

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 16 December 2015

Public Authority: Medway Council

Address: Gun Wharf
Dock Road
Chatham
Kent ME4 4TR

Decision (including any steps ordered)

1. The complainant has requested information relating to a statutory consultation about a proposed traffic regulation order. Medway Council disclosed some information, confirmed other information was not held and withheld other information under the EIR exceptions for personal data (regulation 13) and internal communications (regulation 12(4)(e)).
2. The Commissioner's decision is that Medway Council correctly withheld information under regulation 13(1) and regulation 12(4)(e) of the EIR but, in failing to conduct a proper internal review in 40 working days, it breached regulation 11(4).
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 6 July 2015, the complainant wrote to Medway Council (the "council") and requested a range of information relating to a statutory consultation about a proposed traffic regulation order. The full text of the request is reproduced at the annex to this decision notice.
5. The council responded on 21 July 2015. It confirmed that some information was not held and withheld other information under the EIR exceptions for personal data (regulation 13) and internal communications (regulation 12(4)(e)).

6. Following an internal review the council wrote to the complainant on 28 August 2015. It disclosed redacted versions of the information which had previously been withheld under regulation 13.

Scope of the case

7. On 8 September 2015 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly withheld information under the exceptions cited.

Reasons for decision

Regulation 13(1) – personal data

9. The council has withheld information relating to individuals who responded to the statutory consultation.
10. Regulation 13 provides that personal data of someone other than the person making the request shall not be disclosed where either one of two conditions are satisfied. The first condition, which is relevant here, is that disclosure would contravene one of the data protection principles in the Data Protection Act 1998 (DPA) or would contravene section 10 of the DPA.

Is the withheld information personal data?

11. Personal data is defined in section 1(1) of the DPA as -

"...data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual".

12. In determining whether information is the personal data of individuals other than the requester, that is, third party personal data, the Commissioner has referred to his own guidance and considered the information in question. He has looked at whether the information relates to living individuals who can be identified from the requested information and whether that information is biographically significant about them.

13. In this case the withheld information consists of the names and addresses of individuals who have made submissions to the council as part of the relevant consultation.
14. Having seen the withheld information the Commissioner is satisfied that it constitutes personal data as defined by the DPA.

Would disclosure contravene any of the Data Protection Principles?

15. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations in this case have focused on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of disclosure against the legitimate public interest in disclosing information.

Reasonable expectations

16. The council has advised that it considers that it would not have been within the reasonable expectations of respondents that their personal data would have been passed to third parties. The council drew the distinction between representations in relation to planning applications, which carry an expectation of publication and this consultation which carries no such expectation.
17. The council has confirmed that the information was obtained for the sole purpose of processing individuals' responses to the consultation and it has advised that it is not its current practice to place personally identifiable details relating to such consultations in the public domain.
18. The Commissioner notes the context within which the individuals in question provided their personal data and is satisfied that it would not have been within their reasonable expectations for it to be disclosed more widely or processed for purposes other than that for which it was submitted.

Consequences of disclosure

19. The Commissioner accepts that, given that there is a reasonable expectation that the information will not be disclosed, there would be some level of distress from disclosure on the basis that privacy has been unexpectedly lost.
20. The Commissioner accepts therefore that the disclosure of this information into the public domain would have some negative impact on

the individual's privacy, to the extent that it will result in the unexpected loss of privacy, which in itself could be distressing.

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

21. The complainant has argued that it is important that they know from which address representations were received. In their view, greater or lesser weight should be given to representations depending on whether they come from an address near or far from the proposed waiting restrictions. The complainant has argued that, without this information, they would be impeded in properly lodging an objection as they could not properly evaluate the replies to the statutory consultation.
22. The council has argued that disclosure of the information would breach the first principle of the DPA, that it would be unfair to the individuals concerned and that disclosure of redacted versions of the information has served the public interest in this case.
23. The council has also argued that the aim of the consultation is to give residents the opportunity to frankly express their views in relation to the proposal. Publishing their identities would be a betrayal of trust and would be likely to undermine the effectiveness of future consultations as residents would be reluctant to make submissions.
24. The Commissioner understands why the complainant wishes to have access to the information, however, their individual needs have to be set against the broader public interest in this matter. The Commissioner accepts that the planning consultation process provides a mechanism for public engagement with decision making and this in itself provides an argument for maintaining the integrity of the process and the council's practice in relation to personal data.
25. The Commissioner also considers that the unexpected and unwarranted invasion of individuals' privacy which disclosure would cause would not be in the public interest in this case. He also considers that the public interest has been served by the council's disclosure of redacted versions of the information.
26. In view of the above, the Commissioner is satisfied that disclosure of the information would be likely to contravene the first data protection principle. He has therefore, concluded that the council has correctly withheld the information under regulation 13(1) of the EIR.

Regulation 12(4)(e) – internal communications

27. Regulation 12(4)(e) of the EIR states:

"For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that...

(e) the request involves the disclosure of internal communications."

28. Regulation 12(4)(e) is a class based exception so it is not necessary to demonstrate prejudice or harm to any particular interest in order for its engagement.

29. In this case, the council has withheld correspondence between its integrated transport team, its legal team and other internal officers which relate to decisions around the proposed traffic order.

30. Having considered the council's explanations and referred to the withheld information the Commissioner is satisfied that the withheld information constitutes internal communications and that the exception at regulation 12(4)(e) is, therefore, engaged.

31. The Commissioner considers that the underlying rationale behind the exception is that public authorities should have the necessary space to think in private. The original European Commission proposal for the Directive (COM(2000)0402) explained the rationale as follows:

"It should also be acknowledged that public authorities should have the necessary space to think in private. To this end, public authorities will be entitled to refuse access if the request concerns [...] internal communications."¹

32. Although a wide range of internal information might be caught by the exception, the Commissioner is of the opinion that, following the above European Commissioner proposal (which the EIR are intended to implement), public interest arguments should be focussed on the protection of internal deliberation and decision making processes.

33. The Commissioner considers that these factors must then be balanced against the public interest in disclosure. Regulation 12(2) specifically provides that public authorities should apply a presumption in favour of disclosure. This means that a public authority may have to disclose some internal communications, even though disclosure will have some negative effect on internal deliberation and decision making processes.

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0402:FIN:EN:PDF>

Public interest in disclosure

34. The Commissioner acknowledges the presumption in favour of disclosure inherent in regulation 12(2) of the EIR. He also accepts that there is an inherent public interest in the openness and transparency of public authorities and their decision making process.
35. The complainant is concerned about the council's handling of this matter and has argued that disclosure of the information would assist them in reaching a view in relation to the substantive matter.
36. The Commissioner recognises that, particularly in relation to planning matters, there is a general public interest in making information available which will allow the public to understand and engage with decisions which will affect their living environment.

Public interest in maintaining the exception

37. The council has explained that the traffic regulation order (TRO) has not been finally confirmed and the withheld information relates to discussions around decision making. The council has argued that officers involved would assume that free and frank discussions in relation to this matter would not be disclosed prior to a decision being made. Disclosure of information, it is argued, would lead to a "chilling effect" whereby future decision making would be impaired because officers would be reluctant to provide free and frank views or advice.
38. This need for a "safe space" is an acknowledged part of any decision making process and allows for a public authority to consider options and make suggestions in an environment which is protected from challenge and intrusion which may serve to undermine the process and weaken the quality of decision making.
39. The Commissioner accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This may carry significant weight in some cases, particularly where the relevant issues are still live.
40. The council has provided the Commissioner with a schedule which shows that the informal, concessionary consultation regarding the TRO began on 16 January. After considering responses, the council launched the statutory consultation process on 22 May 2015 and, following completion of this process and, in view of concerns raised by consultees, a second statutory consultation process was conducted on 3 July 2015. The council explained that, following the receipt of further challenges relating to the TRO, the matter is still under consideration and a final decision has not yet been reached.

41. In view of the council's submissions, the Commissioner is satisfied that the matters to which the information relate are still live and that this carries a significant weighting in favour of maintaining a safe space and upholding the exception.

Balance of the public interest

42. The Commissioner considers that there is no automatic public interest in withholding information just because it falls within this class-based exception. Neither should there be a blanket policy of non-disclosure for a particular type of internal document. Arguments should always relate to the content and sensitivity of the particular information in question and the circumstances of the request.
43. In balancing the public interest arguments in this case the Commissioner has given due weight to the position public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. However, it is open to the Commissioner to consider the severity and extensiveness of any harm that disclosure might cause to such a safe space, or, in relation to the extent of any 'chilling effect' which the possibility of future disclosure might have on council staff's willingness to contribute uninhibited and robust advice.
44. The Commissioner considers that the need for a safe space will be strongest when an issue is still "live". Once a public authority has made a decision, a safe space for deliberation will no longer be required and the public interest is more likely to favour disclosure.
45. The Commissioner accepts that there is a general public interest in public engagement in planning processes, particularly where they relate to policies which impact on the local environment. However, except in cases where there are specific concerns that a process is not being correctly followed, where sufficient information is not being made available or where there is evidence of malpractice, the Commissioner does not consider that this general interest justifies bypassing information disclosures made outside the statutory planning regime.
46. In reaching a decision on where the balance of the public interest lies in this case, the Commissioner has attached particular weight to the fact that no formal decision had been made at the time of the request, that there is a need to avoid any impact on the decision making process by premature disclosure of the requested information, and the lack of compelling public interest arguments in favour of disclosure.
47. Whilst the Commissioner accepts that disclosure of the information might well aid transparency he considers that this would be to the

detriment of the ongoing deliberation process which the withheld information records. In short, there is a stronger public interest in the council being able consider the available options in this matter in order to inform a stronger decision making process. He also considers that the disclosure already made by the council in relation to this matter and the existing planning statutory framework provide opportunities for public engagement.

48. For the reasons set out above the Commissioner considers that, in all the circumstances of the case, the public interest in maintaining the exception set out in regulation 12(4)(e) outweighs the public interest in disclosure and he therefore accepts that information should be withheld.

Regulation 11 – internal review

49. Regulation 11(1) of the EIR states:

"Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request."

50. Regulation 11(3) of the EIR states:

"The public authority shall on receipt of the representations and free of charge-

(a) consider them and any supporting evidence produced by the applicant; and

(b) decide if it has complied with the requirement."

51. Regulation 11(4) states:

"A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations."

52. In this case the complainant wrote to the council to request an internal review on 7 August 2015. Although the council provided a response on 28 August 2015 this did not address the full scope of the complainant's representations. During the Commissioner's investigation the council issued a further response to the complainant on 29 October 2015 which remedied this, however, in failing to provide a review within 40 working days, the council breached regulation 11(4) of the EIR.

Right of appeal

53. 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

54. 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.
55. 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

Annex – Request for information (submitted 6 July 2015)

(In relation to the proposed traffic regulation order)

“1. Please supply written copies of all responses to the above statutory consultation which commenced on May 22 2015.

2. For any comments or representations received by the council in connection with the above statutory consultation but not in writing please supply details in writing of all comments or representations including from whom such came.

3. Please supply details in writing of face to face contacts and meetings/discussions with residents and/or councillors and/or anyone else.

4. Starting with the date of May 22 2015, please supply copies of all correspondence, whether by email or by other means, sent to or from Medway Council about this proposal (and not included in your reply to 1 above). This includes correspondence going to or from councillors.

5. Starting with the date of May 22 2015 please supply copies of all internal correspondence or other documentation (computerised or in any other form) at Medway Council including emails, records of discussions or meetings with any person(s). This includes all contact of any sort with councillors.

6. Please supply copies of records of all visits to this site since May 22 2015. It is known that there has been at least one.

7. What is the reason for this amended proposal and why are your (sic) proposing it? Please supply documents to prove why you are proposing it and that you have complied with the law in so doing.

8. From whom did the comments which resulted in this amended proposal come? Was it Mierscourt School?”