

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 29 August 2023

Public Authority: Norfolk County Council
Address: County Hall
Martineau Lane
Norwich
Norfolk
NR1 2DH

Decision (including any steps ordered)

1. The complainant requested a copy of the Outline Bat Mitigation Strategy relating to the Norwich Western Link Road project. Norfolk County Council (the Council) withheld the information requested under regulation 12(4)(d) of the EIR. The Commissioner's decision is that the Council correctly applied regulation 12(4)(d) to the request. He does not require any steps to be taken.

Request and response

2. On 7 March 2023, the complainant wrote to Council and requested information in the following terms:

"Please produce a copy of the Outline Bat Mitigation Strategy pertaining to the Norwich Western Link Road project".
3. The Council responded on 31 March 2023 and stated that the information requested was exempt under regulation 12(4)(d) of the EIR. The Council upheld this position at the time of its internal review dated 2 June 2023.

Scope of the case

4. The complainant contacted the Commissioner on 2 June 2023 to complain about the way their request for information had been handled.
5. The scope of the Commissioner's investigation into this complaint is to determine whether the Council correctly applied regulation 12(4)(d) to the request.

Reasons for decision

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

6. 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.
7. Regulation 12(4)(d) is a class-based exception, which means that if the information falls within its scope then the exception is engaged. It is not necessary to demonstrate that disclosure would have any particular adverse effect in order to engage the exception. However, regulation 12(4)(d) is subject to the public interest test.
8. In this case, the Council's position is that the requested information constitutes material in the course of completion.
9. The Council advised that the outline Bat Mitigation Strategy is currently subject to ongoing development. It is still being formulated and requires a significant amount of work to solve and document elements of the strategy. The Council contends that it is a 'work in progress' which will be finalised and then relied upon when a planning application is formally submitted.
10. The Bat Mitigation Strategy has been drafted in order to engage with Natural England to promote understanding of the proposals in respect of the project, and to facilitate ongoing engagement. The content of the withheld information is subject to amendment, change and review by members of the project team. The Council also advised that engagement with Legal Counsel has taken place following development of the draft document in order to facilitate further development and refinement of the content and direction of the document. As such, the outline strategy "may contain perspectives that have not been influenced and amended through legal advice, and there may be an absence of conclusions drawn for several points".

11. In their internal review request and their complaint to the Commissioner the complainant stated that, in their opinion, the document in question is finished, as its findings have been presented to the Department for Transport (DfT) as part of the Council's Outline Business Case Addendum¹.
12. The Council addressed this point in its internal review and confirmed that the strategy had not been shared with the DfT. The Council was only required to provide the DfT with sufficient information to demonstrate that the project is potentially deliverable. The strategy has not, therefore, been relied upon to make a case to secure funding for the project. It added that:

"Any confirmation of funding from the DfT is then subject to a Final Business Case stage, for which the County Council must undertake detailed design work, demonstrate that all statutory approvals have been secured (planning consent, compulsory land order, highways order), and procure the scheme before seeking final funding approval through submission of a Full Business Case to the DfT".
13. The Council confirmed that the withheld information will be subject to substantive development to formulate and document the BAT Mitigation Strategy prior to its fundamental purpose, which is to support and inform the planning application for the project. The Council is awaiting further information from DfT in respect of funding for the project and it is working to prepare and submit a planning application for the project.
14. The Council considers that if the withheld information is disclosed prior to it undergoing further changes and revisions as a result of internal discussions, re-drafting and/or verification of certain aspects it would potentially provide an inaccurate, misleading and incomplete view to the public. The Council confirmed that once the document has been finalised it will be published as part of the planning application documentation.
15. The Commissioner notes that very limited information about the Council's bat mitigation strategy is referred to in the Outline Business case for the project. He also notes that the Outline Business Case confirms that the bat mitigation strategy is under development, likely to be updated and is subject to consultation prior to it being finalised.
16. 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

¹ <https://www.norfolk.gov.uk/-/media/norfolk/downloads/roads-and-transport/nwl/obc-and-appendices/nwl-addendum-to-the-obc.pdf>

an unfinished document, as it is clearly marked "Draft Bat Licence Mitigation Survey". The Commissioner also notes the Council's comments that the document is going to be subject to further development and changes before it is finalised. Based on this and the Council's explanations as to the status of the document and the project to which it relates the Commissioner accepts that the requested information constitutes material in the course of completion 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

17. Regulation 12(1)(b) requires that where the exception under Regulation 12(4)(d) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. The Commissioner is mindful of the provisions of Regulation 12(2) which state that a public authority shall apply a presumption in favour of disclosure.
18. The complainant pointed out that the project involves a significant amount of public money – around £300 million. In addition the project will have a significant impact on the whole population of Norfolk as expenditure on the project will affect other areas of Council spending in areas such as social and child service budgets.
19. The complainant also suggests that there are major question marks over the Council's approach to environmental protection matters relating to the project and referred to a particular online article² and BBC programme³.
20. The complainant advised that the Council does not have a proven track record of transparency in respect of planning matters. It held a public pre-planning consultation about the project between August and October 2022, and to date it has still not published the results of that consultation.
21. The Council acknowledges the general public interest in accountability and transparency in relation to decisions taken by public authorities and the spending of public money. The Council also confirmed that it has

² <https://www.edp24.co.uk/news/local-council/20752859.heavy-handed-accusation-council-forced-suspend-western-link-bat-survey/>

³ <https://www.bbc.co.uk/programmes/m000dwf3>

taken into account the presumption in favour of disclosure under the EIR.

22. The Council also accepts that there is a significant public interest in understanding any environmental impacts of the project in question. However, the Council considers that it is also in the public interest that the project reaches the public planning stage without any undue delay. When the Bat Mitigation Strategy document is finalised later this year, the Council confirmed that it will be published as part of the planning application process. Members of the public will then be able to fully engage in the planning process, which includes commenting on, and objecting to any proposals. The Council advised that there is also likely to be an inquiry in respect of the project, which will provide a further opportunity in relation to public access to transparency.
23. The Council contends that it requires a safe thinking space in order to develop and finalise the strategy document away from public scrutiny during the drafting stage. Premature disclosure of the information would erode this safe space.
24. The Council accepts that it provided a very limited amount of information about its bat mitigation strategy to the DfT to allow the project to progress. However, the strategy requires further consideration and detail in order to get the project to the next stage of the planning process.
25. The Council also contends that disclosure of the document before it has been finalised could result in the release of misleading and inaccurate data. This "could prematurely engage public debate in an unstructured and ineffective manner". It would also mean that the Council would need to divert resources to respond to external comments and this would affect the development and progress of the project.

Balance of the public interest

26. 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.
27. The Commissioner understands that there is significant local public interest in both the project itself, and in any effect it may have on the environment.
28. However, the Commissioner is of the view that equally, there are strong public interest arguments in favour of the non-disclosure of the withheld information.

29. 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.
30. With regard to the Council's argument that a safe space is needed to finalise the Bat Mitigation Strategy, the Commissioner acknowledges that the strategy is still under development and subject to change. In addition the wider process of submitting the associated planning application for the project is ongoing. He accepts that disclosure of the withheld 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.
31. The Commissioner has taken into account the timing of the request in this case and is mindful that matters relating to both the strategy itself and the wider project were live at the time of the request and the time of this notice. 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 Bat Mitigation Strategy, away from public scrutiny.
32. 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 withheld information is a draft outline strategy for the project. He also notes the Council's comments that the draft document is likely to be amended before it is finalised.
33. Finally, the Commissioner notes that the Council plans to publish the final version of the Bat Mitigation Strategy when a planning application for the project is submitted, at which time the public will have an opportunity to comment on the application and engage in the planning process.
34. 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.
35. 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, 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

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

Joanne Edwards
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