

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 24 October 2019

Public Authority: Bristol City Council
Address: City Hall
College Green
Bristol
Avon
BS1 5TR

Decision (including any steps ordered)

1. The complainant has requested information from Bristol City Council ("the Council") regarding the Cumberland Basin Feasibility Report.
2. The Commissioner's decision is that the Council has correctly applied regulation 12(4)(d) of the EIR - Material in the course of completion, unfinished documents and incomplete data.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 6 May 2019, the complainant wrote to the Council and requested information in the following terms:

"On January 5, 2018, a Cumberland Basin Feasibility Report was commissioned for £50,000 (see: link provided) The project is no longer confidential as the brief was provided to the Growth and Regeneration Scrutiny Committee and is available publicly.

Please provide a full copy of the report."

5. The Council responded on 21 May 2019. It refused to provide the requested information, relying on section 22 of the FOIA - Information intended for future publication.
6. Following an internal review the Council wrote to the complainant on 6 June 2019. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 7 June 2019, to complain about the way her request for information had been handled.
8. During the Commissioner's investigation, the Council revised its position and considered the request under the EIR, since it considered that the information was environmental as it relates to works which would affect the local environment. It withheld the requested information under regulation 12(4)(d) of the EIR – material in the course of completion.
9. The Commissioner considers that the scope of the case is to consider if the Council correctly withheld the information under Regulation 12(4)(d).

Reasons for decision

Is the information environmental?

10. Regulation 2(1) of the EIR provides the following definition of environmental information:

"...any information in written, visual, aural, electronic or any other material form 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) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);”

11. It is important to ensure that requests for information are handled under the correct access regime, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.
12. The Commissioner has considered the withheld information in this case, which relates to proposed changes to the Cumberland Basin road network in Bristol’s Western Harbour.
13. The Commissioner is satisfied that the information is environmental within the definition at regulation 2(1)(c), since it is information on activities which would affect, or be likely to affect, the elements and factors referred to in regulation 2(1)(a) and/or 2(1)(b). Activities in this case are upgrading the road networks and the proposed options for the work involved. The Commissioner is, therefore, satisfied that the Council considered the request under the correct access regime, and the Commissioner has considered whether it applied the exception correctly.

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

14. Regulation 12(4)(d) of the EIR states that a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
15. The exception sets out three distinct categories and the information must fall within one of these for the exception to be engaged. The first category is that the request relates to material which is in the course of completion. The “material” in question may relate to a policy that is being developed; therefore, although the requested information may be contained in a document which is in itself complete, if that document is

intended to inform a policy process that is still ongoing, the information may engage the exception.

16. The Council explained to the Commissioner that the Cumberland Basin road network was constructed in the 1960s and requires significant investment if it is to remain in use. It advised that it is seeking to redesign the road network and provide additional benefits within the area.
17. The Council informed the Commissioner that Arup and Alec French Architects had examined opportunities within the area and presented them to the Council. From this, the Council requested a feasibility study to examine more extensive ideas.
18. The withheld information includes different ideas for the Cumberland Basin road network, provided by Arup and Alec French Architects. The Council has explained that only three of the ideas have subsequently been taken forward as viable.
19. The Council's position is that this request relates to material which is in the course of completion. It explained that it intended to ask for feedback from the public on the three initial ideas between 19 August 2019 and 15 September 2019. The Council advised the Commissioner that, once the process was completed, it would determine the next steps and if any of the approaches were approved, there would be a period of masterplanning, involving the local communities. In summary, the Council has argued that it was still in the process of developing its policy regarding the changes to the road network.
20. The Commissioner has considered whether (as argued by the Council) the feasibility report comprises material in the course of completion. The ICO's published guidance on this exception¹ provides the example of a public authority formulating and developing policy, which is relevant to the Council's position in this case.
21. In this case, it is evident that the contents of the feasibility study relate to matters which, at the time, had not been settled. They relate to the Council's consideration of options for the road networks within the Cumberland Basin, prior to a decision being made about which ideas to put forward to the public regarding the redevelopment.

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

22. The Commissioner accepts that the information is material in the course of completion and that the exception at regulation 12(4)(d) is engaged. She has therefore gone on to consider the public interest in the disclosure of the information.

The public interest test

23. As is stated in regulation 12(1) of the EIR, the exceptions at the subsections of regulation 12(4) are subject to the public interest test. That is, a public authority may only refuse to disclose information under a 12(4) exception if *"in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information"*.
24. Therefore the Commissioner has gone on to consider the public interest test for this case.

Public interest arguments in favour of disclosure

25. The Council is aware of the public interest in promoting accountability and transparency for decisions taken by public authorities. It has recognised that there is an obligation to be transparent to enable greater access to environmental information.
26. The Council understands that disclosure of the requested information would contribute to the development of public debate and facilitate the public's understanding of a project that will affect the local area.
27. It also acknowledges that disclosure of the requested information will ensure that the Council remains accountable to the public in respect of its operations and decision making, especially where it involves the use of public funds.
28. The complainant argued that the project was no longer confidential, as the project brief², developed by the Council, had been provided to the Growth and Regeneration Scrutiny Commission and is available publicly.
29. She has also advised that she believes it is in the public interest to release the feasibility report, so that the Bristol public can be informed

2

<https://democracy.bristol.gov.uk/documents/s30396/Cumberland%20Basin%20sch%201.pdf>

of the different options and potential plans, which may affect how they respond.

Public interest arguments in favour of maintaining the exception

30. The Council argued that to disclose this information at the date of the request now would inhibit the Council's safe space to consider the information, deliberate on issues and reach decisions.
31. The Council reported that the feasibility study included different approaches to the road network, some of which have not been taken forwards as they are not viable and which are not referred to in the project brief.
32. It explained that releasing information on approaches that did not become part of the early engagement process may have resulted in significant public confusion and concern. At the date of the request, the Council would not be in the position to provide reassurances, as the engagement process was on-going and a decision had not yet been made.
33. The Council stated that release of the information could also disrupt the process, as it could result in fruitless public debate and interrogation of officials for unadopted positions and abandoned arguments. This would be likely to make it more difficult to bring the decision process to a proper conclusion.
34. The Council argued that there is no public benefit in releasing this information before it is completed as it runs the risk of misleading public debate. It advised that while it can contextualise information on the approaches that are not currently under consideration, it is not confident that it would be sufficient to correct any misleading impressions or confusion that could be created within the local community, should the information be released.
35. It advised that due to the above factors, it considers that it is important for the public to know exactly what ideas are included in the current engagement process, rather than information about approaches which may not, in the end, be relevant.

Balance of the public interest arguments

36. The Commissioner accepts that there is always a general public interest in disclosing environmental information. She also considers there may be an argument for informing public debate on the particular environmental issue that the requested information relates to, as she

understands the importance of environmental improvements to the public.

37. The Commissioner understands that, given the impact that the road development may have on the local community, the strength of the public interest in transparency and accountability in this case must be acknowledged. She understands that there is a high level of local interest. However, the Commissioner is of the view that there are also strong public interest arguments in favour of the nondisclosure of the relevant information in this instance.
38. The Commissioner has given some weight to the general principles of achieving accountability and transparency through disclosure of information held by public authorities. In finding that regulation 12(4)(d) is engaged, the Commissioner accepted that the information requested is material which is still in the course of completion. She considers that this is relevant when considering the public interest.
39. The Commissioner has considered whether there is a public interest, in this case, in releasing information which the Council considers to be an incomplete part of its overall policy development, and which she understands may have caused diversion of resources away from priority matters. She understands that the Council wished to consider a variety of options and move further towards settled alternatives to be presented to the public, away from public scrutiny, before disclosure.
40. The Commissioner acknowledges the Council's aim to publish the feasibility study, along with the results, once the consultation process has been completed and the results analysed.
41. The Commissioner accepts that there is a public interest in the redevelopment of the Cumberland Basin area. She is persuaded that, in this case, disclosure of the information at the date of the request may have disrupted the Council's processes and procedures in bringing its plans for this redevelopment to fruition.
42. The Commissioner considers that the Council should have the necessary space to think in private. She acknowledges that the process is ongoing and that disclosure of the information would provide a distraction which would invade this space and inhibit the Council's ability to carry out this work. She considers that release of the requested information would inhibit the safe space to consider the information, deliberate on issues and reach decisions. She is satisfied that there is a strong public interest in ensuring that public 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 and that this outweighs the public interest in disclosure in this case.

43. She therefore considers that the balance of the public interest, albeit by a fairly narrow margin, lies in withholding the information.

The Commissioner's conclusion

44. The Commissioner has considered the request and the explanations supplied by the Council and she is satisfied that the public interest in maintaining the exception outweighs the public interest in disclosure. She has therefore determined that regulation 12(4)(d) of the EIR has been correctly applied in this case.

Right of appeal

45. 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@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

46. 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.
47. 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