

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

Date: 18 July 2018

Public Authority: South Gloucestershire Council
Address: PO Box 1953
Bristol
BS37 0DB

Decision (including any steps ordered)

1. The complainant has requested information relating to a proposed development. South Gloucestershire Council disclosed some information and withheld the remainder, citing regulation 12(4)(d) (material in the course of completion) of the EIR.
2. The Commissioner's decision is that South Gloucestershire Council has cited regulation 12(4)(d) of the EIR appropriately. However, she considers that South Gloucestershire Council has breached regulations 5(2) (time for compliance) and 14(3) (refusal to disclose information) of the EIR.
3. The Commissioner does not require South Gloucestershire Council to take any steps following this decision notice.

Request and response

4. On 17 October 2017, the complainant wrote to South Gloucestershire Council (SGC) and requested information in the following terms:

'Further to the e-mail from [name redacted] on 12 July 2016 (titled "Expressions of Interest-locally led Garden Villages Towns and Cities – Buckover") that outlined transport concerns for the proposed development, I would like to receive all subsequent internal and external emails, letters, documents and correspondence between Officers (including the Council's Transport Team), or between Officers and members of the Cabinet (also known as the Executive), relating to concerns about the suitability of the proposed development from a

transport point of view.

I would also like to receive all internal and external emails, letters, documents and correspondence between the same dates relating to concerns expressed by, or between, Officers or members of the Cabinet about the close proximity of the proposed site of BGV and the town of Thornbury, and specifically any concerns raised about the Council's ability to prevent building on the proposed "green gap" between BGV and Thornbury, such as those put forward by [reference redacted].'

5. SGC responded on 1 December 2017. It explained that it was interpreting his concerns in the context of the EIR to mean matters of disagreement between officers and their external partners/consultants. It provided some information but refused to provide the remainder citing the following exception:

regulation 12(4)(d) (material in the course of completion).

6. Following an internal review SGC wrote to the complainant on 30 January 2018, upholding its decision.

Background

7. SGC is working with 3 other unitary authorities to prepare a Joint Spatial Plan (JSP). It is very high level and the purpose is to provide a strategic, overarching vision and framework across the 4 unitary authorities involved, to help deliver new homes, land for employment purposes and the supporting infrastructure that will be needed over 20 years, until 2036. Each stage of the JSP is being prepared in accordance with the statutory requirements in the Town and Country Planning Regulations 2010.
8. Each unitary authority has to then produce an individual Local Plan in accordance with the JSP and all other local allocations and policies required in order to determine planning applications and to deliver the levels of development needed. The Local Plans are also prepared in accordance with the statutory requirements in Town and Country Planning Regulations 2010.
9. SGC also explained that as the JSP is setting the new growth agenda for the whole of the West of England, it is being prepared first and therefore it is the most advanced in terms of completing the necessary stages it needs to go through.
10. Additionally, SGC explained that at the time of the request, there had been two previous consultations: November 2015 to January 2016, which asked respondents to provide feedback on what the priorities of

the JSP should be and November 2016 to January 2017, which asked for people's views on the emerging spatial strategy.

11. Following these two consultations, a draft plan was prepared and published for a 6 week public consultation period on 22nd November 2017, (which closed on 10th January 2018). Under the planning rules this is called the 'Publication Plan' but it is not the final plan.
12. SGC also explained that the withheld information, which consists of its modelling approach and trip rate assumptions (as set out in paragraph 16) forms part of the JSP process and its related technical evidence.

Scope of the case

13. The complainant contacted the Commissioner on 11 December 2017 to complain about the way his request for information had been handled. He explained that SGC had submitted the JSP to the Secretary of State under regulation 19 of the Town and Country Planning Regulations 2010. In addition he pointed out that, as only the Secretary of State could make any changes, SGC could not rely on regulation 12(4)(d) to withhold the requested information.
14. During the Commissioner's investigation, SGC explained that, at the time of the request, its final JSP had not been submitted to the Secretary of State. SGC confirmed that this was done on 13th April 2018, in accordance with regulation 19 of the Town and Country Planning Regulations 2010.
15. Furthermore, SGC explained that, allowing for the passage of time and given that its Publication Plan had been published and the 6 week consultation period was over, the requirement to withhold certain information had passed. It disclosed further information to the complainant.
16. The Commissioner will consider SGC's application of regulation 12(4)(d) to the withheld information which consists of the:
 - Modelling approach – emails relate to the requirements for modelling and the need to use the strategic transport modes and the necessary data collection required in order to improve the robustness of the transport model on the Buckover station;
 - Trip Rate assumptions- emails relate to the negotiation of assumed trip rates to be used in the assessment of the impact of the Buckover Garden village.

Reasons for decision

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

17. Regulation 12(4)(d) of 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.
18. 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.
19. For regulation 12(4)(d) to be engaged, the requested information must fall within one of the categories contained within it.
20. The first category is that the information relates to material which is in the course of completion. The 'material' in question may be a final policy document that is to be produced later. Therefore, although the requested information may be contained in a document which is, in itself, complete, if that document is intended to inform a policy process that is still ongoing, the information may attract the exception.
21. The second category is unfinished documents. A document will be unfinished if the public authority is still working on it at the time the request is received. Furthermore, a draft version of a document will remain an unfinished document even once a final, finished version of that document has been produced.
22. The third category is incomplete data. This is data that a public authority is still collecting at the time of the request. Data that is being used or relied upon at the time of the request is not incomplete, even if it may be modified later.
23. SGC explained that it considered that the first category ie still in the course of completion applied as all of the resulting modelling work and trip rate assumptions would also be included in the Transport Assessment which the developers were producing. It also explained that, given that this was a negotiation and there had been a change in consultants leading the negotiation on its behalf, its modelling and trip rate assumptions may not be completed, so it was also relying on the second category ie unfinished documents.

24. It is the Commissioner's view that the relevant consideration is the information contained within the withheld information and the purpose for which it was created, not the overall application to which it relates.
25. She has considered whether the withheld information relates to information in the course of completion. It consists of a series of emails between SGC and the transport consultant regarding the:
 - Modelling approach – emails relate to the requirements for modelling and the need to use the strategic transport modes and the necessary data collection required in order to improve the robustness of the transport model on the Buckover station;
 - Trip Rate assumptions- emails relate to the negotiation of assumed trip rates to be used in the assessment of the impact of the Buckover Garden village.
26. SCG explained to the Commissioner that the additional information it had disclosed to the complainant related to the production of the JSP. However, the withheld information relates to the production of a transport assessment which would support a subsequent planning application for Buckover. SGC also explained that the production of this and the planning application, is the responsibility of the developer, not SGC.
27. Additionally, SGC explained that its responsibility for this and all planning applications, is to ensure that any transport assessment is robust and that the impact of the development is sufficiently mitigated through a period of negotiation. It also explained that these negotiations are reflected in the withheld emails and confirmed that they are ongoing.
28. SGC also explained that its officers were progressing both the transport model development and trip rate assumptions and they would influence the outcomes of the modelling work that would support the strategic development locations being taken forward and a planning application. It explained that this meant that the development of this work remained incomplete. SGC explained that it was necessary for its officers and their consultants to have the space and time to allow them to determine the final form of the model required and be able to engage with colleagues and consultants during the development stages, in the knowledge that they can express their formative views without the threat of these views being published.
29. SGC also explained that as there were a lot of objections received during the consultation period, this needed to be resolved through a public examination known as the Examination in Public. This examination will be undertaken by an inspector appointed by the Secretary of State and

will consider all the issues for and against the JSP and its content, together with all the technical evidence provided by all parties.

30. The inspector will report back to the unitary authorities, identifying any proposed amendments to the plan which are required. Once the plan meets all the planning requirements and laws, the unitary authorities adopt it, giving it statutory status.
31. Additionally, SGC also explained that the JSP contains seven main policies and identifies Buckover as one of 12 locations identified for strategic growth. Site specific allocations and policy designations will be determined through each unitary authority's Local Plan.
32. The Commissioner is satisfied that the withheld information relates to the production of a transport model development and trip rate assumptions and that at the time of the request, these issues were still "live", and therefore the withheld information relates to material which is still in the course of completion.
33. The Commissioner therefore considers that regulation 12(4)(d) is engaged. As the regulations under the EIR are all subject to the public interest test, the Commissioner will go on to consider whether, in all the circumstances in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

Public interest arguments in favour of maintaining the exception

34. SGC argued that the public interest in maintaining regulation 12(4)(d) outweighed the public interest in disclosure. It explained that the withheld information relates directly to the on-going preparation of the JSP and will ultimately form part of its submission of this plan to the inspector appointed by the Secretary of State to undertake an Examination in Public. As such the plan preparation remains a "live" issue at this time.
35. Additionally, SGC argued that the Commissioner recognised the importance of the timing of a request. It explained that she had taken account of the following in determining the public interest in relation to the exception:
 - Whether a formal decision or decision to adopt a Plan has been taken.
 - The fact that much of the information requested is already in the public domain.
 - The potential at a future date for legal challenges to be made to a decision to adopt.

36. SGC explained that, at the time of the request, the JSP had not been submitted to the Secretary of State for Housing Communities and Local Government (the Secretary of State) for examination by an independent inspector, appointed on behalf of the Secretary of State. It also confirmed that the intention was for this to take place on 13 April 2018.
37. SGC also pointed out that at the time of the request it had not made a formal decision to adopt the JSP. It explained that it would not be in a position to determine this until the JSP has undergone its Examination in Public and SGC had received a written report from the appointed independent inspector, expected to be in early 2019.
38. In addition, SGC explained that the 4 authorities involved would be providing further transport technical work. It confirmed that it intends to undertake further public consultation on the strategic transport packages that will support the strategic development locations as part of its new Local Plan, later this year.
39. SGC also explained that the complainant would, along with other interested parties who oppose the allocation, be able to review the completed technical information when it is published. They will also have the opportunity to address the independent inspector at the Examination in Public, on matters relating to the proposed strategic development locations and other matters.
40. Furthermore, SGC argued that it would not be appropriate to disclose technical data relating one of the strategic development locations in advance of disclosing equivalent technical data relating to other strategic development locations. It also argued that disclosing incomplete data would have a detrimental and prejudicial impact on decision making and on the ongoing negotiation in relation to modelling work and master planning.
41. SGC also argued that the disclosure of incomplete information had the potential to be misleading, prejudicial and potentially waste time at the Examination in Public. Additionally, SGC argued that disclosure could expose it to an increased risk of challenge from parties who consider that they could be disadvantaged by the release of information relating to one strategic development location. SGC also explained that when completed, the modelling approach and outcomes will result in the production of a transport assessment which will be released into the public domain as part of any planning application for sale.
42. SGC confirmed that further transport technical work will be provided and expected to be available publically before the end of May 2018. It also confirmed that it intends to undertake further public consultation on the strategic transport packages that will support the strategic development locations. In addition, SGC explained that interested parties will have

the opportunity to address the independent inspector at the Examination in Public on matters relating to the proposed strategic development locations and other matters.

43. Furthermore, SGC explained that once it received the outcome of the Examination in Public regarding the JSP, including what changes the Inspector wants to make to the JSP, it would know with more certainty what it needs to include its own Local Plan.

Public interest arguments in favour of disclosing the information

44. SGC acknowledged that there was considerable information relating to the inclusion of Buckover Garden Village as a strategic development location within the JSP already in the public domain. At the time of the request, each authority party to the JSP, had received and considered a detailed report recommending the approval of a "publication draft of the JSP". It also explained that in order for officers to be in a position to recommend that each authority approve the publication draft document, a degree of technical work had been undertaken on each strategic development location to establish its deliverability, including in transport terms.
45. The complainant argued that disclosure of the requested information was in the public interest. He explained that the present request concerns information about a major housing development (Buckover Garden Village) that has met with overwhelming local opposition, had been denied Government support twice and remained in the Joint Spatial Plan despite suggestions that information on this proposal had been suppressed by SGC.
46. The complainant provided the Commissioner with an extract from a previous response from SGC to an FOI request made more than a year ago, concerning application for Government funding for this development. He explained that it was an e-mail from SGC's Acting Head of Transport and Strategic Projects, [name redacted] to senior planning officers in SGC, in which she criticises the proposal from a transport point of view, but suggests that this could be "fudged" if the council wishes to pursue this development for other reasons.
47. The complainant explained that the present request was a direct follow up this, to ascertain what subsequent information may have been suppressed in terms of the transport issues for this proposal and also on the other main argument against the development, being its proximity to the existing town of Thornbury. He also explained that he strongly believes that residents of Thornbury have a right to know the content of any professional assessments made on the proposed development because:

- All of the public documentation on this proposal contains only positive sentiments, reflecting SGC's determination to proceed.
- It is known from this much earlier document that there are genuine concerns held by officers about the sustainability of this proposal.
- The JSP is now a finished proposal from SGC having been submitted under regulation 19 of the Town and Country Regulations 2010.

Balance of the public interest arguments

48. The Commissioner has considered the public interest arguments from both parties, including the public interest in transparency.
49. The Commissioner 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 issue that the requested information relates to.
50. The Commissioner understands that, given the impact that the JSP may have on the local community, the strength of the public interest in transparency and accountability in this case cannot be underestimated.
51. 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.
52. In its explanation to the Commissioner about why regulation 12(4)(d) is engaged, she notes that SGC has referred to the need for space for officers to be able to engage with colleagues and consultants (see paragraph 30). She considers that this argument is also relevant when considering the public interest.
53. 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 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 and whether it carries any significant weight will depend on the timing of the request.
54. With regard to SGC's argument that a safe space is needed to determine the final form of the model required and be able to engage with

colleagues and consultants during the development stages, in the knowledge that they can express their views without the threat of their formative views being published, the Commissioner considers that this is reasonable. She considers that officers should be able to develop their ideas in the knowledge that they have the space to do so, whilst the process is still ongoing.

55. The Commissioner also notes SGC's argument regarding disclosure having a detrimental and prejudicial impact on decision making. She considers that this relates to disclosure having a 'chilling effect', which concerns the loss of frankness and candour, should the information be disclosed. In turn, this would lead to poorer quality advice and less well formulated policy and decisions.
56. The Commissioner's view is that if the relevant information was disclosed in response to the request, there was a realistic prospect that it would interfere with the decision-making process regarding the ongoing preparation of the JSP.
57. In this case, the Commissioner is sympathetic to the complainant's concerns regarding the impact of the proposed development and why he believes it is in the public interest to disclose the requested information. She also notes the complainant's point that the proposed development had met with overwhelming local opposition. Additionally, the Commissioner notes SGC's explanation during her investigation that as so many objections had been raised, they needed to be resolved through the Examination in Public.
58. The Commissioner has also considered the timing of the request. She notes that the JSP had not been submitted to the Secretary of State for consideration, in accordance with the statutory requirements of section 19 of the Town and Country Planning Regulations 2010, at that time. She also understands that the Secretary of State can make amendments to the JSP. The Commissioner considers that, as this process is governed by statute and information has to be disclosed by way of public consultations and in the case of the Examination in Public, through hearings, it all goes some way to satisfying the public interest. She would not want to undermine the JSP or the statute which governs the preparation of it.
59. The Commissioner therefore takes the view that the mechanisms in place allow for information to be made available at the various stages of the JSP and that this provides transparency and openness.
60. Additionally, the Commissioner considers that the formulation of the JSP is a continuous process and throughout the various stages of development, is subject to change. She notes that any interested parties have been given the opportunity to comment on the JSP and will

continue to be able to do so and that SGC has confirmed that anybody who opposes it will be able to address the inspector at the Examination in Public. The Commissioner is also aware that planning applications are subject to a statutory process.

61. The Commissioner also considers that at a later stage the inspector may decide that some of the information should be made available for consideration as part of the JSP process. However, she has to consider the circumstances at the time of the request and the rights of access under the EIR.
62. Taking everything into account, the Commissioner is not persuaded in this case that the arguments put forward for disclosure under the EIR are sufficient to circumvent the formal process under which the JSP is governed, at this stage.
63. The Commissioner is therefore satisfied that regulation 12(4)(d) has been applied appropriately in this case and that the public interest in maintaining the exception outweighs the public interest in disclosure.

Conclusion

64. Taking all of the above into account, the Commissioner is satisfied that regulation 12(4)(d) has been applied appropriately in this case and that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Procedural issues

65. The complainant submitted her request on 17 October 2017. SGC responded on 1 December 2017.

Regulation 5(2) – time for compliance

66. Regulation 5(2) requires that the public authority must respond to a request promptly and in any event no later than 20 working days after the date of receipt.
67. The Commissioner considers that SGC has breached regulation 5(2) as it took longer than 20 working days to respond to the request.

Regulation 14(2) – refusal to disclose information

68. Regulation 14(3) states that if a public authority wishes to refuse any part of a request it must issue a refusal notice within the 20 working day time for compliance, citing the relevant exemptions.

69. The Commissioner considers that SGC has breached regulation 14(3) as it took it took longer than 20 working days to explain which exception it was relying on.

Right of appeal

70. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

71. 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.

72. 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

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