

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

Decision notice

Date: 16 January 2012

Public Authority: Birmingham City Council

Address: ICF
First Floor
1 Lancaster Circus
Birmingham
B4 7AB

Decision (including any steps ordered)

1. The complainant requested a draft report together with any communications with the Chief Executive relating to Harborne Clock Tower in Birmingham. The council had paid substantial amounts of money to private contractors for scaffolding surrounding the tower for an extended period of time due to health and safety concerns and the council then made a decision to sell the Clock Tower as surplus to requirements.
2. The Commissioner's decision is that Birmingham City Council has correctly applied the exception for unfinished documents to the draft report. He has also decided that the exception for internal communications applies to the communications with the Chief Executive.

Request and response

3. On 16 May 2011 the complainant wrote to Birmingham City Council and requested information in the following terms:

"In view of the delay in issuing a report please would you accept this as a formal request under FOI for release of copies of such draft reports that have been prepared to date together with communications with the Chief Executive."

4. The council responded on 10 June 2011. It stated that the information was exempt from disclosure under the Environmental Information Regulations 2004 (the 'Regulations'). It said that the exceptions for internal communications; Regulation 12(4)(e), the exception for information in the course of completion; Regulation 12(4)(d), and the exception where a disclosure of the information would have an adverse effect on the ability of a public authority to carry out an investigation of a disciplinary nature; Regulation 12(5)(b).
5. Following an internal review the council wrote to the complainant on 11 July 2011 upholding its initial decision.

Scope of the case

6. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He asked the Commissioner to consider whether the information he requested should have been disclosed to him.
7. The council provided the Commissioner with a copy of the draft report together with a copy of the communications it holds. It also provided a later copy of the report in order to demonstrate that the earlier version was unfinished at the time of the request.
8. The council argues that the report is environmental information and that it falls within the definition of environmental information provided in Regulation 2. It states that the report is information on measures (including administrative measures) and activities affecting or likely to affect the elements of the environment. It also falls within the definition which relates to "the state of human health and safety, including... built structures in as much as they are or may be affected by the state of the elements of the environment.
9. The Commissioner is satisfied that the information in question is environmental information. The report relates to the history of maintenance carried out on the clock tower together with details of the management decisions which were taken which led to the situation developing. It seeks to establish how and why the council paid substantial amounts of money to rent scaffolding over an extended period of time and to analyse what decisions were made which resulted in those circumstances occurring.

Reasons for decision

The Draft Report.

Regulation 12(4)(d)

10. Section Regulation 12(4)(d) of the Regulations states that information will be exempt from disclosure where it is material which is still in the course of completion, is an unfinished document or is incomplete data.
11. The council explained to the Commissioner that the draft report had been provided to the Chief Executive, however he had then asked for further investigation to be carried out and the report was subsequently amended to reflect that.
12. In evidence that this was the case the council provided the Commissioner with a copy of the report as it stood when the complainant had made his request. It also provided a later draft of the report. It did this to demonstrate to the Commissioner that at the time of the request the report was unfinished and that further work had been carried out and amendments made.
13. The council has said that once the report is finished and has been agreed by the council it will disclose it to the complainant. It says that a relatively small section will however need to remain exempt as it contains commercially sensitive information relating to a third party.
14. The Commissioner is satisfied that the requested information was unfinished at the time of the request and that the exception is therefore engaged.
15. Regulation 12(1)(b) requires the Commissioner to carry out a public interest test to decide whether the information should be disclosed in spite of the fact that the exception is engaged. The test is whether the public interest in maintaining the exception outweighs the public interest in the information being disclosed.
16. When considering this public interest test he must take into consideration the presumption of disclosure which Regulation 12(2) provides. If the public interest is balanced then the information should be disclosed.

The public interest in the information being disclosed

17. The central public interest argument in the information being disclosed surrounds creating greater transparency about a situation where the council paid substantial amounts of public money to hire scaffolding to

ensure public within the building's vicinity. Public safety was an issue because tiles fell from the roof of the clock tower onto the street below. There is therefore a public interest in the council providing its analysis as to how circumstances arose and decisions were taken which led to public safety being put at risk, and substantial tax payers money being spent to pay for the scaffolding.

18. Additionally there is a public interest in allowing greater transparency surrounding how the council has allowed the scaffolding to continue to surround the building with no or little additional work being carried out to safeguard the building.
19. Further to this, as a result of the situation disruption occurred to educational services. Courses previously run from the building were moved to other accommodation to ensure public safety and the building ceased to be used.
20. The Commissioner therefore recognises that there is a strong public interest in the circumstances and history which led to this situation being disclosed. There is a public interest in allowing interested parties to understand how that occurred and what, if any, mistakes were made.
21. The Commissioner further recognises that there has been a delay in the publication of the report, and that this in itself is not in the public interest bearing in mind that the council is considering the sale of the clock tower. The clock tower is a listed building which is widely recognised as iconic within the community. Its sale into private hands would therefore potentially be a loss of a valuable asset to the community. A disclosure of the report would therefore inform public debate about the future of the building.

The public interest in the exception being maintained

22. The Commissioner recognises that at the time of the request the report was in draft form. A draft had been completed by the council officer carrying out the investigation, however the Chief Executive had asked for further investigation to be carried out.
23. The exception in Regulation 12(4)(d) recognises that authorities need 'thinking space' in order to carry out their functions effectively.
24. In some circumstances authorities need to be able to carry out investigations away from the public eye. Officers will need to discuss the circumstances under investigation and draw up preliminary findings to report to more senior officers for their consideration.
25. Once a report has been finalised and agreed there may be a stronger public interest in that information being made public in order that the

public can understand the nature of the issue, how it came to be and what steps the authority is going to take to rectify the issue. Mistakes therefore need to be recognised and changes made to prevent further occurrences.

26. In the course of such investigations draft reports may be produced by less senior officers that do not fully address areas which senior officers or elected members feel need addressing and/or want investigated. Senior officers may want amendments to the draft before they are happy to agree the findings. This may be simply that they require further emphasis on certain sections, or further investigation carried out on areas which they believe are not fully covered by the report or raise further concerns. This is a normal process within many investigations and with the production of such reports.
27. In order for this system to work effectively officers need to be able to provide draft reports to their managers so that they can discuss their preliminary findings with them. Managers can then provide direction and assistance and discuss what further information they would like in the report or further investigation they would like carried out. Draft reports may not therefore report the settled, final position of the authority.
28. The Commissioner recognises that during the time that the report is being drafted there is a strong public interest in the reports being exempted from disclosure. A disclosure of reports before they are finished may result findings being presented which is not the settled position of the authority. This might result in interference and pressure from interested parties and the media when the authority has not made final decisions or fully investigated the issue. This may result in further investigation becoming more difficult.
29. Although the Commissioner recognises that the authority might consider issuing a warning that the report is incomplete if it did disclose an incomplete report it is likely that interested parties would still lobby the authority if they were unhappy with the contents or the direction of the draft report.
30. Having read both the draft which was held at the time that the request was received, and the subsequent draft, the Commissioner is satisfied that amendments were not ordered from a point of view of "hiding embarrassment" or preventing the apportionment of fault or blame. Such a suggestion would generally be a strong argument in favour of disclosure in order that 'spin' is avoided.
31. Communications between the Chief Executive and the reports authors also demonstrate that additional investigation was requested in order to clarify areas of the report where further information was wanted. The

Chief Executive needed to report the situation fully to councillors and provide a strong set of recommendations to address the situation and the further work her required reflected this need.

32. The council also clearly demonstrated that it was considering potential disciplinary proceedings if any individual was found to have been at significant fault. A disclosure of the information and media reporting of the issue prior its completion may have disrupted its investigation.

The balance of the public interest

33. The council states that it intends to disclose the vast majority of the finished report once it has been accepted by the council. It says that it only intends to redact a small amount of commercially sensitive information from the report. Many of the arguments in favour of disclosing the information considered above will therefore be met by that disclosure.
34. In effect a disclosure of the completed report rather than the draft will further clarify the circumstances to tax payers and interested parties and will highlight the recommendations which were actually provided to councillors. This significantly weakens the public interest in favour of disclosing the draft report.
35. The Commissioner notes that the council intends to withhold a small section which would be commercially sensitive to third parties. He does not however consider this unless a further request is made for the final report and that information is subsequently refused by the council.
36. Considering all of the above the Commissioner considers that there is a stronger public interest in maintaining the exception. The officers required thinking space in order to properly consider the circumstances which led to the situation. Interference from the public or the media during this period could have made the investigation and forming a settled formal position more difficult. The Commissioner has also taken into account the council's statement to him that it will disclose the completed report once it has been agreed by the council. He is therefore satisfied that the greater public interest rests in maintaining the exception.
37. Given his finding above the Commissioner has not considered the other exceptions which were applied by the council further.

Communications with the Chief Executive of the Council

38. As regards the communications with the Chief Executive the council claimed that these were exempt under the exception for internal communications, Regulation 12(4)(e).
39. The Commissioner has considered the information in question. He notes that some of the emails caught within the scope of the request were sent to the Chief Executive by the complainant. As these are from an external source the Commissioner is satisfied that they are not internal communications and that the exception cannot apply to them. However in reality, as the complainant is the author of the emails he will already have copies of these and so the Commissioner has not considered these further.
40. As regards the rest of the information he is satisfied that as they are internal communications between departments or individuals within the council and the exception is therefore engaged.
41. Again the Regulations require the Commissioner to carry out a public interest test to consider whether the information should be disclosed in spite of the fact that the exception is engaged. The test is the same as that expressed in paragraph 16 above.

The public interest in maintaining the exception

42. The central public interest in maintaining the exception rests in the preservation of internal confidentiality and the protection of internal decision making processes that are required for the sound performance of a public authority.
43. In this case arguments in favour of the exception applying rest primarily on creating a safe space for officers and members to discuss the ongoing situation and the investigation into the circumstances are surrounding the clock tower and the drafting of the report.
44. The Chief Executive needed to be kept up to date with how the investigation was proceeding in order to respond to questions which he was being asked. He needed to direct officers to areas where he needed further investigation or where he felt that the report needed expanding. Such input from the Chief Executive would provide the officers with the knowledge that they are meeting his requirements and that the report identified and made recommendations which would be acceptable and achievable to him.
45. A disclosure of this information prior to publication of the final report would have an adverse effect on the ability of the Chief Executive and his officers to freely discuss the interim findings of the draft report. It

would be likely to draw media interest, and the resultant pressure could disrupt the investigation and divert attention away from the areas which were of chief concern – namely identifying faults within the system and considering recommendations to prevent similar issues arising in the future. The Commissioner guidance on section 36 of the Act addresses issues of a similar nature and concludes that *"some disclosures may lead to less candid and robust discussions, hard choices being avoided and ultimately the quality of government being undermined"*.

46. Where communications of this sort are disclosed prior to the final position of the authority being reached it can make it difficult for the authority to complete its investigation. Press intrusion and interested parties trying to lobby for their own personal interests at too early a stage can make it difficult for officers to concentrate on the central issues which need to be considered. This can have a detrimental effect on the ability of the council to 'think the unthinkable' or to consider different options to address the situation.

The public interest in the information being disclosed

47. It is argued that the council's management of the building has led to significant cost to the public purse. There are also questions about how such an iconic building, which was being maintained by the council, ended up in a position where it became a potential danger to the public.
48. Further to this there is a strong argument for disclosure to identify why this has led to a position where the council may argue that the best solution is to sell the building into private hands. Clearly there may also be a debate about whether that is the correct decision in any event.
49. There are therefore very strong public interest arguments for a disclosure of information to the public which would fully explain how this situation occurred. These would however be answered through the publication of the final report into the situation.
50. The Commissioner recognises that a disclosure of the communications between the Chief Executive and officers drafting the report would lessen any allegations that the report was amended to avoid embarrassment to the council.
51. The Commissioner notes that where decisions are made on issues such as the future of iconic buildings held by the community there is a strong public interest in allowing the public to have a say in the decision making process and to lobby the council to protect the future of the building. This accords with intentions of the Aarhus Treaty that communities should have a greater say in the decision making process on matters which affect the environment locally. In this case however

the environment itself would not be affected. Rather, this effect of the decisions taken by the council would potentially be a loss of community ownership and the loss of a public resource.

The balance of the public interest

52. The Commissioner recognises the importance of the involvement of the community in issues of this nature. The council makes the final decision as to the future of properties which it considers to be surplus to requirements. There is however an inevitable public interest in a full explanation being provided to the community due to the circumstances which have led to cost and the potential sale of the site. The clock tower is considered to be an iconic building in the area. The Commissioner therefore recognises that there is a strong public interest in as much information as possible being provided to the public in order that it can scrutinise the council's management and decisions on this issue. The Commissioner recognises this, but considers that the disclosure of the final report will to an extent meet the majority of this need.
53. The communications between staff at the council would highlight how the investigation proceeded and would provide greater trust in how it was approached and on the conclusions which it reached.
54. However at the time of the request the report had not been concluded and discussions were still ongoing between officers and the Chief Executive. The Commissioner recognises that at that time a disclosure of the communications would have been likely to lead to interference which may have disrupted and delayed the final conclusions of the report being reached. It would have significantly affected internal confidentiality and disrupted the internal investigation processes which are required for the sound performance of a public authority.
55. Bearing in mind the intention to disclose the majority of the final report the Commissioner's conclusion is that the public interest in maintaining the exception outweighs the public interest in disclosing the information in this case.

Right of appeal

56. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

57. 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.
58. 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