

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 28 June 2021

Public Authority: Breckland District Council
Address: Elizabeth House
Walpole Loke
Dereham
Norfolk
NR19 1EE

Decision (including any steps ordered)

1. The complainant has requested minutes of Local Plan Working Group minutes. Breckland District Council withheld the requested information under the exception for material in the course of completion – regulation 12(4)(d) of the EIR.
2. The Commissioner's decision is that Breckland District Council has correctly applied regulation 12(4)(d) and that the public interest favours maintaining the exception.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 6 August 2020, the complainant wrote to Breckland District Council (the "council") and requested information in the following terms:

"May I please have a copy of the minutes of all Local Plan Working Group meetings held between 1st January 2020 and 31st July 2020."

5. The council responded on 2 September 2020. It stated that it was withholding the information under regulation 12(4)(d) – the exception for material in the course of completion
6. Following an internal review the council wrote to the complainant on 12 November 2020. It stated that it was maintaining its position.

Scope of the case

7. On 15 December 2020 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the requested information under regulation 12(4)(d).

Reasons for decision

Regulation 12(4)(d) – material in the course of completion

9. Regulation 12(4)(d) of EIR provides that a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents, or to incomplete data.
10. The aims of the exception are:
 - to protect work a public authority may have in progress by delaying disclosure until a final or completed version can be made available. This allows it to finish ongoing work without interruption and interference from outside; and
 - to provide some protection from having to spend time and resources explaining or justifying ideas that are not and may never be, final.

11. For regulation 12(4)(d) to be engaged, the requested information must fall within one of the categories specified in the exception. It is not necessary to show that disclosure would have a particular adverse effect but any adverse effects of disclosure may be relevant to the public interest test.
12. The Commissioner considers that the fact that the exception refers to both material in the course of completion and unfinished documents confirms that these terms are not necessarily synonymous. Material which is still in the course of completion can include information created as part of the process of formulating and developing policy, where the process is not complete.
13. The council has explained that it is a Local Planning Authority (LPA) that is responsible for the preparation of a new Local Plan for the Breckland area and any review of that plan. It confirmed that the Local Plan and its review sets out the plan for the future development of the Breckland area and will guide the council's decisions on whether to approve planning applications
14. The council has argued that the requested minutes of the Local Plan Working Group (the "Group") cover a live process and different topics relating to the Local Plan review which has not been completed. The council explained that the Group does not have decision making powers and its agendas are available to all Members of the council but the meetings themselves would remain private.
15. Having considered the council's position and referred to the withheld minutes, the Commissioner is satisfied that the information relates to the Local Plan, a policy which is still under review. Therefore, the minutes constitute information created as part of the process of formulating and developing policy, where the process is not complete.
16. In light of the above, the Commissioner has concluded that the information falls within the scope of the exception and that, therefore, regulation 12(4)(d) is engaged.
17. As the regulations under the EIR are all subject to the public interest test, the Commissioner will go on to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

Public Interest Test

18. As with the other exceptions in the EIR, when regulation 12(4)(d) is engaged, the public authority must still carry out the public interest test

in order to decide whether the information should be withheld. Under regulation 12(1)(b), the public authority can only withhold the information if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Furthermore, under regulation 12(2), it must apply a presumption in favour of disclosure.

Public interest in disclosing the information

19. The council has acknowledged that regulation 12(2) provides a general presumption in favour of release of environmental information.
20. It has further recognised that transparency is important as it helps to inform public debate and to show that a proper process has been followed.
21. The complainant has argued that the Local Plan is probably the most important policy document that a local authority produces, covering many different aspects of planning and development and putting numerous policies in place. They consider that it is of great concern to local residents and that there is a strong public interest in having access to information about how the council is making decisions in this regard.
22. The complainant has argued that the council's practice in its decision-making is questionable and has suggested that it has restricted membership of the Group to members of one political party.
23. The complainant has further argued that a previous incarnation of the Group met and published its meeting minutes publicly. They consider that this undermines the council's argument that disclosure would inhibit its ability to make decisions.

Public interest in maintaining the exception.

24. The council has argued that the members of the Group need a "safe space" to debate the review of the local plan, which should be away from public scrutiny to allow them to be candid with one another.
25. In relation to the need for a safe space, the council has argued that the information requested has not been published elsewhere. As the LPA, the Council considers that there is a wider benefit to the public interest in withholding the minutes as the Local Plan Review is yet to be published. If a subject or matter was discussed initially but not included in the final plan and had been reported or disclosed this may affect the consultation. Therefore, the council has argued, withholding the minutes is necessary to ensure the consultation process is on those matters which have been agreed by the Council and not muddled with matters which have discussed and dismissed at a private meeting in a group

with no decision making powers. The council considers that releasing the information will, therefore, distract the public debate and consultation.

26. The council has confirmed that the Local Plan Review process requires the LPA to comply with various statutes, regulations and relevant framework guidance and that these contain various provisions for the disclosure of certain information to the public throughout the process.
27. The council explained that the Town and Country Planning (Local Planning) (England) Regulations 2012 (the TCPR) are relevant to this request and the decision to withhold the information held as there are a number of requirements in relation to the publication of information at various stages of the Local Plan Review process. Regulations 18, 19 and Regulation 20 of the TCPR concern the public consultation process and make provision for the local community, businesses and other interested parties to view and comment on the draft Local Plan. Once prepared, the Local Plan Review document will be submitted in accordance with Regulation 22 of the TCPR to the Secretary of State for examination. Included with this is a summary of the main issues raised by the representations and the LPA's comments on this. The information which has been submitted to the Secretary of State must also be made publicly available "as soon as reasonably practicable".
28. The council confirmed that the Secretary of State will appoint an independent Planning Inspector to undertake a "public examination" of the Local Plan Review document. The Inspector can recommend "main modifications" (changes that materially affect the Plan) to make a submitted Local Plan sound and legally compliant but only if asked to do so by the local planning authority. The latter can also put forward "additional modifications" of its own to deal with more minor matters.
29. The council explained that any person who has made a representation seeking a change to the plan within the deadline set by the LPA for Regulation 19 consultation responses must be given the opportunity of attending a hearing to put forward their views. Consideration is given to the information provided by both the LPA and the representatives at the hearing and the Inspector may request further details, if required. The Inspector's report on the plan will only be issued once the LPA has consulted on the main modifications and the Inspector has had the opportunity to consider the representations on these. Once the examination process is complete, adoption is the final stage of putting a Local Plan in place. On adopting a Local Plan, the local planning authority will then make a copy of the plan, an adoption statement and Sustainability Appraisal available to the public.

30. The council has confirmed that all matters relevant to the local plan review will be published at the appropriate time and the complainant and other residents will have an opportunity to comment on them at that stage. The council considers that, as the statutory Local Plan review process is being followed, the public interest in transparency and accountability is being served.

Balance of the public interest

31. The Commissioner has given some weighting to the specific public interest in disclosure in this case as the Local Plan is a significant endeavour which will have a broad impact on the local community and environment.
32. In relation to the complainant's concerns about the council's decision-making and the political composition of the Group, the Commissioner has seen no direct evidence to support these points. More importantly it is not the Commissioner's role to vet the governance and procedural arrangements made by the council. If the complainant has concerns in this regard other remedies for pursuing these concerns are available¹.
33. The complainant has also suggested that a previous incarnation of the Group met in public and that information about its workings was publicly available. The council has confirmed that there are no officers within the Planning Policy section or in senior positions within the Planning and Building Control Service who were involved in the Local Plan process between 2013-2017. It confirmed that, whilst there were public meetings of the Local Plan Working Group (LPWG) between 2013 and 2017 there were also meetings of the group that were not public. The Commissioner is satisfied that there is no evidence that the council has behaved inconsistently in relation to its approach to transparency.
34. The Commissioner is mindful that the purpose of the exception is to provide authorities with a safe space within which decisions can be made without this process being frustrated or hindered. She accepts that putting information in the public domain about speculative proposals which might never actually come to fruition may result in the effectiveness of decision making being challenged as the council may be forced to field enquiries about hypotheticals.

¹ For example, the Local Government and Social Care Ombudsman: <https://www.lgo.org.uk/>

35. The Commissioner considers it to be an established fact that the need for a safe space is heightened when decisions are yet to be reached.
36. In this case the council has confirmed that the matters referred to in the withheld information are still under consideration and a decision in relation to the Local Plan Review is yet to be made.
37. In relation to the public interest in transparency and accountability, the Commissioner notes that the council has identified clear mechanisms for these concerns to be addressed. The council has confirmed that there is a timeframe for information to be made publicly available to assist public participation in the consultation process.
38. In reaching her decision in this case the Commissioner has considered the arguments provided by the council and the complainant and also referred to a previous decision notice she has issued in relation to a comparable scenario².
39. The Commissioner is satisfied that, at this time, the public interest in facilitating effective decision making by the council is best served by maintaining the exception and withholding the information. The Commissioner is, however, alive to the complainant's concerns and considers that, as the process of deliberation regarding the Local Plan comes to an end, the public interest is likely to shift in favour of disclosure.
40. The Commissioner has concluded that the council has correctly applied regulation 12(4)(d) and that the public interest favours maintaining the exception.

² ICO reference FER0870530 (Elmbridge Borough Council, 26 February 2020), published here: <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617319/fer0870530.pdf>

Right of appeal

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

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

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

42. 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.
43. 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

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