

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 18 October 2021

Public Authority: West of England Combined Authority

Address: 3 Rivergate
Temple Quay
Bristol
BS1 6ER

Decision (including any steps ordered)

1. The complainant requested information with regards to the Bristol Mass Transit Policy. West of England Combined Authority (the council) refused the request under regulation 12(4)(d) of the EIR – material in the course of completion.
2. The Commissioner's decision is that regulation 12(4)(d) of the EIR is engaged and the public interest in maintaining the exception outweighs the public interest in disclosure.
3. The Commissioner does not require any steps.

Request and response

4. On 23 September 2020 the complainant requested "*...full copies of the Bristol metro/mass-transport feasibility and pre-feasibility studies.*"
5. After the complainant chased a response, the council refused the request under section 22 of the Freedom of Information Act on 4 December 2020, stating it was information intended for future publication.
6. Then on 29 January 2021, the council provided its internal review amending its response to refuse the request under regulation 12(4)(d) of the EIR – material in the course of completion.

Scope of the case

7. The complainant contacted the Commissioner disputing the council's refusal of his information request on 1 February 2021.
8. The scope of the case is for the Commissioner to determine whether 12(4)(d) of the EIR is engaged.

Reasons for decision

Is the requested information environmental information

9. The Commissioner has first considered whether the requested information constitutes environmental information as defined by regulation 2(1) of the EIR.
10. Regulation 2(1)(c) applies in this case. Feasibility studies on a transport system falls under measures affecting, or likely to affect the elements of the environment, namely the landscape. Therefore the Commissioner is satisfied that this is a request for environmental information.

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

11. Regulation 12(4)(d) of the 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.

12. 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.

13. For regulation 12(4)(d) of the EIR 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 may be relevant to the public interest test.

14. 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.

15. The council has told the Commissioner that it commissioned the Mass Transit feasibility study – Final Draft Early Phase Options Report to explore the feasibility and viability of a mass transit system in the Greater Bristol area for both overground and underground routes. The study also provided recommendations for the next steps to developing comprehensive transport appraisals for the options.

16. The council argues that the study was undertaken as part of the gathering of an evidence base for an overall Mass Transit review project and forms just part of that evidence base. It has not been and is not intended to be published as a separate document and none of the recommendations contained within it have been accepted or endorsed. The council says that to provide the document alone in its current format would be misleading.

17. The council's position is that the study falls under 'incomplete data' as it is purely part of a wider base of material that it will be using to formulate and develop the Mass Transit Policy.

18. Having considered the council's explanations of how the requested information is intended to be used, the Commissioner is satisfied that, although in itself the study is a complete document (albeit in draft form), it was created as part of the process of formulating and

developing policy, and this process was ongoing at the time of the request.

19. Therefore the Commissioner has concluded that the information falls within the scope of the exception and regulation 12(4)(d) of the EIR is engaged.
20. As the regulation 12(4)(d) is 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

21. As with 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.
22. Under regulation 12(1)(b) of the EIR, the public authority can only withhold the information if in all 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

23. The council has stated that it accepts that there is public interest in disclosure of information as it promotes the aims of transparency and accountability, which in turn can create greater public engagement and understanding of decisions taken by public authorities.
24. The complainant has argued that the studies have had a significant cost to taxpayers and so they have a right to see the contents.

Public Interest in maintaining the exception

25. The council has argued that whilst allowing taxpayers to engage with the democratic and decision-making processes at an earlier point in time and provide greater transparency in the council's decision making process are valid reasons for disclosing the information, this was weighed against releasing a potentially misleading draft document that would only give a partial picture.
26. It also states that it is important that the relationship and discussions between itself and other local authorities and consultants need to be conducted in the spirit of candour so proposals can be tested, weighed and, where necessary, challenged or discarded.

27. For this to happen effectively, a safe space away from public scrutiny was needed and has referred to a previous decision notice FS50738741¹ by the Commissioner, quoting:

"The Commissioner had considered 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 final 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."

28. The council highlights that the conclusion of the report has not been made publicly available as they form only part of the information to be used to develop the Mass Transit proposals.
29. Should the conclusions of this study be made publicly available with no context, there is a potential for a chilling effect which would deter parties from engaging fully with certain processes, and a bias forming that may affect other possible consultations or studies undertaken to gather further evidence.
30. The council says it is being mindful that it would not serve in the public interest to restrict or damage its ability to develop the Mass Transit proposals in the best interest of the local community by making partial and potentially misleading information available ad hoc and out of context to the overall picture.
31. As a formal public decision will be required in the future and the Mass Transit policy will be made publicly available at the appropriate time as part of the normal decision making process, the council believes that the public interest in withholding the partial and potentially misleading information outweighs the public interest in disclosure.

¹ [Freedom of Information Act 2000 \(Section 50\) \(ico.org.uk\)](https://ico.org.uk)

Balance of the public interest

32. The Commissioner has given some weighting to the specific public interest in disclosure in this case as the Mass Transit Policy is a significant endeavour which will have a broad impact on the local community and environment.
33. She accepts that there is always a general public interest in disclosing environmental information. She also considers that there may be an argument for informing public debate on the particular environmental issues that the requested information relates to.
34. The Commissioner has no doubt that such a transit system is going to result in a substantial financial cost and appreciates that the public would want to see the information that this money is being spent on.
35. However, the Commissioner is of the view that, there are strong public interest arguments in favour of the non-disclosure of the requested information.
36. The Commissioner considers that argument for the need for safe space as referred to above is a weighty consideration in this case. Given the costs that are going to be involved in the overall project, it would be in the public interest to ensure the council is able to obtain and discuss the best and most appropriate advice.
37. Finally, the Commissioner accepts the council's position that this information, if disclosed into the public domain could be misleading as it is a draft document to be used to create the overall policy, which is still ongoing.
38. With the fact that this policy will be then made publicly available as part of the normal decision making process, the Commissioner is satisfied that regulation 12(4)(d) of the EIR has been applied appropriately in this case and that the public interest in maintaining the exception outweighs the public interest in disclosure. The council was not, therefore, obliged to disclose the information requested by the complainant.

Right of appeal

39. 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

40. 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.
41. 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