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Case Reference: EA-2023-0523

**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Decided without a hearing  
Decision given on: 16 July 2024**

**Before**

**JUDGE SOPHIE BUCKLEY  
MEMBER DR PHEBE MANN  
MEMBER MARION SAUNDERS**

**Between**

**JAMES MOONEY**

**and**

**THE INFORMATION COMMISSIONER**

Appellant

Respondent

**Decision:** The appeal is dismissed.

**REASONS**

## **Introduction**

1. This is an appeal against the Commissioner's decision notice IC-244702-D9T4 of 14 November 2022 which held that:
  - 1.1. Lincolnshire County Council ('the Council') was entitled to rely on regulation 12(4)(d) of the Environmental Information Regulations 2004 (EIR) (material in the course of completion) in relation to part of the request.
  - 1.2. The Council did not hold part of the information and was entitled to rely on regulation 12(4)(a) EIR in relation to the remainder.

## **Factual background to the appeal**

2. Where these facts were disputed, we have made these findings on the balance of probabilities on the basis of the documents contained in the bundle.
3. The Council is the Mineral and Waste Planning Authority for the county of Lincolnshire. It is responsible for the preparation of a minerals and waste local plan. This plan sets out its detailed policies and locations for future minerals extraction and for the development of waste management facilities.
4. The Council's current plan, the LMWLP, forms part of the statutory development plan for Lincolnshire. Under Section 38(6) of the Planning and Compulsory Purchase Act 2004, all planning applications for minerals and waste development in the county must be determined in accordance with this development plan unless material considerations indicate otherwise.
5. The LMWLP comprises two parts, the Core Strategy and Development Management Policies (CSDMP) document, adopted 1 June 2016. This sets out the Council's key principles to guide the future winning and working of minerals and the form of waste management development in the county up to 2031. The second part is the Site Locations document (SLD), adopted on 15 December 2017. This allocates specific sites for the winning and working of sand and gravel and for waste management, and more general areas that are suitable for waste management. In addition, it safeguards the allocated sand and gravel sites from other forms of development.
6. The current LMWLP identifies a number of mineral sites to meet the requirements for a steady supply of sand and gravel provision. This includes a 'plant and bagging' site with the reference number MS29-SL located on the north of the A1175, intended as an extension of an existing King Street Quarry and involving the transportation of the extracted sand and gravel to the existing site via a conveyor over or under the A1175.
7. Under regulation 10A of The Town and Country Planning (Local Planning) (England) Regulations 2012 (as amended), the Council is required to undertake a

more in depth review of the LMWLP within five years from its date of adoption. This needs to take into account the findings of Annual Monitoring Reports (AMR's) and any changing circumstances that may affect the relevance and effectiveness of the policies. Both parts of the LMWLP (the CSDMP and SLD) were reviewed during 2020, and a detailed report setting out the conclusions of this review was published in February 2021.

8. In response to the conclusions of the LMWLP Review, the Council commenced work on a new, updated LMWLP. The new plan, once completed, will eventually replace the existing adopted CSDMP and SLD. In line with national policy and legislation, the Council proposes to produce the new LMWLP as a single document, which will include both strategic and criteria-based policies, along with site allocations where required.
  
9. For the production of a Local Plan, a Local Authority is required to publish and maintain a Local Development Scheme which sets out the proposed timetable for each stage of the plan. The new LMWLP will go through several stages of public consultation and a formal examination process in order to ensure the views of communities, stakeholders and other interested parties are taken into account during the formulation of the plan, and that it meets all necessary legal and procedural requirements.
  
10. The proposed timetable for the production of the new LMWLP was:

<b>Stage of Plan- production</b>	<b>Target</b>
Consultation on Issues and Options including a "call for Sites" exercise (Regulation 18)	Spring 2022
Consultation on the Preferred Approach (Draft) of the new LMWLP (Regulation 18)	Spring 2023
Publication of the 'Proposed Submission' version of the new LMWLP (Regulation 19)	Spring 2024
Submission to Secretary of State	Summer 2024
Examination hearings	Autumn 2024
Adoption	Winter 2024/2025

11. The consultation on issues and options began in Spring 2022. In June 2022 the Council published a number of documents including an 'issues and options' consultation document, a proposed site selection methodology and a scoping report. The issues and options document proposes that sites already allocated in the adopted plan will be carried forward as allocations in the updated LMWLP provided there have been no substantial change in circumstances since they were originally allocated.
12. At the same time there was a 'call for sites exercise' whereby interested parties were invited to nominate potential mineral sites for the winning and working of aggregate that they wished to put forward for consideration in the updating of the LMWLP. As stated above, the proposed methodology for assessing the sites was also subject to consultation alongside the issues and options document. The deadline for submitting responses to the consultation and site nominations was August 2022. 31 sites were put forward for the Council's consideration.
13. In November 2022 the Council undertook a 'targeted consultation' or an information gathering process of bodies or organisations (including parish councils) that might hold important information relevant to the sites that had been put forward by interested parties for consideration.
14. Once that exercise was completed the intention was to assess the nominated sites and select the most appropriate for provisional allocation in a draft plan setting out the Council's preferred approach. The Council's intention was that residents would have the opportunity to comment once the draft plan was produced.
15. The draft plan, when published, will be supported by a detailed sites report setting out the results of the site assessment process and the reasons behind which sites are provisionally proposed for allocation and those proposed to be discounted.
16. The document sent to those bodies or organisations as part of the targeted engagement in November 2022 included a site with the reference number SG17 which included a new plant and bagging site south of the A1175 near to the village of West Deeping. It did not include MS29-SL.
17. We accept the following explanation from the Council as to how this came about:

"Exclusion of MS29-SL

As you may be aware, earlier this year the county council carried out a public consultation on an Issues and Options document – the first stage in the updating of the adopted Lincolnshire Minerals and Waste Local Plan. This proposes that sites already allocated in the adopted plan should be carried forward as allocations in the new plan except where evidence emerges that there has been a significant change in circumstances since a site was originally allocated.

In the case of MS29-SL, this site was previously promoted by Cemex as an extension to their King Street site, which would have involved the transportation of the excavated sand and gravel to their existing plant site via a conveyor that would pass under or over the A1175. Since that time, however, Cemex has decided to focus its attention on a different site in Baston (SG08) and is no longer proposing to work MS29-SL. This constitutes a significant change in circumstances as Cemex is unlikely to make an application to work MS29-SL within the new plan period. The inclusion of a site in the new plan which is undeliverable would be inappropriate and could be found unsound in due course when the plan is examined. Therefore, it is likely that the proposal not to carry forward MS29-SL would have been the same even if SG17 had not been nominated.

#### Nomination of SG17

Breedon initially only nominated SG11 in the West Deeping area. However, the nomination forms indicated that the company were intending to work MS29-SL first, but as a free-standing quarry. Breedon were therefore contacted and advised that this proposal was contrary to the site's allocation as an extension to the King Street Quarry and were asked to submit a nomination form so that the site could be reassessed. The decision to ask for this information is down to the diligence of the Minerals and Waste Policy Team when checking the nominations to ensure that all sites are assessed on the correct information. Furthermore, this does not imply that the nomination will be acceptable or preferable to the previous allocation – it is simply a means to ensure that the nominations are assessed against the correct information.”

18. Although not intended to be published, according to the West Deeping Action Group, the document sent to the various bodies in November 2022 ‘became public within the West Deeping community on 16 November 2022 following a posting on the West Deeping Facebook page’.
19. Residents concerned at the proximity of the proposed plant and bagging site to the village of West Deeping formed the West Deeping Action Group. The residents are concerned about the impact of the site on the quality of life of West Deeping residents in terms of:
  - 19.1. Loss in value of the properties
  - 19.2. Anxiety resulting in stress and mental health issues
  - 19.3. Potential increase in road incidents on the A1175
  - 19.4. Environmental and safety risks resulting from mud being deposited on the A1175
  - 19.5. Noise pollution
  - 19.6. Light pollution

20. In about March 2023 the original timetable for updating the plan, was altered so that the public consultation on the draft (plan) preferred approach was anticipated to take place in 2024 rather than in spring 2023. The Council states that this was because of the large number of comments and site nominations that had been received.
21. The appellant asserts that this amounted to a decision to suspend the process and asserts that the decision was taken because the West Deeping community had raised concerns with the Council and had submitted a 'draft injunction document' to the Council on 10 March 2023, which would be served if the Council did not revert the location of the plant and bagging site to the north of the A1175.

### **Requests and response**

22. This appeal concerns the following request for information made to the Council by Mr. Mooney on 7 April 2023:

“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.”

23. The Council replied on 11 May 2023. The Council refused to provide the information requested in parts 1 and 2 under regulation 12(4)(d) EIR on the basis that it was information in the course of completion. The Council stated that it did not hold any information requested in part 3 and relied on regulation 12(4)(a).

24. Mr. Mooney applied for an internal review on 11 May 2023. In that application he stated:

“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.”

25. On 11 July 2023 the Council upheld its decision.

26. Mr. Mooney complained to the Commissioner. On 22 August 2023 the Commissioner confirmed that the scope of his investigation was to consider the request as set out in the letter of 7 April 2023. The appellant replied confirming that he was happy with the scope of the investigation. That also defines the scope of this appeal.

### **Decision Notice**

27. In a decision notice dated 14 November 2023 the Commissioner decided that the Council had correctly applied regulation 12(4)(a) and (e) EIR.

28. The Commissioner was satisfied that the request related 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 and thus that the EIR was the applicable legislation.

29. The Commissioner accepted on the balance of probabilities that the Council did not hold any updates of the Lincolnshire Minerals and Waste Local Plan (‘the Local Plan’) that had been issued.

30. The Commissioner accepted that the Local Plan was an unfinished document and in draft form and that therefore regulation 12(4)(d) was engaged. The Commissioner recognised the public interest in transparency but concluded that disclosure would not satisfy this public interest because the information would not represent the final analysis or concluded position. The Commissioner recognised

that authorities need a safe space to develop ideas, debate issues and reach decisions away from external interference and distraction.

31. The Commissioner concluded that the public interest favoured maintaining the exception.

### **The grounds of appeal**

32. Mr. Mooney appealed the decision in essence on the following grounds:

#### *Ground 1 – the exception was not engaged*

33. Mr Mooney argues that:

- 33.1. The Council had provided factually inaccurate information to the Commissioner.
- 33.2. The request did not relate to environmental matters but public safety.
- 33.3. The requested information was in its final and complete form.

#### *Ground 2 – the public interest favours disclosure*

- 33.4. The Council's duties of care and statutory duties under health and safety legislation override the obligations and exceptions under FOIA and EIR. The Council is refusing to comply with those duties.
- 33.5. The Council deliberately suspended the updating of the Local Plan rather than acknowledge the concerns and address the risks to the West Deeping Community and to stop the West Deeping Community from pursuing injunction proceedings.
- 33.6. The quality of life of the West Deeping Community is being put at risk and the Council should have addressed that risk before putting the Local Plan out to consultation. Public Safety issues should have formed the primary consideration when undertaking the public interest test.

### **The Commissioner's response**

#### *Ground 1 – engagement of the exception*

##### *Environmental information*

34. The Commissioner submits that whilst the appellant's motivation for the request relates primarily to matters of public safety the information requested nonetheless relates to the updating of the Plan which is clearly a measure which will affect environmental elements and factors.

##### *Material in the course of completion*



35. The Commissioner submits that the Council has explicitly stated in its timetable for updating the Plan that the initial consultation in Spring 2022 included a call for sites exercise, and that the next stage is for the Council to prepare a draft updated Plan, on which a consultation will then follow. Given the Council's submissions, and the nature of the relevant statutory process and the need for further consultation and discussion before matters are finalised, the Commissioner remained satisfied that the updated Plan was not a finished document as it remained subject to discussion and consultation processes.

*Ground 2 - public interest test*

36. It was submitted that the Commissioner properly considered the public interest, and the presumption in favour of the disclosure of environmental information, but was correct to conclude that due to the timing of the request the Council was entitled to a safe space to consider the responses to the consultation and finalise its position. The Commissioner stated that it was unclear to the Commissioner why the Council could not at this juncture still amend any of its proposed plans in light of the consultation responses received, even if there would be a cost in doing so.

37. The Commissioner acknowledged the appellant's concerns with regards to public safety and the impact on the local community, and the Commissioner recorded in the decision notice the significant public interest in understanding the impact which any plans would have on the local community.

38. The Commissioner remained satisfied that the public interest favoured withholding the requested information to enable the Council to have sufficient time and a safe space to fully consider all of its options and the responses to the consultation before finalising its proposals.

39. The Commissioner noted that should the Tribunal disagree with the Commissioner's findings in respect of regulation 12(4)(d) EIR, the Council had also, during the course of handling this request, referred to reliance on regulations 12(4)(b) (manifestly unreasonable), 12(4)(e) (internal communications), 12(5)(b) (course of justice - legal privilege) and 12(5)(f) (the interests of the person who provided information) EIR. Whilst it was not necessary for the Commissioner to consider these exceptions given his findings, the Tribunal will need to do so if it concludes that regulation 12(4)(d) EIR is not engaged.

**Mr. Mooney's reply**

40. The tribunal has considered Mr. Mooney's reply in full. His main arguments are as follows.

40.1. The request was not 'on environmental issues' but on 'the application of health and safety legislation and the legal obligation of public funded bodies and their employees to protect the life and

quality of life of UK citizens and to establish if the requirements of such legislation extend to a Local Authority or can a Local Authority place the life and quality of life of UK citizens at risk with impunity’.

- 40.2. The Commissioner was wrong to conclude that the consultation had been suspended to allow Council officers to consider other options. The suspension was to stop the submission of an injunction and to allow the Council to avoid responding to an allegation that the Council were working with the gravel developer to ignore legal obligations.
  - 40.3. In undertaking the public interest test the Commissioner did not consider the primary obligation of public bodies to protect the life and quality of life of UK citizens. The Commissioner failed to address ‘in hierarchy terms’ whether a request for information relating to decision by public bodies that places the health, safety and wellbeing and quality of life of UK citizens at risk must be declared supreme and overrides exemptions in FOIA or EIR.
41. Mr. Mooney argues, in essence, that human rights instruments have the effect that the UK Government is responsible for ensuring that individuals or groups of individuals do not have their right to life or quality of life violated. He argues that it is necessary for the tribunal to address the hierarchy between the Human Rights Act 1998 (HRA), the Health and Safety (Enforcing Authority) Regulations 1998 and the FOIA.
  42. He submits that FOIA is the relevant legislation because the information has been requested to determine if the Council has complied with its legal duties under Health and Safety legislation and the HRA. The information requested is specific to the legal obligations of the Council to protect the health, safety, wellbeing and quality of life of UK Citizens. The Council refuses to accept that it has such obligations.
  43. Mr. Mooney submits the information relates to a decision by the Council to disregard a proposal for gravel extraction (MS290 approved by the Secretary of State in 2017 which had a plant an bagging site north of the A1175 road and replaced it within the 2022 ‘Updating of the Lincolnshire Minerals and Waste Local Plan’ with a site south of the A1175 road (SG17) in closed proximity to the village of West Deeping which the residents consider will have a major impact on their quality if life. Mr. Mooney submits that the decision violates health and safety legislation because it placed the quality of life of the residents at risk.
  44. Mr. Mooney submits that the actions of the Council suggest that they have entered into an agreement with the developer to place the plant on the south side of the A1175 adjacent to West Deeping despite the risk to the quality of life of the West Deeping community in violation of its legal duties and that this is either illegal or will result in major contractual difficulties or financial liabilities to LCC. It is this

information that the request relates to which must be provided in order that the West Deeping community can protect their quality of life through the legal system.

45. Mr. Mooney sets out what he submits are the legal obligations of a local authority to protect the life and quality of life of UK citizens.
46. Mr. Mooney submits that the correspondence demonstrates that the processes was suspended to stop the submission of an injunction and to avoid the Council having to concede the decisions they had made were illegal which could have resulted in the agreement with the Developer becoming public knowledge and highlighted major contractual difficulties or financial liabilities to the Council.
47. Mr. Mooney submits that the 'Updating of the Lincolnshire Minerals and Waste Local Plan' was complete and issued for consultation in November 2022. It is submitted that the publication presents a definitive decision by the Council. The Commissioner was wrong to conclude that the process was ongoing.
48. It is submitted that the information requested must be provided in order that the West Deeping community can determine why the Council has made the decisions they have which if the logical conclusions are correct enables the West Deeping community to seek redress to have the decisions revoked.
49. It is submitted that the safe space the Council needed was during the early stages of the process to consider the impact of their decision in terms of safety legislation and the Health and Safety (Enforcing Authority) Regulations and had they fulfilled that legal obligation before publishing the "Updating of the Lincolnshire Minerals and Waste Local Plan" then the request for the information would not have been necessary.
50. Mr. Mooney submits that the Council cannot amend its decision to replace MS29 with SG17 because to do so it would have to admit that its decision was a criminal act in breach of safety legislation and this would leave the Council open to legal challenge to legal challenge due to a breach of contract relating to the land agreement the Council entered into with the developer that has the potential to be either illegal or will result in major contractual difficulties or financial liabilities to the Council.

### **Legal framework**

51. Regulation 2(1) of the EIR defines environmental information as information on:

“(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)... as well as measures or activities designed to protect those elements"

52. In **BEIS v IC and Henney** [2017] EWCA Civ 844 (**'Henney'**) the Court of Appeal held that:

"35. ...an approach that assesses whether information is "on" a measure by reference to whether it "relates to" or has a "connection to" one of the environmental factors mentioned, however minimal...is not permissible because, contrary to the intention of the Directive, it would lead to a general and unlimited right of access to all such information.

...

37. ...It is therefore first necessary to identify the relevant measure. Information is "on" a measure if it is about, relates to or concerns the measure in question. Accordingly, the Upper Tribunal was correct first to identify the measure that the disputed information is "on".

...

42. Furthermore, Mr Choudhury accepted that it is possible for information to be "on" more than one measure. He was right to do so. Nothing in the EIR suggests that an artificially restrictive approach should be taken to regulation 2(1) or that there is only a single answer to the question "what measure or activity is the requested information about?". Understood in its proper context, information may correctly be characterised as being about a specific measure, about more than one measure, or about both a measure which is a sub-component of a broader measure and the broader measure as a whole. In my view, it therefore cannot be said that it was impermissible for the Judge to conclude that the Smart Meter Programme was "a" or "the" relevant measure.

43. It follows that identifying the measure that the disputed information is "on" may require consideration of the wider context and is not strictly limited to the precise issue with which the information is concerned, here the communications and data component, or the document containing the information, here the Project Assessment Review. It may be relevant to consider the purpose for which the information was produced, how

important the information is to that purpose, how it is to be used, and whether access to it would enable the public to be informed about, or to participate in, decision-making in a better way. None of these matters may be apparent on the face of the information itself. It was not in dispute that, when identifying the measure, a tribunal should apply the definition in the EIR purposively, bearing in mind the modern approach to the interpretation of legislation, and particularly to international and European measures such as the Aarhus Convention and the Directive. It is then necessary to consider whether the measure so identified has the requisite environmental impact for the purposes of regulation 2(1). “

53. The relevant parts of regulation 12 of EIR are:

*Exceptions to the duty to disclose environmental information*

12. – (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.

(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that - [...]

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data [...]

54. Regulation 12(d) is engaged where the request relates to material which is still in the course of completion. The requested information itself does not have to be material in the course of completion.

55. ‘Material’ must have a physical existence. It cannot be something that does not physically exist, like a project, an exercise, or a process. (**Highways England v Information Commissioner and Manisty** [2018] UKUT 423 AAC)

56. ‘Relates to’ should be given its everyday meaning. The exception must be applied consistently with its context. The context is likely to include the following (**Manisty**):

56.1. A decision that the exception is not engaged means that disclosure is appropriate regardless of where the balance of the public interests may lie.

56.2. The exception must not be engaged so widely as to be incompatible with the restrictive approach required by EU law. But it must not be engaged so narrowly that it defeats its purpose of allowing public authorities to think in private.

56.3. It is not engaged when a piece of work may fairly be said to be complete in itself

56.4. The way that the public authority has treated the material is relevant but not decisive.

56.5. The terms of the request are important

57. There is a presumption in favour of disclosure under the EIR under reg. 12(2). The result is that the threshold to justify non- disclosure is a high one.

## **Evidence**

58. We read an open bundle of documents.

## **Issues**

59. The tribunal has to determine the following issues:

59.1. Is the EIR the appropriate regime?

59.2. Is the request for information related to material in the course of completion?

59.3. Bearing in mind the presumption of disclosure , where does the public interest balance lie?

### *The role of the tribunal*

60. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

## **Discussion and conclusions**

### *The scope of the appeal*

61. The Commissioner's investigation and the decision notice considered the request as set out in three parts in the letter of 7 April 2023 and responded to on 11 May 2023. Mr. Mooney agreed with the Commissioner that this was the appropriate scope of the investigation. We are not considering the refined request that was set out in the request for an internal review.

62. Further, there is no challenge to the Commissioner's conclusions that the information requested in part 3 of the request was, on the balance of probabilities, not held by the Council. We do not need to determine this issue, although it is clear to us on the basis of the material before us that the Commissioner reached the right decision in relation to part 3 of the request.

### *The relevance of the Human Rights Act 1998*

63. The tribunal, the Commissioner and the Council, as a public authority, have a duty, pursuant to section 3 of the HRA to interpret EIR or FOIA so far as is possible in a way that is compatible with the ECHR incorporated into domestic law by the HRA.
64. If a right under the ECHR is engaged, it is likely to be relevant to the question of whether or not an exception is engaged and to the public interest balance.
65. Mr. Mooney relies on the 'right to life' under Article 2 HRA. We do not accept that article 2 is engaged in a case where the potential impact on an individual's life consists of asserted loss in value of properties, anxiety resulting in stress and mental health issues, a potential increase in road incidents on the A1175 and environmental safety risks resulting from mud being deposited on the A1175, noise pollution and light pollution.
66. Mr. Mooney has not raised Article 8 before this tribunal, although it is referred to in the bundle. We accept that Article 8 might be relevant in a case where there is reasonable and convincing evidence of a substantial threat to health and property or severe environmental pollution such as there was in Geurra v Italy 26 EHRR 357 to residents from a factory producing polyamide which was classified as high risk according to 82/501/EEC which governs the major accident hazards of certain industrial activities dangerous to the environment and the well-being of the local population (see R (Furness) v Environment Agency [2001] EWHC Admin 1058 [26] and R (Vetterlein) v Hampshire County Council and Hampshire Waste Ltd [2001] EWHC Admin 560 (
67. We do not accept that Article 8 is engaged in a case where the potential impact on an individual's life consists of asserted, rather than evidenced, future loss in value of properties, anxiety resulting in stress and mental health issues, a potential increase in road incidents on the A1175 and environmental safety risks resulting from mud being deposited on the A1175, noise pollution and light pollution.
68. In conclusion we do not accept that there is before us reasonable and convincing evidence that the residents' quality of life would be so directly affected by the proposal as to engage Article 8.
69. In any event, in our view, even if Article 8 were engaged it would not materially have affected our conclusions because the public interest balance already allows for appropriate weight to be given to the potential impact on the residents' enjoyment of their homes.

*The relevance of health and safety legislation*

70. Unlike human rights legislation there is no obligation on the tribunal to interpret the EIR or FOIA in a way which is compatible with health and safety legislation. However, the public interest balance allows us to take account of health and safety concerns and to give appropriate weight to any potential risks to the health and safety of residents.

*Is EIR or FOIA the appropriate regime*

71. First it is important to make clear that there would be no benefit to Mr. Mooney in having his case considered under FOIA. There is an equivalent exemption under FOIA and requestors do not have the benefit of the presumption of disclosure under FOI. However we have in any event considered whether EIR applies.
72. The purpose of the request is not relevant to the question of whether the request is for environmental information.
73. Taking into account the guidance in Henney as applied in DfT and Porsche Cars GB v Information Commissioner and John Cieslik [2018] UKUT 127 (AAC) ("Cieslik"), we take the following approach. First, we need to identify the 'measure' or 'activity' that the information is 'on' or about. Then we must ask if that measure or activity has the requisite environmental impact for the purposes of regulation 2(1).

*What measure or activity is the information 'on' or about?*

74. This is not restricted to the measure or activity the information is specifically, directly or immediately about. The information can be about more than one measure or activity. The relevant measure or activity is not required to be that which the information is "primarily" on. A mere connection, however minimal, is not sufficient.
75. Identifying the measure or activity that the disputed information is "on" may require consideration of the wider context and is not strictly limited to the precise issue with which the information is concerned, or the document containing the information.
76. It may be relevant to consider:
- 76.1. the purpose for which the information was produced,
  - 76.2. how important the information is to that purpose,
  - 76.3. how it is to be used, and
  - 76.4. whether access to it would enable the public to be informed about, or to participate in, decision-making in a better way.



77. The statutory definition in regulation 2(1)(c) does not mean that the information itself must be intrinsically environmental.
78. The requested information in this case is a long list of documents 'in respect of the Updating of the Lincolnshire Minerals and Waste Local Plan'. It is clear from the documents in the bundle that by the 'Updating of the Lincolnshire Minerals and Waste Local Plan', Mr. Mooney is referring to the document that was sent to, amongst others, the Parish Council in November 2022 as part of the Council's 'targeted consultation' or an information gathering process of bodies or organisations (including parish councils) that might hold important information relevant to the sites.
79. That document identified potential mineral sites for the winning and working of aggregate that had been submitted in the call for sites for consideration in the updating of the LMWLP.
80. By dint of the terms of the request, all information in scope of part 1 and part 2 of the request is 'in respect' of that document.
81. In our view any correspondence etc. that is in respect of a document prepared for consultation/information gathering in relation to proposed sites for the winning and working of aggregate is information that is 'on' or 'about' the activity of winning or working aggregate. The identification of sites is an integral part of the proposed activity: it is the subject matter of that activity. Information about the sites which are being considered for that activity would enable the public to be informed about and to participate in decision-making relating to that redevelopment.

*Does that measure or activity have the requisite environmental impact for the purposes of regulation 2(1)?*

82. We find that a winning and working aggregate is an activity which is likely to affect the state of the elements of the environment such as air, land and landscape. We therefore find that requested information is environmental information and the EIR is the appropriate regime.

*What is the relevant 'material'?*

83. In our view there are two documents to which the request might relate. The first is the Preferred Approach (Draft) of the new LMWLP which was intended to be published in Spring 2023 and was delayed until 2024. The second is the document shared with, inter alia, the Parish Council in November 2022.

*Does the request relate to the material?*

84. It is clear that the request relates to the document shared in November 2022. In our view the request also relates to the Preferred Approach (Draft) of the new LMWLP. We do not accept that the document shared in November 2022 can fairly be seen as a complete piece of work in itself. It is a document intended to facilitate information gathering for the purposes of drafting the preferred approach document.
85. The public authority in sending out that document was not moving from one stage of the project to another. There is no natural break in the private thinking. The authority did not intend to 'go public' about progress so far at that stage. It was not ready to do so. This document was near the start of the site assessment process which would culminate only in provisional proposals for allocation and proposals for sites to be discounted in the preferred approach document. In our view it cannot properly be considered as independent from the continuing work on the preferred approach draft.
86. We have taken account of the report of the Monitoring Officer dated 30 June 2023. We do not accept Mr. Mooney's criticisms of that report. That report makes clear that the Council had, in June 2023, not yet made any decision relating to the removal of MS29-SL or to the inclusion of SG17. The preferred approach document to be published in 2024 will be supported by a detailed site report setting out the results of the site assessment process and the reasons behind which sites are provisionally proposed for allocation and those proposed to be discounted.
87. We do not accept Mr. Mooney's submission that the evidence in the bundle shows that a final decision had already been made.
88. We do not accept that it can be implied from the evidence that the Council had made a final decision because it would be open to 'a legal challenge in respect to its position of a landowner' taking into account 'the Council's contractual arrangements with Breedon'. We do not accept that this can be implied from, for example, the statement by Cllr Dyer at p A55. Further we do not accept that the other evidence supports Mr. Mooney's submission that a final decision had been taken by the Council in relation to SG17 in November 2022.
89. For all those reasons, in our view the request also relates to the Preferred Approach (Draft) of the new LMWLP which was intended to be published in Spring 2023 and was delayed until 2024.

*Was the material in the course of completion*

90. At the date of the response to the request in May 2023 work had commenced on the Preferred Approach (Draft) of the new LMWLP but had not been completed ('Although the county council has commenced work on the updating of the plan, this is at a very early stage... Head of Planning, 4 January 2023 page E300). The

intention was originally to publish that document for consultation in spring 2023 but in March 2023 that was delayed until 2024.

91. We agree with the Commissioner's guidance on regulation 12(4)(d) that for material to be 'in the course of completion', the draft document must still be actively being worked on, or will continue to be worked upon within a reasonable period of time
92. Mr. Mooney submits that the process had been suspended in March 2023 as a result of the Council receiving the injunction document. We do not accept that the evidence supports a conclusion that the process of developing the preferred approach draft had been suspended. That is Mr. Mooney's inference. We accept the Council's position that the date at which the draft would be published had been delayed, because of the large number of comments and site nominations that had been received. An extension to a deadline does not suggest that active work on the document has stopped.
93. For all those reasons we conclude that the request relates to material that was still in the course of completion in May 2023 and the exception is engaged.

*Public interest in disclosure*

94. We accept that there is a strong public interest in transparency in relation the Council's decision making processes, where the ultimate outcome of that process will be the placing of sites for working and extracting minerals. Given the potential impact on residents of a plant and bagging site near their homes, there is a clear public interest in transparency and in ensuring accountability for decisions taken by the Council. The wider environmental impact of the placing of a site also adds significantly to the public interest.
95. The extent to which this public interest is served by disclosure of this particular information at this particular time is limited. No final decision had been made. The time for public consultation on the proposed sites had not yet arrived. Information has been and will be placed in the public domain. The process has a built in opportunity for informed scrutiny and challenge by the public at a later date before any final decisions are taken in relation to sites.
96. We do not accept that the existence of health and safety legislation is material to the consideration of the public interest balance in the way argued by Mr. Mooney. The potential impact on the residents and others has already been factored into our consideration of the public interest balance set out above.
97. Mr. Mooney makes a number of allegations that, in effect, amount to a submission that there is a plausible suspicion of wrongdoing. We do not accept that there is a plausible suspicion of wrongdoing by the Council. Many of Mr. Mooney's allegations are suppositions based on his interpretation of the

evidence and others are based on the fact that a final decision had been made, which we do not accept.

*Public interest in maintaining the exception*

98. We accept that there is a need for a safe space for the Council to develop ideas, debate issues and reach decisions away from external interference and distraction. We accept that good governance is served by officers being able to fully engage with each other and third parties away from public scrutiny while a process is ongoing. This carries significant weight where the process is at an early stage, as it was in this case. In our view there is an increased risk of external interference and distraction because of the heightened local interest and level of challenge and communications relating to the potential site at SG17.
99. For those reasons we find that there is a strong public interest in maintaining the exception.

*Conclusions on the public interest balance*

100. In our view, taking all the above into account, at the date of the response to the request, even taking full account the presumption of disclosure, the public interest clearly favoured maintaining the exception.
101. We agree with the Commissioner's conclusions and the appeal is dismissed.

Signed Sophie Buckley

Date: 15 July 2024

Judge of the First-tier Tribunal