

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 1 August 2022

Public Authority: Nottinghamshire County Council
Address: County Hall
West Bridgford
Nottingham NG2 7QP

Decision (including any steps ordered)

1. The complainant requested information relating to school sites in West Bridgford. Nottinghamshire County Council (the "council") disclosed some information and withheld other information under the exception for material in the course of completion – regulation 12(4)(d).
2. The Commissioner's decision is that the council failed to respond in time and breached regulation 5(2) and that it correctly withheld some of the requested information under regulation 12(4)(d).
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 20 April 2021 the complainant wrote to Nottinghamshire County Council (the "council") and requested the following information:

"The three documents are referred to in the NCC Policy Committee Meeting 17 March 2021 Agenda item 8: Report to Policy committee 19 September 2019 Report to Policy committee 12 February 2020 Report to Policy committee 13 May 2020

Any related information would also be appreciated, including any reports that contain information relating to previous/current Strategic Flood Risk Assessments on Regatta Way West Bridgford where NCC propose to build a schools campus, and how and where from the number of quoted school placements to be accommodated were derived. See also in Agenda item 8."

5. On 21 April 2021 the complainant also asked for the following information to be included in their request: "In the same meeting as below (agenda item 8) Councillor Liz Plant referred to a feasibility study costing £445k (conducted in 2020) into finding a site to build a new schools campus in WB."
6. The council responded on 21 May 2021 and 26 May 2021 and disclosed some information. On 2 June 2021 the complainant queried the council's responses and identified further information they considered fell within the scope of their request.
7. Following further correspondence, the council provided further responses and on 10 August 2021 it confirmed that it was withholding some of the document titled "West Bridgford School Site Assessment" under the exception for material in the course of completion (regulation 12(4)(d)).
8. Following an internal review the council wrote to the complainant on 6 September 2021 and confirmed that it was maintaining its position.

Scope of the case

9. On 29 September 2021 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
10. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly withheld information under the exception in regulation 12(4)(d).

Reasons for decision

Regulation 5(2) – time for compliance

11. Regulation 5(1) of the EIR states:

“Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.”

12. Regulation 5(2) states:

“Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.”

13. In this case the complainant initially requested information on 20 April 2021 and, although it did respond and disclose information earlier, the council provided a response withholding some information under regulation 12(4)(d) on 10 August 2021. As this information is within the scope of the original request the Commissioner has concluded that the council breached regulation 5(2).

Regulation 12(4)(d) – incomplete material

14. Regulation 12(4)(d) provides an exception to the duty to make environmental information available when the request relates to material which is still in the course of completion, unfinished documents or incomplete data. By nature of being an unfinished document (by definition), draft documents will similarly engage the exception. A draft version of a document will still be considered an unfinished document even if the final version of the document has been published.

15. If the information in question falls into one of the categories above then the exception is engaged. It is not necessary to show that disclosure would have any particular adverse effect in order to engage the exception, however, any adverse effects of disclosure may be relevant to the public interest.

16. The council confirmed that it is withholding parts of a document titled “West Bridgford School Site Assessment” (the “Report”) under regulation 12(4)(d). The remainder of the information has been disclosed to the complainant.

17. The council has explained that the purpose of the Report is to provide internal guidance only in terms of the direction of a site solution for the

new West Bridgford school, and direction as to next steps in developing a planning application.

18. The council considers that releasing the Report into the public domain would prejudice its interests and explained that the information was produced not only as a site assessment document for internal use only, but also as an informative for a potential future planning application to be submitted in due course. The council confirmed that more detailed planning and technical information will be generated as part of any planning application process to justify the site selection, which will be detailed on the council's planning portal which the public will have the opportunity to comment upon.
19. The council explained that, whilst the withheld report is complete, it includes information which will be used in planning applications and the feasibility study into the proposed building of a school campus in West Bridgford which are ongoing and not yet complete. It confirmed, the limb of the regulation it is relying on is incomplete data and explained that information which will be included in the potential future planning applications will be published when the applications are made, and will likely include more detailed information. It explained that the feasibility study into the requirements and planning for new schools in West Bridgford is ongoing.

Incomplete Data

20. In relation to the requirements for engaging the exception, the Commissioner's guidance, in relation to information defined as "incomplete data", states:

"Data that is incomplete because a public authority is still collecting it will be covered by this, but where an authority is using or relying on data at the time of the request, then it cannot be considered incomplete simply on the basis that it may be modified or amended in the future."¹

21. The Commissioner's understanding of the council's position is that the Report will inform the more detailed feasibility study which remains incomplete.

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

Conclusions

22. Having no evidence to dispute the council's position and having viewed the withheld information and considered the assurances provided by the council, the Commissioner has concluded that the information is incomplete data and relates to material in the course of completion. He is, therefore, satisfied that the exception is engaged.
23. The council may continue to withhold the information where, in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing it. The Commissioner has, therefore, gone on to consider the public interest test.

Public interest in disclosing the information

24. In considering the public interest in this case, the Commissioner is mindful that regulation 12(2) of the EIR instructs authorities to apply a presumption in favour of disclosure.
25. The council has acknowledged that releasing the information would aid transparency in decision making and use of public funds.
26. The complainant has cited local concerns that the council might build schools on green belt, high risk flood plain land and not where the school placement demand is, when there are alternative viable options available. There is, therefore, significant local public interest in being able to review and potentially challenge the council's proposals.

Public interest in maintaining the exception

27. The council has argued that, if the information was to be released, it would be misleading and would not reflect its final position in relation to these matters. In the council's view it would also mean that time and unnecessary expense would be spent dealing with queries and challenges about issues/decisions which have not yet been finalised.
28. The council has explained that factors highlighted in the withheld information need to be considered further and no decisions or approval has been agreed. It confirmed that the public will have the opportunity to be consulted and make comment when the planning applications are progressed and when this occurs all relevant information will be made publicly available.
29. The council has further argued that, if disclosed, the information could mislead and upset the public as they would not have had an opportunity to comment on the factors raised and would question the council's

transparency and accountability. The council considers that this in turn could result in a loss of public trust in the council.

Balance of the public interest

30. In relation to the council's arguments about maintaining a safe space around incomplete material, the Commissioner acknowledges that, in this case, these carry some weight. It is clear that the decision-making process in relation to the matters raised in the Report was incomplete at the time of the request (and remains incomplete at this time). In previous decisions, the Commissioner has acknowledged that there is a strong likelihood that the integrity of and effectiveness of the decision-making process would be harmed by the disclosure of information before the process is complete.
31. The Commissioner notes that, in cases where an authority has concerns that disclosing information might create public confusion or might misinform debate, it can be appropriate for the authority to preface such disclosures with a corrective or explanatory narrative. However, he considers that this is not always appropriate since an authority may not hold information about final decisions which allow for discrepancies to be resolved.
32. The Commissioner accepts that, without a completed version of the information to reference, the public would be left with a provisional, misleading picture of the grounds for the decision-making process. The Commissioner accepts that this would not contribute to the public interest in participation in decision-making in this case. He recognises that the public interest in participation would be better served when the feasibility study and resulting planning applications are complete and placed in the public domain.
33. The Commissioner is mindful that there is a general presumption in favour of disclosing environmental information and that there is an inbuilt public interest in enabling public participation in decision making in planning matters.
34. However, public interest considerations should always be relevant to the exception being relied upon, to the specific nature of withheld information and to the context at the time of the request. In this case, he considers that the council has demonstrated that the information relates to and informs a decision making process that is incomplete and that its disclosure would, by misinforming public debate, impede the decision making process that it supports.
35. As noted above, regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of

the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019):

“If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure...” and “the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations” (paragraph 19).

36. As covered above, in this case the Commissioner’s view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner’s decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(d) was applied correctly.

Right of appeal

37. 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

38. 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.
39. 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

Christopher Williams
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF