

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 23 January 2017

Public Authority: Middlesbrough Borough Council

Address: PO Box 500
Civic Centre
Middlesbrough
TS1 9FT

Decision (including any steps ordered)

1. The complainant has requested information relating to their business interests. Middlesbrough Borough Council disclosed some information and withheld other information under the exceptions for internal communications (regulation 12(4)(e)), commercial confidentiality (regulation 12(5)(e)), interests of the information provider (regulation 12(5)(f) and personal data (regulation 13(1)).
2. The Commissioner's decision is that Middlesbrough Borough Council has correctly applied regulation 12(4)(e), regulation 12(5)(f) and regulation 13(1) to withhold the requested information.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 7 December 2015, the complainant wrote to Middlesbrough Borough Council (the "council") and requested information in the following terms:

*"Please provide me with a copy of all information within Middlesbrough Council's communication systems (including letters, emails, file records and internal memos) relating to my business interests – namely the development and land/property interests of Greater Expectations Limited extending back over the last 5 years, from December 8th 2010 to December 7th 2015. These should if possible include all identifiable reference to myself, **[name redacted]** and/or my business by name, 'Greater Expectations' also known as G E. Limited' of Grange Road Middlesbrough. I can advise that I have no wish to see documents or emails or other material that relates solely and exclusively to planning matters. This may serve to significantly reduce the amount of information potentially requested. I am particularly concerned to know of any information and references made to parking provision, leasing, property/land valuations, the alternative use or prospective acquisition of land owned or controlled by Middlesbrough Council at the rear of my business location at Grange Road Middlesbrough i.e. land at Monkland Close and to the rear of 36, Grange Road."*

5. The council responded on 11 February 2016. It disclosed some information and withheld other information under the exceptions for commercial confidentiality (regulation 12(5)(e)) and personal data (regulation 13(1)).
6. Following an internal review the complainant wrote to the complainant on 31 March 2016. It disclosed further information and confirmed that, in addition to regulation 12(5)(e) and regulation 13(1), it was also relying on the exceptions for internal communications (regulation 12(4)(e)) and interests of the information provider (regulation 12(5)(f)) to withhold information.

Scope of the case

7. On 1 June 2016 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 her investigation would consider whether the council had correctly handled the request under the EIR and whether it had correctly applied exceptions to withhold some of the requested information.

9. During the course of the Commissioner's investigation the council disclosed additional information to the complainant. The Commissioner has considered whether the outstanding information has been legitimately withheld.

Reasons for decision

Is it Environmental Information?

10. The complainant considers that the council wrongly handled the request under the EIR and has argued that the request falls to be dealt with under the Freedom of Information Act 2000 (FOIA).
11. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant part of the definition are found in 2(1)(a) to (c) which state that it is as any information in any material form on:
 - '(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements...'*
12. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.
13. In this case the requested information relates to the development of land and property and specifically "... parking provision, leasing, property/land valuations, the alternative use or prospective acquisition of land..."

14. The requested information relates to the use of land and planning. In view of this and given innumerable previous decision notices which have placed planning matters within the purview of the EIR, the Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information Tribunal in the case of *Kirkaldie v IC and Thanet District Council (EA/2006/001)* ("Kirkaldie").
15. As such, the Commissioner has concluded that the council correctly handled the request under the EIR.

Regulation 12(4)(e) – internal communications

16. 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."

17. 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.
18. The withheld information consists of internal email communications between council Planning and Asset Management officers and senior managers. The information relates to negotiations and other issues raised by the complainant in relation to their company.
19. 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.
20. 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

21. Although a wide range of internal information might be caught by the exception, the Commissioner is of the opinion that, following the above European Commission proposal (which the EIR are intended to implement), public interest arguments should be focussed on the protection of internal deliberation and decision making processes.
22. 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.

Public interest in disclosure

23. 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.
24. The council has acknowledged that there is a public interest in promoting public debate, furthering the understanding of issues under consideration and allowing individuals to better understand decision making. It has also recognised that there is a general public interest in disclosing information to promote accountability and transparency in decision making.

Public interest in maintaining the exception

25. The council has explained that, at the time of the request, it had been in the process of negotiating the sale/lease of land (for additional parking spaces) with the complainant's business, Greater Expectations Limited ("GE").
26. The council has explained that, whilst lease negotiations were complete, other associated matters were still under consideration and disclosure at the time of the request would hinder its ability to reach free and informed decisions.

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

27. The council has argued that, when conducting commercial negotiations, challenges and matters relating to enforcement, it is critical that officers have a safe space to discuss and consider options without public intervention. Where issues are contentious, as the council suggests is the case here, the council has argued that it is important that internal advice can be sought and free and frank discussions take place. Disclosure of the information at this stage, the council has suggested, would inhibit the effectiveness of the decision making process resulting in detriment to its ability to maximise the utility of public land and public money.

Balance of the public interest

28. The Commissioner accepts that there is a general public interest in public engagement in decision making processes, particularly where they relate to the use of land. 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 disclosures made outside of any negotiation process.
29. 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.
30. 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.
31. 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 relationship between the council and the complainant's business provide sufficient scope for engagement.
32. The Commissioner acknowledges that the complainant has a valid interest in accessing the information, however, the public interest in the

context of the EIR relates to the broader public interest rather than to the interests of individuals or specific businesses.

33. 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 the internal communications in question should be withheld.
34. In addition to regulation 12(4)(e), the council applied regulation 12(5)(e) to withhold some of the requested information considered above. As the Commissioner is satisfied that the information was correctly withheld under regulation 12(4)(e) she has not gone on to consider whether regulation 12(5)(e) also applies.

Regulation 12(5)(f) – the interests of the information provider

35. Regulation 12(5)(f) provides that information can be withheld where its disclosure would have an adverse affect on the information provider. In order for the exception to be engaged it must be shown that the information provider:

"(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure.

36. The withheld information consists of communications from a third party business (Gentoo) which sought advice from the council.
37. Having considered the withheld information and the council's submissions the Commissioner is satisfied that the information meets the 3 criteria specified by the exception. She has gone on to consider whether disclosure of the information would have an adverse affect on the interests of Gentoo.

Adverse Affect

38. The Commissioner interprets the wording of "would adversely affect" in regulation 12(5)(f) to set a relatively high threshold in terms of likelihood which has to be met in order for the exception to be engaged. She does not consider it sufficient that disclosure may or could have some level of adverse effect but rather that disclosure *would* have an

adverse affect and the likelihood of this happening must be more substantial than remote.

39. The council has explained that, at the same time as it was negotiating the sale/lease of land there was a further dispute between GE and Gentoo regarding staff and customer parking.
40. The council has confirmed that, given the limited number of parking spaces in the area, disclosure of the information would provide an advantage to GE and would impact on Gentoo's commercial and economic development.
41. The council has explained that organisations communicating with it have an expectation that correspondence will be treated in confidence. It has argued that, if Gentoo were aware that information it provided to the council would be disclosed it would be discouraged from seeking advice, resulting in damage to its ability to effectively engage in its dispute with GE. The council has also argued that disclosing the information would result in an escalation of the dispute.
42. Having considered the withheld information and the relevant arguments, the Commissioner is satisfied that disclosure of the withheld information prior to a decision being made regarding the parking matters under consideration would adversely affect the interests of Gentoo. She has gone on to consider the public interest test.

Public interest in disclosing the information

43. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in their understanding of how public authorities make their decisions and in turn fosters trust in public authorities. In many circumstances the disclosure of recorded information may allow greater public participation in the decision making process. In its submissions the council has acknowledged the public interest inherent in these factors.

Public interest in withholding the information

44. The council has argued that there is an inherent public interest in the public and businesses being able to communicate and discuss issues and disputes with the council in confidence.

45. In this case, the council considers that disclosing the information at this time would inhibit Gentoo's ability to make decisions regarding its parking strategy and would exacerbate the dispute between Gentoo and GE.

Balance of the public interest

46. The Commissioner acknowledges that there is a genuine public interest in information which allows scrutiny of public authority decisions being made available. This is particularly the case where information relates to the use of land and public expenditure.
47. Whilst she acknowledges that facilitating public engagement with environmental issues is one of the general principles behind the EIR, the Commissioner does not consider that, in this case, that disclosing the information would assist in furthering this principle, at least not to the extent that any public benefit would outweigh the public interest in protecting the interests of the information provider
48. The Commissioner also considers that the EIR is not an appropriate mechanism for parties to attempt to gain an advantage in business disputes by accessing information which, other than under the EIR, would not be available. The public interest in the context of the EIR relates to the broader public interest, not the interest of individuals or individual businesses.
49. The Commissioner accepts that, in the context of this exception and, in relation to the facts of the case, the public interest is focussed on the interests of Gentoo. She does not consider that it would be in the public interest, therefore, for information relating to Gentoo's strategic approach in this business matter and provided to the council in confidence to be disclosed. She is satisfied that disclosure in this case would adversely affect the interests of the information provider and that the public interest favours maintaining the exception.

Regulation 13 – personal data

50. 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?

51. 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".

52. 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 her own guidance and considered the information in question. She 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.

53. The withheld information is confined to the names and contact details of junior council officers and third parties. The council has confirmed that no whole communication, email or document was withheld under this exception and redactions were confined to names and contact details.

54. Having considered the council's position and referred to the withheld information the Commissioner is satisfied that it constitutes personal data.

Would disclosure contravene any of the Data Protection Principles?

55. 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

56. The withheld information consists of the names and contact details of junior council officers. The council has confirmed that it is its policy to not disclose such information. The Commissioner acknowledges that it is widely accepted practice within public authorities that the personal details of those without responsibility for high level decisions should not be disclosed.

57. The Commissioner accepts that the way in which the council normally treats this type of information would shape the reasonable expectations of the council officers in question, and they therefore would not expect the council to disclose the information.
58. Similarly, where a third party has written to the council in what they reasonably consider to be a confidential context, the Commissioner accepts that it would not be in their reasonable expectations for their personal data to be disclosed. In this case, as concluded under the consideration of regulation 12(5)(f) above, the parties in question contacted the council in a confidential context and would not expect their personal data to be disclosed.

Consequences of disclosure

59. The Commissioner's view is that the consequences of disclosure of the withheld information in this case would not be significant as the information is not of particular personal sensitivity. Therefore, the Commissioner does not see that there would be a specific detrimental impact, on the basis of distress, placed upon the individual should the information be disclosed. Neither has the Commissioner been presented with any tangible consequences on the individual, such as financial loss, if the withheld information was disclosed. However, she does accept 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.
60. 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

61. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to provide the information if there is an overriding legitimate interest in disclosure. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public and the private interests of the requester.
62. Examples of a legitimate public interest in disclosure include the general public interest in transparency, public interest in the issue the information relates to and any public interest in disclosing the specific information. There may for example be occasions when the requirement

to demonstrate accountability and transparency in the spending of public funds will outweigh the rights of the individuals.

63. In this case, beyond the general public interest in transparency, the Commissioner does not see that disclosing the names and contact details of the parties in question would serve any specific public interest.
64. The Commissioner accepts that the consequences of disclosure are limited in this case; relating mainly to the unexpected loss of privacy. However, with regard solely to the public interest in the requested information from this case, the Commissioner is not convinced that this outweighs the individuals' right to privacy of their personal data. This is particularly the case as the Commissioner considers that there are other avenues open to the complainant to resolve their concerns about the substantive matters referred to in the request.
65. Having considered the nature of the information, the reasonable expectations of the data subjects and the legitimate interests in disclosure the Commissioner considers that, in this case, it would be unfair to disclose the requested information and it would be likely that disclosure would result in a breach of the first data protection principle.
66. The Commissioner has, therefore, concluded that the council correctly withheld the information under regulation 13(1) of the EIR.

Right of appeal

67. 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

68. 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.

69. 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
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