

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 8 March 2022

Public Authority: Tunbridge Wells Borough Council
Address: Mount Pleasant Road
Royal Tunbridge Wells
TN1 1RS

Decision (including any steps ordered)

1. The complainant requested agendas and minutes of the Planning Policy Working Group working on the Draft Local Plan.
2. Tunbridge Wells Borough Council (the Council) confirmed it held information with the scope of the request but refused to provide it, citing regulations 12(4)(d) (information in the course of completion), 12(4)(e) (internal communications) and 12(5)(d) (confidentiality of proceedings) of the EIR.
3. The Commissioner's decision is that the Council was entitled to apply regulation 12(4)(d) to the withheld information and that the public interest in maintaining the exception outweighs the public interest in disclosure.
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On a date acknowledged to be around the end of January 2021, the complainant wrote to the Council and requested information in the following terms:

"All Agendas of all the Planning Policy Working Group Meetings held between January 2014 and January 2021 inclusive.

All Minutes of all the Planning Policy Working Group Meetings held between January 2014 and January 2021 inclusive

Time period: 01/01/2014 - 29/01/2021".

6. The Council acknowledged the request on 2 February 2021 and provided its substantive response on 15 April 2021.
7. It refused to provide the requested information, citing the following exceptions as its basis for doing so:
 - Regulation 12(4)(d) - material in the course of completion
 - Regulation 12(4)(e) – internal communications
 - Regulation 12(5)(d) – confidentiality of proceedings
8. Following an internal review, the Council wrote to the complainant on 5 May 2021, upholding its decision to withhold the requested information. While it cited regulations 12(4)(d) and(e), it did not refer to regulation 12(5)(d).

Scope of the case

9. Following earlier correspondence, the complainant contacted the Commissioner on 10 May 2021 to complain about the way her request for information had been handled.
10. By way of background, she explained to the Commissioner that the Policy Planning Working Group is a working group "who have worked on the TWBC [Tunbridge Wells Borough Council] Draft Local Plan for the past few years".
11. She also told him:

"The DLP [Draft Local Plan] is now at pre submission stage and therefore these are historic dox that should be readily available".
12. The Commissioner recognises that the complainant raised concerns about whether it was appropriate that it was a working group, rather than a committee, that was set up to work on the Draft Local Plan.
13. It is not within the Commissioner's remit to address those concerns. The Commissioner's role is to determine whether the Council dealt with the request for information appropriately.

14. With respect to the amount of information within the scope of the request, the Council told the Commissioner:

“The Council holds only agendas from January 2014 to April 2015. Agendas and minutes are held from June 2015 to January 2021”.

15. At his request, the Council provided the Commissioner with a sample of the withheld agendas and minutes. He expects the Council to have provided representative examples on the basis of its knowledge and understanding of the requested information.
16. With respect to the withheld information, the Council confirmed that it was relying on three exceptions, namely regulations 12(4)(d), 12(4)(e) and 12(5)(d).
17. The analysis below considers the Council’s application of those exceptions to the withheld information.

Reasons for decision

18. The Commissioner has first considered the Council’s application of regulation 12(4)(d). The Council has applied the exception to all the withheld information, ie all the agendas and minutes within the scope of the request.

Regulation 12(4)(d) information in the course of completion

19. Regulation 12(4)(d) 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, unfinished documents, or to incomplete data.”

20. 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
- provide some protection from having to spend time and resources explaining or justifying ideas that are not, or may never be, final.

21. 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.

22. The Council told the complainant:

“The Council takes the view that the information held relating to the Planning Policy Working Group would be regarded as material in the course of completion as it was created as part of the process of formulating and developing policy where the process is not complete”.

23. Disputing that regulation 12(4)(d) is applicable, the complainant told the Council:

“Agendas and Minutes once agreed and signed should not in any way be altered and must therefore always be considered complete”.

24. While it acknowledged that view, the Council told the complainant:

“Although the Council have published the Pre-Submission Local Plan for consultation, the process is not yet complete”.

25. Accordingly it argued that the development of the Local Plan process, as a whole, is still in the course of completion.

26. Similarly, the Council told the Commissioner:

“The Council has concluded that all the information is exempt under this regulation [regulation 12(4)(d)] as the development of the Local Plan process is still in the course of completion”.

27. For the avoidance of doubt, the Commissioner sought clarification from the Council as to what policy or process it considered the withheld information relates. In response, the Council confirmed:

“The Council is developing the Local Plan”.

28. It further explained:

“Once adopted, the new Local Plan for Tunbridge Wells borough will provide the planning policy framework against which planning applications will be considered across the borough to 2038”.

The Commissioner's view

29. In his published guidance¹, the Commissioner recognises that regulation 12(4)(d) is engaged when the request relates to material that is still in the course of completion, unfinished documents or incomplete data.
30. He defines those categories as follows:
 - 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.
 - Draft documents are unfinished even if the final version has been produced.
 - Data that is being used or relied on at the time of the request is not incomplete, even if it may be modified later.
31. The Commissioner acknowledges that the fact that the exception refers to both material in the course of completion and unfinished documents implies that these terms are not necessarily synonymous. While a particular document may itself be finished, it may be part of material which is still in the course of completion. An example of this could be where a public authority is formulating and developing policy.
32. In its submission, the Council explained that, after the Local Plan has been submitted to the Planning Inspectorate, there is the potential that the Council will need to undertake further consultation on modifications recommended by the Planning Inspectorate.
33. Accordingly, the Council told the Commissioner that the limb of the regulation that it is relying on in this case is 'material still in the course of completion'.
34. The position of the Local Plan at the time the request was received is clearly relevant to the application of regulation 12(4)(d).
35. From the evidence he has seen, the Commissioner is satisfied that the task of preparing the Local Plan was still in progress at that time.

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

36. Having viewed the sample of withheld information provided by the Council, and considered the Council's arguments, the Commissioner is also satisfied that the agendas and minutes comprise information created as part of the process of formulating and developing policy, namely the Local Plan, where the process is not complete.
37. In light of the above, the Commissioner has concluded that the information falls within the scope of the exception and that regulation 12(4)(d) is engaged.
38. He has next gone on to consider the public interest test.

Public interest test

39. Regulation 12(1)(b) of the EIR provides that where regulation 12(4)(d) is engaged then a public interest test is carried out. 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. Furthermore, under regulation 12(2), a public authority must provide a presumption towards the disclosure of the information.

Public interest arguments in favour of disclosing the requested information

40. The Council recognises there is a public interest in ensuring transparency and accountability in the process of developing the Local Plan.
41. In its submission, it acknowledged that the information relates to areas of interest to local residents and the general public and that there is strong public feeling within the borough regarding developments.
42. In that respect, it told the complainant:

"The Local Plan is a statutory process and a considerable amount of information has already been made available to the public at appropriate stages. Recommendations made by the Planning Policy Working Group are also reported to the relevant decision maker".

43. The Commissioner understands that there have been at least two public consultations under regulation 18 of the Local Planning regulations.

Public interest arguments in favour of maintaining the exception

44. In favour of maintaining the exception, the Council told the complainant:

"We take the view that disclosure of the information would adversely affect the process for developing policy and the integrity of the decision-making process as it would impact on the Council's

ability to have a safe space to consider issues in relation to its emerging Local Plan, away from public scrutiny”.

45. It argued that the Council continues to require a safe space to ensure that the next stages of the Local Plan adoption process can be completed effectively.
46. The Council also argued that it was not in the public interest to release information that has not already been made available for public consultation at appropriate stages.
47. The Council told the complainant:

“We consider that releasing information into the public domain which does not form part of the statutory consultation process would distract public debate and would seriously impact on the Council's resources and its ability to complete all stages of the Local Plan adoption process effectively”.
48. It presented similar arguments in its submission to the Commissioner.
49. Explaining the likely impact of disclosure, and why it considered that disclosure in this case was not in the public interest, the Council told the Commissioner:

“Releasing the information which did not form part of the statutory consultation process would distract from the very specific focus of the consultation undertaken, and that which may be necessary if the Inspectorate recommends modifications. This exception provides the Council some protection from having to spend time and resources explaining or justifying ideas that are not and may never be final. The Council considers that releasing information into the public domain which does not form part of the statutory consultation process would lead to a disruptive effect as we anticipate there could be a significant amount of further enquiries relating to the content of the requested information”.

Balance of the public interest

50. When considering the balance of public interests in this case, the Commissioner has taken into account the wide date range specified in the request and is mindful that the withheld information comprises agendas **and** minutes.

51. He has consulted his guidance 'How exceptions and the public interest test work in the Environmental Information Regulations'². In his guidance the Commissioner recognises:

"The factors determining the weight of the arguments for and against disclosure can include: the likelihood and severity of any adverse effect; the age of the information; how far disclosing the information would serve the public interest; and what information is already in the public domain".

52. The Commissioner acknowledges that, during the course of his investigation, the complainant told him that the Local Plan was submitted for examination to the Planning Inspectorate on 1 November 2021.

53. However, with respect to timing, his guidance states:

"When dealing with a complaint that information has been wrongly withheld, the Commissioner will consider the situation at the time the authority dealt with the request or internal review".

54. On the topic of 'Content of the information', the Commissioner's guidance on regulation 12(4)(d) states:

"A key factor in assessing the weight of public interest arguments is the extent to which the information itself would inform public debate on the issue concerned. There is always an argument for presenting a full picture of how a decision was made or a policy position was arrived at. If disclosing incomplete material or draft documents would support this then it increases the weight of the argument for disclosure. On the other hand, information may be within the scope of a request but nevertheless shed little light on the issue itself. In that case the weight of the argument for disclosure may be less than it otherwise would be".

55. In determining where the balance of the public interest lies in this case, the Commissioner has given due weight to the presumption under regulation 12(2) in favour of disclosure and the specific public interest in

² <https://ico.org.uk/media/for-organisations/documents/2021/2619013/exceptions-pi-test-eir.pdf>

transparency and accountability in relation to decisions that may have widespread effects on the local community.

56. The Commissioner has taken into account, and is sympathetic to, the complainant's concerns that there should be complete transparency regarding the matter under consideration.
57. He acknowledges that planning related matters have the potential to have a widespread or significant impact on the public.
58. However, the Commissioner also recognises the strength of the public interest arguments in favour of maintaining the exception. He acknowledges the Council's argument that public bodies need space and time to fully consider their policy options and reach an impartial and appropriate decision.
59. In that respect, the Commissioner is mindful that, at the time of the request, the Local Plan had yet to be finalised. He also acknowledges the opportunities for public scrutiny within the planning process itself, and the independent examination of the Plan by a Planning Inspector, which provide transparency and openness and inform public debate and thus go some way to satisfying the public interest that would otherwise be served by disclosure.
60. The Commissioner has reviewed the example agendas provided to him. In carrying out the public interest test, he has taken particular account of the content of the information and how far it would contribute to public debate.
61. He accepts that the agenda items list the matters to be discussed at the Planning Policy Working Group meetings. However, from the evidence he has seen, he does not consider that their disclosure would greatly inform the public about the process by which the Council formulates policy and reaches decisions in relation to the Local Plan.
62. The Commissioner has also reviewed the sample provided to him of the withheld minutes. He has considered the public interest arguments, and their relative weight.
63. He considers that the withheld minutes provide insight into the process of formulating policy in relation to the emerging Local Plan.
64. Given that the Local Plan was not finalised at the time the Council received the complainant's request, the Commissioner accepts that the disclosure of the requested information - information he has found to relate to material in the course of completion - would frustrate the process of preparing the Local Plan and inhibit the Council's ability to

finish this work. This is the very activity which the exception is formulated to protect.

65. Accordingly, the Commissioner gives more weight to the argument that disclosure would present a real risk of prejudice to the 'safe space' to consider issues in relation to the emerging Local Plan, away from public scrutiny.
66. The Commissioner takes the view that the mechanisms in place which allow for information to be made available to the public at the various stages of the Local Plan process provides the necessary transparency and openness of the process.
67. In light of the above, and mindful of the timing of the request, the Commissioner is satisfied that regulation 12(4)(d) was applied appropriately and that the public interest in maintaining the exception outweighs the public interest in disclosure of the withheld information.

Other exceptions

68. As the Commissioner is satisfied that regulation 12(4)(d) applies, he has not found it necessary to consider the Council's application of regulations 12(4)(e) and 12(5)(d) to the same information.

Right of appeal

69. 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

70. 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.

71. 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

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