

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 15 March 2019

Public Authority: Cumbria County Council
Address: Cumbria House
117 Botchergate
Carlisle
CA1 1RD

Decision (including any steps ordered)

1. The complainant has requested a copy of a draft report on a decision for the county council not to take further steps in respect of the creation of a footpath. The council refused the request on the grounds that Regulation 12(4)(d) applied (material in the course of completion).
2. The Commissioner's decision is that the council was correct to apply Regulation 12(4)(d) to the information, however the public interest rests in the information being disclosed.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the withheld information to the complainant.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 2 April 2018 the complainant wrote to council and requested information in the following terms:

"We have asked for a copy of [name of individual redacted]'s report and the County Council's conclusions in response but have received nothing, despite numerous reminders.

Given the criticisms made of the County Council's handling of the entire footpath issue, the Parish Council is somewhat surprised that there seems to be such a lack of urgency to resolve matters where we simply have no idea of timescales and intentions. Your complaints procedure states that a written response is expected within 15 working days of triggering the review stage. It is now 9 weeks since we met [name of individual redacted] and 12 weeks since the original date for a reply set by the County Council under your procedures.

The Parish Council therefore asks you directly for a copy of [name of individual redacted]'s report and for the County Council's conclusions in response to the report. Please take this request as being under the Freedom of Information Act."

6. The council responded on 14 May 2018. It provided a copy of the final report, dated 26 April 2018.
7. On 29 May 2018 the complainant wrote back to the council. Amongst other things he requested a copy of the draft report dated 21 February 2018. On 30 May 2018 the complainant made a further request for information.
8. The council responded on 10 July 2018. It provided the majority of information and this was not been questioned further by the complainant. However the council said that the report on 21 February 2018 was a draft report and withheld the information under Regulation 12(4)(d). It also set out its reasons as to why it considered that the public interest rests in the draft report being withheld. The complainant argues that a copy of the draft report should have been disclosed to him.
9. Following an internal review the council wrote to the complainant on 16 August 2018. It upheld its initial decision.

Scope of the case

10. The complainant contacted the Commissioner 21 August 2018 to complain about the way his request for information had been handled. He complained that information should have been disclosed, but also questioned whether the information should have been considered under the FOI Act rather than under the EIR.
11. The Commissioner considers the complaint to be that a copy of the report dated 21 February 2018 should have been disclosed in response to his request for information. As part of her consideration the Commissioner will also consider whether the council was correct to consider the information under the EIR rather than under the FOI Act.

Reasons for decision

Is the information environmental information

12. Regulation 2 of the EIR provides a definition of 'environmental information' for the purposes of the EIR¹.
13. The draft report relates to an earlier decision that the county council would not support a proposal from a Parish Council that a new public footpath be designated. The new footpath would have involved work in establishing the footpath, making it suitable for pushchairs etc., and would therefore have involved activities which would have changed the elements of the landscape of the surrounding area.
14. Having considered the definition provided in Regulation 2, the Commissioner is satisfied that the information falls within the definition provided in Regulation 2(c). It is information on a measure or an activity likely to affect the elements of the environment, and, in particular, the landscape, as outlined in Regulation 2(a)
15. The Commissioner is therefore satisfied that the information is environmental information for the purposes of the EIR.

¹ <http://www.legislation.gov.uk/uksi/2004/3391/contents/made>

Regulation 12(4)(d)

16. Regulation 12(4)(d) provides that 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;"*
17. The council argues that the requested report dated, 21 February 2018, is only a draft report. It points to the fact that the final report was issued on 26 April 2018. A copy of the final report was provided to the complainant in response to his request for information of 2 April 2018.
18. In support of its arguments, the council provided the Commissioner with a copy of an email between the writer of the report, an assistant director at the council, and others. This email clearly states that the report is a draft report, and the wording used within that email clearly establishes the writer's acceptance that further amendments may be necessary before the review is completed.
19. The Commissioner's guidance on the application of Regulation 12(4)(d) refers to the Information Tribunal case of *Secretary of State for Transport v the Information Commissioner (EA/2008/0052, 5 May 2009)*. That case *"concerned a request for the first draft of a study prepared by Sir Rod Eddington on the links between transport and the UK's productivity, growth and stability in the context of sustainable development"*. *The Department of Transport had published the final version of the study, but the request was for the draft version. The Tribunal found at paragraph 81 that the status of the draft "does not change simply because a final version exists" and at paragraph 82 that "the Draft Report is, by its very name and giving the words their logical meaning, an unfinished document."*
20. However, in the Upper Tribunal case of *Highways England Company Ltd v Information Commissioner & Manisty [GIA/1589/2018]*², Judge Jacobs found that:

"Similarly, the mere status of something as a draft alone does not automatically bring it under the exception. The words 'in the course of completion' suggest that the term refers to individual documents that are actively being worked on by the public authority. Once these documents are no longer in the 'course of completion' they may be

² <https://www.gov.uk/administrative-appeals-tribunal-decisions/highways-england-company-ltd-v-information-commissioner-and-henry-manisty-2018-ukut-423-aac>

released, even if they are still unfinished and even if the decision to which they pertain has not been resolved. 'In the course of completion' suggests that the document will have more work done on it within some reasonable time frame"

21. In essence therefore, if the document is a draft report this strongly suggests that it is material in the course of completion. However, the Upper Tribunal's decision in the *Highways England* case considers that, further to this, there must also be evidence that the material was still actively being worked on by the public authority before the exception is engaged.
22. Having considered the above, the Commissioner is satisfied that the report of 21 February 2018 was a draft report for the purposes of the Regulations. Further to this, whilst the draft of 21 February 2018 had been completed, it was clear from the email communicating the report that, at that time, the material was still in the course of completion and that further changes to that document would potentially be made following a review by the recipients of that document. The fact that the report was being sent for review is, in itself, conclusive evidence that it was still in the process of being worked on by the council. A final view had not been reached and the document was intended as a foundation for further discussion. It is therefore clear that the draft version of the report dated 21 February 2018 was material in the course of completion.
23. The Commissioner has therefore decided that the exception in Regulation 12(4)(d) was therefore correctly engaged by the council as regards this information.

The public interest

24. Regulation 12(4)(d) is subject to a public interest test. The test is set out in Regulation 12(1)(b). The test is whether "*in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information*".
25. When carrying out the test, Regulation 12(2) provides a presumption towards the disclosure of the information.

The public interest in the information being disclosed

26. The complainant argues that he understood from the council that its review of its decision would encompass the actual grounds and the final decision taken by it not to take forward the footpath proposal. The final report which was issued in April however is actually a review of the processes which the council undertook in reaching that decision. It did not review the merits of the decision which was taken. In his letter of complaint to the Commissioner he stated:

"[Name of council officer redacted] assured us on 5 February 2018 he was dealing with the merits of the decision, he completed the review just over 2 weeks later, then nearly 12 weeks later we were sent his review which states categorically that he had only been instructed to review the process of the officer decision and not the merits, but that instruction cannot be produced."

27. The complainant argues that the final review states that the Chief Executive commissioned a review tasked with finding out whether the decision-making process was appropriately followed. However, when a request was made by the complainant asking for this document he was told that the no written instruction had been made – the instruction had only been made verbally. He argues that the limitation of the review in the final report contradicts assurances he had been provided with previously by the reviewer, an Assistant Director at the council, that the entire decision could be reviewed and reconsidered.
28. He therefore argues that *"It therefore behoves the County Council to produce the 21 February 2018 report to show whether his completed review at that point included the merits of the County Council's officer decision which we sought to review, as he had assured us he would, and whether he was subsequently instructed to confine his report to reviewing processes after his report dated 21 February 2018 was seen by the Chief Executive."*
29. The complainant argues that the majority of the community are strongly in favour of the creation of the footpath. It argues that members of the public walking between the village of Caldbeck and a neighbouring village are forced, in parts of the journey, to walk along the road where there are no grass verges, creating a danger to both pedestrians and other road users.
30. The complainant highlights that the parish council was to pay for the majority of the work required to create the footpath through a £100,000 gift for that purpose, but that this will be withdrawn if the footpath is not forthcoming. It argues that local Members of Parliament and the Lake District National Park are broadly supportive of the need for the footpath.
31. He argues therefore that the grounds for the creation of the footpath are very strong, and that there is an associated public interest in the council being as transparent as possible about what has occurred and why the review report does not include the grounds which the decision was based upon, as well as reviewing the actual decision itself.

The public interest in the exception being maintained.

32. The council argues that the central public interest in the exception being maintained relates to the chilling affect which would occur if the draft report is disclosed. It further argues that the council require a safe space in which to fully and frankly discuss the information which it needs to consider in order to reach, or review a decision, and the disclosure of a draft document such as this would intrude upon its ability to do so.
33. It argues that:
- There is a strong public interest in ensuring that Council officials have a 'safe space' to work candidly and freely without being concerned that information could be released in a form where it is potentially misleading.
 - Releasing incomplete information runs the risk of misleading public debate.
 - The public interest has already been met with the disclosure of the completed report.
34. It further argues that *"The Council considers that effective decision making depends on sound evidence and candid communications that allow a full consideration of all the options without any concern over premature disclosure. Decisions need to be thoroughly evaluated and this can only happen when all parties have the confidence that there is no risk of those exchanges being prematurely disclosed. There is a strong public interest in maintaining the safe space for Council officers to debate live issues and reach decisions away from external interference. The Council also highlights that the report has now been completed and has already been disclosed."*

The Commissioner's conclusions

35. The Commissioner must firstly point out that her decision cannot take into account the public interest in the creation of the footpath. That is not a decision which she is able to consider. The Commissioner must therefore disregard the substance of that decision insofar as her decision on this case is concerned as she has no remit to comment or have an opinion on this.
36. The Commissioner understands the complainant's concern that the final review only considered the procedures leading to the decision, rather than reviewing the actual decision itself. He argues that the council had led him to believe that the review would specifically address the merits of the decision which was reached rather than simply the process with which the decision was reached.

37. The Commissioner accepts the council's argument that a disclosure of a draft review during the period where this was still under consideration risks impinging upon the safe space which the council required when reaching its decision on the review. The intention behind the exception is to protect this 'safe space' particularly in relation to the development of policy. The same principles apply in this case. She notes however that the final report had been issued by the point of the complainant's request of 29 May 2018. At that point, the review had been completed and the council's decision not to support the footpath remained in place. At the point of receiving the request therefore the council did not require a safe space in which to discuss and determine the way forward. That had already occurred.
38. The council argues that where the issue is of public concern, a disclosure of the information risks misleading the public. The Commissioner considers that this would easily have been resolved by the council by providing an explanatory note with the disclosure of the draft report. Additionally, as the final version of the report had already been disclosed it was open to the council to explain any differences between the draft and the final version if it believes that the disclosure of the draft copy would mislead in some way. The Commissioner does not therefore consider that this is a strong public interest argument for the exception being maintained in this case
39. The Commissioner understands the council's view that a disclosure could have a chilling effect. If information on the 'current thinking' in a position were to be disclosed prior to the final decision being reached the risk is that reviewers would fail to be candid within such documents in case a request was received prior to the final decision being issued and this caused further questioning of the councils final decision. In effect, disclosing 'current thinking' prior to the final decision being made may ultimately result in further correspondence and arguments being received from the public and interested parties. This could make the final decision harder to make, and could ultimately delay its final decision.
40. Whilst the Commissioner recognises that this argument has some weight, in this case the decision had already been taken not to support the footpath, and the final review of that decision had already been made and disclosed in response to the complainant's earlier request for information.

41. In her guidance on the application of Regulation 12(4)(d)³ the Commissioner notes, at paragraph 18, the Tribunals decision in the case of *The Department for Education and Skills v the Information Commissioner and the Evening Standard (EA/2006/0006)*. At paragraph 75 of that decision the Tribunal referred to civil servants having "*the courage and independence that has been the hallmark of our civil servants since the Northcote - Trevelyan reforms*".
42. The Commissioner's guidance further states that "*Officials also have a responsibility to provide information and advice as part of their job, whether or not it may subsequently be disclosed under the EIR*".
43. The author of the review is an Assistant Director at the council. The Commissioner considers that senior officers should have the courage and independence not to be dissuaded from providing the information which is required in order for the review to reach a fully informed decision, and on this basis the disclosure of this information should not have the effect of creating a significant chilling effect for such reviews in the future. The Commissioner therefore considers that the chilling effect arguments do not hold a great deal of weight in this case.
44. The issue of the footpath has important health and safety implications for people using the proposed pathway. The complainant argues that the majority of the community want the footpath created, and that the parish council and other organisations are supportive of its creation. The council's refusal of the request states that the central issue was the risk posed of judicial reviews being taken by objectors to the development of the footpath. It also considered that the Parish council's funding for the development would not cover any subsequent costs for any legal work involved. The decision was taken at officer level rather than by elected members, but the council clarified that the decision was reached following a meeting between the officer, elected members and portfolio holders.
45. The content of the draft review may be relatively immaterial to any future consideration or appeal of the council's decision. The council made its decision and its review found that the decision was taken appropriately. Supporters of the footpath therefore have the option to consider what avenues of appeal are open to challenge the decision of the council on this basis.

³ https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf

46. Nevertheless the Commissioner has taken into account that the complainant was effectively left confused as to the exact scope of the review following his initial discussions with the officer carrying out the review. She also notes that the relevant council leaflet which was provided to the complainant outlining the review procedure does not specify the scope such reviews will take with clarity.
47. A disclosure would create greater transparency on the councils review processes. There is a strong public interest in allowing members of the public to be able to obtain a better understanding the review process given that the complainant appears to have either misunderstood, or been misinformed, as to the scope of the review which would occur in his case.
48. The Commissioner therefore recognises a strong public interest in the disclosure of the information. Disclosure would create greater transparency on the process and form which the review took, and will allow the public and the council to consider whether there were any issues with that process which could have been made clearer for the purposes of future reviews of a similar nature.
49. Having considered the above the Commissioner's decision is that the public interest rests in the disclosure of the information.

Right of appeal

50. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

51. 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.
52. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF