMMISSIONER**

**First Respondent**

And

**KELLY LAVERTY**

**Second Respondent**

**TRIBUNAL: Brian Kennedy, Anne Chafer and Dave Sivers.**

**Dates of Hearing: 6 December 2019 & 29 May 2020-05-30**

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**DECISION**

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**Introduction**

**[1]** This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”). The appeal is against the decision of the Information

Commissioner (“the Commissioner”) contained in a Decision Notice dated 3 June 2019 (reference FS50691732), which is a matter of public record.

[2] The Tribunal sat to hear this appeal consider this case on 6 December 2019 & deliberated on the Final submissions submitted by the parties on 29 May 2020.

### **Factual Background to this Appeal:**

[3] Full details of the background to this appeal, the request for information and the Commissioner’s decision are set out in the Decision Notice. The appeal concerns the question of whether the Commissioner was correct to determine that the requested report was a completed document and therefore fell to be disclosed.

### **CHRONOLOGY**

Dec 2014	Consultants retained by Craigavon Borough Council (‘CBC’) to prepare the ‘South Lake Masterplan’ (‘SLM’)
April 2015	Craigavon Council merges to form current Armagh City, Banbridge and Craigavon Borough Council (‘ABC Council’)
Sept 2015	Consultants produce SLM
21 Dec 2016	Complainant leaves voicemail requesting copy of SLM
19 Jan 2017	Written request for information pertaining to the Craigavon Civic Centre and a copy of the SLM
20 Jan 2017	Council provides some documents but refuses to disclose the SLM, citing s43(2) FOIA
30 Jan 2017	Complainant requests internal review
6 March 2017	Internal review upholds original refusal
18 July 2017	Complaint to the Commissioner
19 July 2018	Commissioner requests detailed submissions from Council
2 May 2019	Commissioner informs Council of view that matter should be considered under EIR
7 June 2019	Council reconsiders initial exemption and relies on reg.12(4)(d) EIR

### **RELEVANT LEGISLATION**

***Environmental Information Regulations 2004***

## **12. Exceptions to the duty to disclose environmental information**

- (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if
  - (a) an exception to disclosure applies under paragraphs (4) or (5); and
  - (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
- (2) A public authority shall apply a presumption in favour of disclosure.
- (3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.
- (4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –
  - (a) it does not hold that information when an applicant's request is received;
  - (b) the request for information is manifestly unreasonable;
  - (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
  - (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
  - (e) the request involves the disclosure of internal communications.
- (5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –
  - (a) international relations, defence, national security or public safety;
  - (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
  - (c) intellectual property rights;
  - (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
  - (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
  - (f) the interests of the person who provided the information where that person –
    - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
    - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
    - (iii) has not consented to its disclosure; or

(g) the protection of the environment to which the information relates.

## **COMMISSIONER'S DECISION NOTICE**

**[4]** The information is environmental information under reg.2 of the EIR as it refers to plans for the regeneration and development of land. As the document itself was completed, the regulation in question would only be engaged for this document if the Council showed that the policy process, which the document was intended to inform, is still on going, or the document itself was only a draft.

**[5]** It was the Council's case that the SLM was commissioned by the previous Craigavon Council, and had not been adopted formally as a Masterplan of the new ABC Council. It contended therefore that the document was unfinished. It confirmed that work on the document had ceased during the review of public administration following the amalgamation of the Councils into ABC Council, and as it was never adopted it remains a draft.

The Commissioner noted that the consultants who had drawn up the report had been commissioned in December 2014 and produced the report in September 2015. Nothing within the document suggests that it is a draft, and the Commissioner received no evidence that the process of developing that plan was on going. The document itself was therefore finished. Neither was there evidence that the SLM formed part of the on going process to develop the area to which the SLM relates. The Commissioner ordered disclosure accordingly.

## **GROUND OF APPEAL**

### ***Ground 1 – Information is incomplete***

**[6]** Contrary to the Commissioner's assertions, the Council informed the Commissioner in July 2018 and again in May 2019 that the document was not a formally adopted Masterplan and should therefore be considered unfinished. The original tender document for the SLM defined the project as "*a 2014 Masterplan for the shore of the South Lake will fully consider the development potential of the South Lake shore*", and the successful company "*will be responsible for the development of a Masterplan*".

**[7]** The tender document also made clear that the Masterplan formed part of a broader project that had been launched in July 2010. It was described as involving "*the preparation of conceptual designs for key opportunity sites*". This, the Council argued, necessarily

implied that these were only proposals that would need to be subject to approval. They could equally be revised or rejected. At no stage did the Council tell the Commissioner that the work on the SLM was complete, or that it had no intentions of doing further work on it; merely, work had been suspended. It was submitted *“There was no evidence before the Commissioner to show that the Council might not resume its work on the Masterplan at some future date or that it had abandoned any plans for further development of the South Lakeshore generally”*.

[8] The Council argued that the Commissioner had placed undue weight on the appearance of the SLM to the exclusion of the context. Citing the Upper Tribunal’s decision in *Highways England Company Ltd v ICO and Manisty* [2018] UKUT 423 (AAC), the Council stated that even if the document itself were considered complete, the wider process was still in the course of completion and the exemption applied. The question identified by the Upper Tribunal at para.31 as being relevant to this determination was whether *“there has been a natural break in the private thinking that the public authority is undertaking? Is it moving from one stage of a project to another?”* or whether *“the authority is ready to go public about progress so far”*. The Council contended strongly that there was no natural break in the Council’s thinking, and the suspension of work on the plan occurred before the plan was received from the consultants so it evidently was not ready to ‘go public’.

### ***Grounds II – Public Interest favours non-disclosure***

[9] The Council accepted that disclosure of the SLM would promote accountability and transparency by enabling people to understand its processes and decisions. However, there is a public interest in protecting preliminary documents from exposure to public scrutiny and protecting public resources from being unnecessarily expended on justifying unfinished documents. In any event, the Council was only a “statement of ambition” prepared by consultants that had not formally adopted the SLM. The Council also warned of a ‘chilling effect’ on the ability to develop proposals in future.

### **COMMISSIONER’S RESPONSE**

[10] The consultants were contracted to provide one document, and the document that they did provide is neither marked as a draft nor gives the impression in any way that it was to form part of a series of documents. The Commissioner stated that the *“fact that the Appellant might not have yet considered whether or how to use the Masterplan does not mean that the document itself is ‘unfinished’.”*

**[11]** The Commissioner accepted that a finished document may attract the protection of the exception where it forms part of material still in the course of completion. However, it must be shown that the document does relate to wider incomplete material. Material was defined in *Manisty* as something with a “*physical existence...[not] something incorporeal, like a project, an exercise or a process.*” For the document to fall within the *Manisty* clarification, it must form part of a wider corpus of work that is not completed, rather than a process or project. The Council identified “*no other document or thing with a corporeal existence (as required by Manisty at §§23-24) to which the Masterplan could be said to relate*”.

**[12]** Upon the receipt of further submissions, the Commissioner affirmed “*the adoption of a Masterplan by the Council is [not] coextensive with the completion of the document*”. The word ‘finished’ must be construed as per its ordinary meaning, and should not be supplemented with any additional requirements of formal adoption. The matter ought to be considered in sympathy with the purpose of the exception, namely to preserve a ‘safe space’ for the private thinking of the public authority. There has been no correspondence provided by the Council with the consultants to show that the document was subject to on going revisions or prospective next steps. Indeed, the tender document does not refer to the presentation of a draft as a key milestone in the process, and the timescale envisioned in the document led the Commissioner to consider that the document could not be a draft. If the document was ready to put out to public consultation, the need for the ‘safe space’ had disappeared.

**[13]** The stage at which the Council is at in regards to the decision-making process appears to be one characterised by the lack of a decision, rather than a positive decision to suspend work on the document. In reference to the witness statement provided by the Council’s Chief Executive, the Commissioner stated that the “*strong impression conveyed by the witness statement is that the document was received in September 2015 and has gathered dust in a drawer since then*”.

**[14]** In the event that the exception was not engaged, the Commissioner considered that the public interest lay in disclosure. The fact that the document had most likely been paid for with public funds and then allowed to “*languish [...] in purgatory*” tipped the balance towards disclosure. The Commissioner also dismissed the allegation of a chilling effect, noting that “*the Masterplan was prepared by external consultants rather than Council officers [which] rather tends to suggest that disclosure of the withheld information would be even less likely to give rise to a chilling effect than other disclosures.*” The Council did not

appear to have given any consideration for measures that could be taken to counteract the risk of misinterpretation, which did not appear to the Commissioner to be unduly onerous or disproportionate.

## **APPELLANT'S REPLY**

**[15]** The Council maintained that the SLM was unfinished, as the process had not been completed; there had been no public consultation and no formal adoption of the plan. The tender document required the successful bidder to engage with the Council regularly *“throughout the project lifecycle”* including making presentations and engaging with representatives and stakeholders. Key milestones included the presentation of *“high level concepts”* by February 2014 and presentation of the *“final Masterplan”* by March 2015. The Commissioner makes no mention of this requirement for a final Masterplan, and appears to accept that it was never presented to the Council. Therefore, according to the Council,, it is plainly a draft.

**[16]** If this is not accepted, then the Council argues that the SLM was intended to *“form part of a study comprising high-level ideas for regeneration and development”*. It also confirmed that the document had been referred to *“in part”* at various meetings and presentations between 2016 and 2019.

**[17]** The Council noted that Ms Laverty had asked to be joined as a party to these proceedings, and she noted that the SLM had been *“seen by other parties outside of [the] Council”*. She had instructed solicitors who, the Council noted, also represented another individual in a proposed application for a judicial review of a planning decision by the Council. This other individual had received discovery of the SLM as part of the judicial review proceedings, but this is not disclosure to the world at large, and there is a prohibition on the legal representatives sharing or using the information for purposes collateral to that set of legal proceedings.

**[18]** The Council also provided a witness statement from Roger Wilson, Chief Executive of the Council. He explained the history of the plans to develop the South Lake area of Craigavon and how they coincided with the amalgamation of various authorities into ABC Council. He stated that the tender document stipulated that the final Masterplan was to be submitted to CBC by March 2015, but a draft had not even been submitted to the

Development Committee. By April 2015 CBC, the body that had commissioned the report, “*ceased to exist*”. He described the report submitted in September 2015 as “*a draft of the Masterplan*”. It “*has not been considered at all by Council*”, but was subject to “*very limited consultation with private stakeholders, as required under the tender, and not wide and extensive consultation, as would be expected*”.

**[19]** In regard to future plans for the use of the document, Mr Wilson stated as follows:

*“At present, work on the draft Masterplan remains suspended. Nor has the Council taken any decision to resume work on the draft. It may be that the Council will do so in future but I am unable to say when that will be. Simply put, what role the draft Masterplan may play in future planning work remains to be seen.”*

**[20]** As for the public interest, Mr Wilson was concerned that the released SLM may be misinterpreted as representing the final version of the Council’s proposals, and may inhibit developers approaching the Council if they consider that their suggestions do not comply with the SLM. Mr Wilson did concede, “*it would not be apparent to members of the public or developers that the document is a draft*”.

**[21]** The Council’s position appeared at this stage to be that the document is a draft because

- i. The consultants who produced the report did not meet the required milestones of the tender document, and so the document was never put before any Committee for a review;
- ii. The document was neither put out for consultation with the public nor adopted by the Council;
- iii. Work on the document was suspended while the commissioning Council was amalgamated into the present Council, and no decision has yet been taken on whether to resume work on the document.

## **TRIBUNAL HEARING**

**[22]** On the morning of hearing the oral Appeal on 6 December 2019, the Council abandoned its reliance on the argument that the *material* was in the course of completion, but still maintained that the document itself was unfinished.



[23] Following that hearing, and despite the assertions of its counsel that all material was before the court, the Council made an application to adduce fresh evidence, claiming that it had been discovered from searches undertaken as a result of the Commissioner's skeleton. They are in fact documents upon which Mr Wilson was cross-examined, and which were requested by me on behalf of the Tribunal at the hearing. The Tribunal adjourned to allow the parties to consider the fresh evidence and make further submissions. The parties have agreed to, and the Tribunal has allowed the introduction of fresh evidence through relevant documents presented by the Appellant at a very late stage of the appeal. This is most unsatisfactory in all the circumstances and we accept and adopt the Commissioner's criticisms of the Appellant Council in the conduct of their appeal generally.

[24] The Second Respondent submitted with her Closing Submissions copies of the documents and minutes of meetings, which the Council had referred to in their Reply (OB 38, Para 9)

[25] Upon inspection of the additional evidence, and documents, one of which was a programme for delivery and priced activity schedule from the consultants, the Commissioner was satisfied that the SLM was indeed a draft document. Furthermore, it was a draft to which there had been no input from the Council. The Commissioner then accepted that there was indeed a greater risk of misinterpretation than previously apprehended, but this risk could be ameliorated by actions the Council could take such as distancing itself from the document, or marking it as a draft. Similarly, the Commissioner accepted that the chilling effect was real and of substance, but in reality "*greatly diminished*" by the fact that it was the consultants' work, and not the Council's. The Commissioner left the matter to the Tribunal to determine whether or not to diverge from the Decision Notice and reserved her position in relation to costs,

## **THE ISSUES**

[26] The two issues then that remain to be addressed are therefore;

- (a) Whether the withheld information was an "*unfinished document*" such that EIR Reg. 12(4)(d) was engaged; and
- (b) If EIR Reg, 12 (4)(d) was engaged; whether the public interest in disclosure outweighed the public interest in maintaining the exception.

[27] On the issue of Public Interest, the Appellant Council now refers to concern expressed by Mr Wilson CEO, that disclosure of the draft Masterplan “*would make Council officers reluctant to put forward or develop proposals in the future because of the risk that their proposals would be exposed to public scrutiny at a stage when they were no more than preliminary*” and, “*would obviously prejudice the Appellants ability to develop proposals in the future*”. Mr Wilson provided no tangible evidence of the nature or extent of any such concerns. In fact a detailed analysis of his evidence and all of the supporting documents supplied to the Tribunal subsequent to the adjournment of 6 December 2019, persuades us that there is no tangible evidence of significant grounds for any such concerns before us.

### **UNFINISHED DOCUMENT**

[28] Whilst it is correct to state that the withheld information in the form of a Master Plan has the status of a draft to the extent that the formal milestones to formally adopt it have not been met, the document has clearly been referenced in planning meetings and documents with no evidence of any caveat or health warnings. The Tribunal find the evidence does not characterise it as such, as being an ‘unfinished’ document

The status of the plan is at least ambiguous. The Appellant (AB&C Council) wish to withhold it because it is an unfinished document that has not been formally adopted, yet its ‘unadopted’, ‘unfinished’ contents are being utilised in directly relevant discussions.

Mr Wilson mentioned in his evidence to the hearing that the old councils were “trying to establish legacies to tie the hands of ABC Council - ” *as the reason why the master plan was commissioned in the run up to the merger.*”

It is clear that the AB&C Council, as a body had no part in the original commissioning of the plan, and that it has had no input into the plan as it stands. Yet this ambiguity undermines the notion that the document is a mere draft with no status. Indeed, it suggests a document paid for with a considerable sum of public money that is being freely utilised, despite not having cleared the formal milestones for adoption. It appears to all intents and purposes at that stage to be finished.

In the Documents provided to us by the Appellant we see no evidence to support the contention that the withheld information at the time of the request was an unfinished

document. A brief reference to some of the matters we note in the documents provided to the Tribunal (but which had not, it appears been previously provided to the Commissioner), are as follows;

**(i) The Appellant's Reply** (OB 38 Para 9) replies to a question in the Information Commissioner's Response which asked if the Council had used the Masterplan at all (OB 32, Para 35). The Council replied '*although work on the draft Masterplan was suspended in the early life of the new Council*', it has been **briefly referred to**, in part, in other Council documents and meetings including :

- a) Commissioning of a model for MIPIM in 2016
  - b) Presentation to a Ministerial Advisory Group by the Southern Regional College 2016
  - c) Report to council's Strategy and Community Planning Committee in 2016
  - d) Draft 'Evening Economy Strategy 2017 and accompanying reports in Jan 2018
  - e) An objector at a Council planning committee meeting in Jan 2019 referred to the 'draft Masterplan' – Committee accepted a material consideration but shouldn't be given any weight as not consulted on, not been adopted by council, not produced by a planning authority and not been published.
- Both of these are after date of request 21/12/16

*(Note Para 1(1) refers to the South Lake Masterplan not South Lakeshore Masterplan so name has been changed at some point.)*

**(ii) Roger Wilson's statement:** explains that in April 2015 Craigavon Borough Council ceased to exist and that the consultants submitted a draft of Masterplan in Sept 2015. He stated that it had not been considered by Council, it is not the 'final Masterplan, un-adopted and remains in draft.' (OB Pg. 65 Para 20/1)

During the hearing Roger Wilson explained that the Council has continued to refer to the draft Masterplan from 'time-to-time in other documents ... used simply as a reference point.'

ABC Council provided some emails between themselves and GMD sent in January, May and July 2016 where GMD queried further work/payment. The only response provided to the Tribunal from ABC Council was dated February 2016, this came from a member of the planning department who was involved in the original Form of Tender and stated that ‘ my own view is we are practically complete so don’t anticipate anything very much to close out.’ We note that no mention was made that the SLM document should still be marked as a draft

The Second Respondent’s Closing Submissions (email 30 Jan 2020) highlight that fact the South Lakeshore Master Plan, Scope of Service – Priced Activity Schedule provided by ABC Council post hearing is ‘a programme for delivery’ and that ‘there is no written evidence ... that (the consultants) were advised to suspend work on the Masterplan’. However, the Tribunal notes that ABC Council’s Closing Submissions (Pg. 5 Para 4f) state that ‘Mr Wilson accepted there had been no specific decision to cease work on the draft Masterplan’

The Second Respondent provided a list of payments made by ABC Council to the consultants, which shows that the final payment of the full purchase price was made on 30/8/2016. As stated previously, copies of the documents and minutes mentioned by ABC Council as ‘briefly referring’ to the SLM were provided and the Second Respondent points out that none of the references to the SLM made in these documents or minutes refer to a ‘draft Masterplan’.

During our deliberations we reviewed these and the results are as follows:

Presentation by Kennedy Fitzgerald (architects) 8/12/2015 – a starting point with planning and statutory agencies.

Southern Regional College, Craigavon

Same location as in Masterplan

Section entitled Masterplan, includes slide Masterplan Aspirations, Vehicular Movement Routes Including shared car park

Feasibility Option 1 (Reflective of Council’s Lake Masterplan)

Slide, Option 1 Masterplan context,

Pros 1 the building as outlined in the Masterplan,

Cons 1 Density – site constraints of the Masterplan

4 Parking – the Masterplan promotes a remote shared provision

Slide Option 2 – Masterplan context

Pros 1 – Density – without the site constraints of the Masterplan a three storey height solution is possible

Cons 1 the building is not located as outlined in the Masterplan.

Letter dated 10/12/15 sent to Roisin Hamill Local Planning Office AB&C

Re ecology study of Craigavon college site reiterating **Option 1, reflective of Council's Lake Masterplan is not a viable option.**

11/2/2016 MAG (Ministerial Advisory Group) Briefing Workshop, attended by Roger Wilson, CEO, Olga Murtagh (Dir. of Development) Richard Griffin (Development Manager) Roisin Hamill Planning

Plus MAG x 5, SRC x 7, WYG x 8, Transport NI x 1 Translink x 1 DRD Transport x 1 DCAL x 2, Rushmere Shopping Centre x 1 NIHE x 1 DSD Regeneration x 1

Discusses presentation by Kennedy Fitzgerald/Southern Regional College with options appraisal.

18/2/2016 Subsequent MAG Report – Para 6.01 three references to the Masterplan and specific content re college site, outline for college and felling of trees. 7.02 'The Masterplan proposes a shared parking lot...

*Assume this must have been discussed at meeting where Roger Wilson present and report distributed to attendees so could have queried no reference to draft*

Quote for Production of Model 16/8/2016 prepared by ABC – model required for MIPIM UK in London Oct 2016 Appendices use illustrations from the Masterplan App 1 see CB pg. 28, App 3 see CB pg. 70 – headed Extract from South Lake Masterplan, 71, 72 headed South Lake Masterplan and Front picture - *no mention of draft.*

20/9/2017 Evening Economy Development Strategy Final Draft –pg. 17 Key Projects – Central Craigavon Development briefs for key developments Opportunities (now known as South Lakes Masterplan).

The Tribunal confirm that there is no reference in any of the documents or meeting notes to the Masterplan as being a draft or unfinished document.

## **PUBLIC INTEREST IN DISCLOSURE**

**[29]** Whilst the Tribunal accept the exception is engaged, the additional factors referred to above are significant in the context of a public interest balance and include;

- The document may be regarded by the Appellant as officially unfinished, yet is being treated as if it has some authority;
- The chilling effect argument is weakened in that Appellant has had no hand in the preparation, nor even in its commissioning. Safe space considerations normally apply to the need to discuss proposals freely and frankly without premature scrutiny; however not only are these not the Appellants proposals, they are being openly quoted in what cannot be viewed as 'safe space';
- The status of the plan, and indeed, the Appellant's lack of input could be misconstrued, with it being taken as an approved document and accompanying it with caveats or health warnings can as the Commissioner has suggested, ameliorate this; We accept and adopt the Commissioners submissions in that regard.
- The Appellant are unable to say whether or not the plan will be taken further, or in what timescale. On the evidence before us, it is not a substantive part of any on-going plan and citizens are entitled to wonder what the relevant and significant public funds expended on the withheld information has been spent on.
- Roger Wilson witness statement OB 64 p18
- The Masterplan is not a statutory plan or a planning policy document and therefore at this stage does not carry any weight in the determination of planning applications.

- No evidence in these docs that developers are inhibited or constrained by document.
- No evidence that ABC staff in planning experience chilling effect

**[30]** It appears to the Tribunal that the submissions by the Appellant here at [27] above are more of a speculative afterthought rather than being based on any serious consideration, or evidence, of the nature or extent of any such concerns. On the evidence before us, and in the circumstances now pertaining, the Tribunal can attach little weight to the concerns raised. The basis of an EIR exception starts on the premise that disclosure is preferred and we have not been satisfied that the purported Public Interest in withholding the requested information has been established to any extent that would outweigh the Public Interest in transparency and accountability, which the Appellant has properly recognised exists. In all the circumstances and on the evidence before us relating to the history, there is in our view considerable weight to be attached to the disclosure of the withheld information.

**[31]** Accordingly this Tribunal find that the Public Interest lies in favour of disclosure and directs accordingly. The Tribunal direct that the Appellant should disclose a copy of the withheld information as requested by the Complainant, the second Respondent herein,

**[32]** The Tribunal will consider submissions of the issue of costs as reserved by the Commissioner in her submissions herein should this be required.

**Brian Kennedy QC**

**Date Promulgated**

**3 June 2020.**

**4 June 2020**