

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

Date: 25 May 2022

Public Authority: Swansea Council

Address: freedomofinformation@swansea.gov.uk

Decision (including any steps ordered)

1. The complainant requested a copy of a report on travel proposals for a particular area. Swansea Council (the Council) withheld the information under regulation 12(4)(e) (internal communications). During the Commissioner's investigation the Council withdrew reliance on regulation 12(4)(e) and stated that it was now relying on regulation 12(4)(d) (material in the course of completion) to withhold the information requested. The Commissioner's decision is that the Council has correctly applied regulation 12(4)(d) to the information. He does not require any steps to be taken.

Request and response

2. On 8 April 2021 the complainant wrote to the Council and requested information in the following terms:

"As you may recall we e-mailed you on January 11th requesting a copy of the Arcadis report on the Active Travel proposals for Walter Rd through the Uplands shopping centre to Sketty.

We are now making a freedom of information request to have a copy of this report".

3. The Council responded on 5 May 2021 advising that a draft report had been prepared but had not yet been signed off. The Council also provided some background information about the subject matter

associated with the request, however, it did not cite any specific exemption or exception as the basis to refuse to provide the information requested.

4. On 10 May 2021 the complainant requested an internal review of the Council's handling of the request.
5. The Council provided the outcome of its internal review on 3 June 2021 and stated that it considered the information requested to be exempt under regulation 12(4)(e) – internal communications.

Scope of the case

6. The complainant contacted the Commissioner on 28 June 2021 to complain about the way their request for information had been handled.
7. During the course of the Commissioner's investigation, the Council withdrew its reliance on regulation 12(4)(e) and stated that it now considered regulation 12(4)(d) to apply to the withheld information. The Council wrote to the complainant to advise of its change of stance.
8. In light of the above, the scope of the Commissioner's investigation is to determine whether the Council has correctly applied regulation 12(4)(d) to the request.

Reasons for decision

Regulation 12(4)(d) of the EIR – material which is still in the course of completion, unfinished documents or incomplete data

9. 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.
10. In this case, the Council's position is that the requested information comprises a draft document, and therefore falls within the category of "unfinished documents".
11. 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.
 - 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 Council advised that the Arcadis report "is a draft option appraisal which, when finalised, will inform a proposal for an active travel scheme. It is a proposal that will require public consultation and engagement before implementation".
13. The Council advised that, at the time of the request, the report/proposal was at the pre-sign off/pre-consultation stage. The stage that matters are at in respect of the proposal/project has not changed since the request was received despite the passage of time. Delays and slippages in the timetable as a result of the Covid 19 pandemic have meant that the Council have been unable to invite targeted stakeholders (including the organisation that the complainant represents) to workshop sessions. Workshop sessions will be held after discussions have taken place with the newly elected councillors for the area. The Council also confirmed that the report is likely to be go through a number of iterations before it is finalised. As such, the Council considers that the report is very much a live issue.

The Commissioner's view

14. In his published guidance, 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. 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.

15. As the Commissioner's guidance¹ makes clear, 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.
16. The Council considers that it is clear that the requested information comprises a draft report which at the time of the request and still now is at the pre-sign off / pre-consultation stage. Work on the proposal to which the report relates, including consultation with relevant parties, has been delayed as a result of the pandemic.
17. The Commissioner has viewed the withheld information which was provided to him by the Council as part of the investigation. The Commissioner notes that the document in question is characteristic of an unfinished document, as it is clearly marked "draft". The Commissioner also notes the Council's comments that the report is likely to be amended before it is finalised. Based on this and the Council's explanations as to the status of the proposal to which the report relates the Commissioner accepts that the requested information constitutes an unfinished document and he finds that regulation 12(4)(d) is engaged in this case. He has gone on to consider the public interest test.

Public Interest Test

18. 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 disclosure of the requested information

19. The Council accepts that active travel schemes are important proposals in a local authority area and there is a general public interest in their development both from a public health and an environmental perspective.
20. The Council also acknowledges that there has been some local interest in the particular active travel scheme that the withheld information

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

relates to and controversies in other Swansea suburbs around the location/positioning of cycle paths.

21. The Council also acknowledges that disclosure of the withheld information will inform the public as to how decisions were arrived at once the final report is produced as it will provide access to information about a potential proposal for the area.

Public interest arguments in favour of maintaining the exemption

22. In favour of maintaining the exception, the Council put forward the following arguments:

- "There is a strong public interest in allowing officers a safe space to develop robust proposals.
- There is a strong public interest in preventing a chilling effect from the premature release of the report which may harm the future discussion of the draft proposal between elected members and officers.
- The timing of the request is important. The proposal is in its infancy with the report not signed off or completed and the wider proposal that will be developed yet to be advanced to a stage where consultation can commence.
- There is every intention to disclose the final report and consult with the public and this particular public interest group in the future, as described above.
- Publishing drafts pre-consultation may harm the integrity of the consultation process and / or confuse the consultees as to the version being consulted upon".

23. In the Council's opinion the balance of the public interest test in this case favours non disclosure. It has placed particular weight on its safe space and chilling effect arguments, and the timing of the request in respect of its potential to harm the process which is in progress.

24. The Council does not consider the arguments in favour of disclosure in this case to be particularly strong in light of the fact that a final version of the report and the proposal, if it is not shelved by the new administration, is likely to be published sometime in the summer in 2022. The proposal will also be subject to consultation with key stakeholders, which will include the organisation that the complainant in this case represents. In its view, the prejudice which the Council believes would result from early disclosure is not outweighed by any benefit to the public.

Balance of the public interest

25. In determining where the balance of the public interest lies, the Commissioner has given due weighting to the general presumption in favour of disclosure and the specific public interest in transparency and accountability in relation to decisions having a significant community impact.
26. The Commissioner understands that there is a significant local public interest in understanding what options the Council is considering in terms of active travel proposals for the area.
27. However, the Commissioner is of the view that equally, there are strong public interest arguments in favour of the non-disclosure of the relevant information.
28. The Commissioner considers that arguments about the need for space for officers to be able to engage with others are considered to be 'safe space' arguments. The term 'safe space' is about the need to be able to formulate policy, debate live issues and reach decisions without being hindered by external comments and/or media involvement. Whilst part of the reason for needing a safe space is to allow for free and frank debate, it is the Commissioner's view that the need for a safe space exists regardless of any impact that the disclosure of information may have on this. The Commissioner considers the 'safe space' argument to be about protecting the integrity of the decision-making process and whether it carries any significant weight will depend on the timing of the request.
29. With regard to the Council's argument that a safe space is needed to develop its approach to the active travel proposals in question, the Commissioner acknowledges that the wider process of establishing and delivering active travel proposals is ongoing, and that a disclosure of the information could provide a distraction which would invade the thinking space and inhibit the Council's ability to carry out this work. This is the very activity which the exception is formulated to protect.
30. The Commissioner has taken into account the timing of the request in this case and is mindful that matters relating to the proposal were live and the associated consultation on proposals were delayed as a result of the pandemic. 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.
31. In terms of balancing the public interest, the Commissioner has also had regard to the nature of the information withheld. He notes that in this case, the unfinished information is a draft report on the active travel

proposals for the area. He also notes the Council's comments that the draft report is likely to be amended before it is finalised.

32. Finally, the Commissioner notes that the Council plans to publish the final version of the report when it is available and to consult with key stakeholders through a number of events/workshops.
33. Whilst he accepts that the arguments in favour of disclosure in this case carry weight the Commissioner does not consider that they outweigh the arguments in favour of withholding the information.
34. 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).
35. As covered above, the Commissioner has concluded that the public interest in maintaining the exception at regulation 12(4)(d) outweighs the public interest in disclosure of the information. 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

36. 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

37. 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.
38. 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

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