

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 16 November 2018

Public Authority: Essex County Council

Address: PO Box 11
County Hall
Chelmsford
Essex
CM1 1QH

Decision (including any steps ordered)

1. The complainant requested from Essex County Council (the Council) information relating to highways work carried out at Brook Street, Colchester during 2016.
2. The Commissioner's decision is that the exception at regulation 12(4)(e) (internal communications) is engaged in this case. However, the balance of the public interest favours disclosure of the information.
3. The Commissioner requires the Council to take the following step to ensure compliance with the legislation.
 - Subject to paragraph 45 of this notice, disclose the information to the complainant.
4. The Council must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Freedom of Information Act and may be dealt with as a contempt of court.

Request and response

5. On 11 January 2018 the complainant wrote to the Council and requested information in the following terms:

"Question 1 – Please supply me with any report and/or before-and-after data you may have on the effect on congestion of the change from a mini-roundabout to signals, carried out at the junction of Brook street with East Hill and East Bay, Colchester, together with the cost of the scheme.

Question 2 – If there was no report or study, I would like to know why not, especially considering the levels of pollution in the locality.

Question 3 – Please also supply me with copies of internal council emails/memos relating to the effect of the work."

6. The Council responded on 7 February 2018. It confirmed that it does hold some information in relation to question 1 of the request and it provided the information. The Council confirmed that it does not hold information in regards to question 2 and confirmed it holds information in relation to question 3 but withheld this under regulation 12(4)(e) (internal communications) of the EIR.
7. On 12 February 2018 the complainant requested an internal review.
8. On 7 March 2018 the Council provided its internal review outcome. With regards to questions 1 and 2 of the request, the Council stated it had disclosed all relevant information to the complainant and it maintained its position to withhold the information for question 3 under regulation 12(4)(e) of the EIR.

Scope of the case

9. The complainant contacted the Commissioner on 8 May 2018 to complain about the way his request for information had been handled.
10. The complainant confirmed that he had received the information from the Council regarding question 1 of his request and did not dispute that there was no information held in relation to question 2. Therefore, the complainant asked for an investigation specifically regarding question 3 of his request.
11. The following analysis considers whether the Council correctly withheld the information relevant to question 3 of the request under regulation 12(4)(e) of the EIR.

Reasons for decision

Is the information environmental?

12. Regulation 2(1) of the EIR provides the following definition of environmental information:

"...any information in written, visual, aural, electronic or any other 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;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c);

and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);"

13. It is important to ensure that requests for information are handled under the correct access regime, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.
14. The Commissioner has considered the withheld information in this case, which consists of internal Council emails, contractor's letters and MP's letters. This information relates to highways work carried out at Brook Street, Colchester. It concerns congestion and some of it concerns emissions from cars.
15. The Commissioner is satisfied that the information is environmental within the definition at regulation 2(1)(c), since it is information on activities which would affect or be likely to affect the elements and factors referred to in regulations 2(1)(a) and 2(1)(b). She is, therefore, also satisfied that the Council considered the request under the correct access regime, and the Commissioner has considered whether it applied the exception correctly.

Regulation 12(4)(e) – Internal communications

16. There is a presumption of disclosure at regulation 12(2) of the EIR; however, regulation 12(4)(e) states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. The exception is subject to the public interest test.
17. As the Commissioner notes in her guidance¹ on the application of regulation 12(4)(e), the term "*internal communications*" is not defined in the EIR and is normally interpreted in a broad sense. She has considered the meaning of "*internal*" and "*communications*" separately.
18. With regard to the term "*internal*", the Commissioner notes in her guidance that "*an 'internal' communication is a communication within one public authority*". From reviewing the withheld information, which includes internal correspondence between staff at the Council regarding the highways work at Brook Street, Colchester, the Commissioner is

¹https://ico.org.uk/media/fororganisations/documents/1634/eir_internal_communications.pdf

satisfied that this information has been shared between officers of the same public authority; that is, the Council.

19. With regard to "*communications*", the guidance notes that "*the concept of a communication is broad and will encompass any information someone intends to communicate to others, or even places on file... It will therefore include not only letters, memos, and emails, but also notes of meetings or any other documents if these are circulated or filed so that they are available to others*". In this case, the emails were all sent internally between members of the Council's staff in relation to the effect of the highways work at Brook Street, Colchester. The Commissioner's guidance also states: "*An internal email sent from one individual within a public authority to multiple recipients within that public authority will clearly constitute an internal communication.*"
20. The exception is clearly engaged in relation to the internal emails. However, as noted above, the withheld information also includes correspondence between the Council and its contractors and between the Council and MPs. These documents fall within the scope of the request because they were attached to an internal communication.
21. Paragraph 35 of the Commissioner's guidance on regulation 12(4)(e) states that if "*the document only falls within the request because it was attached to an internal communication...in these circumstances the exception will be engaged for both the internal communication and the attachment*". In relation to the email attachments, these materials do only fall within the scope of the request as a result of being attached to internal communications. The Commissioner therefore finds that the exception provided by regulation 12(4)(e) is engaged in relation to both the internal emails and the attachments to those emails.

The public interest test

22. As is stated in regulation 12(1) of the EIR, the exceptions at the subsections of regulation 12(4) are subject to the public interest test. That is, a public authority may only refuse to disclose information under a 12(4) exception if "*in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information*".
23. Therefore, as the Commissioner notes in her guidance, although the term "*internal communications*" is normally interpreted in a broad sense, in practice, the application of the exception may be limited by the public interest test.

Public interest arguments in favour of disclosure

24. The complainant stated that viewing the Council's internal correspondence would make the decision regarding Brook Street highways scheme fully transparent. He argued that in this case, concern about transparency outweighs the need for the Council to have privacy for free and frank discussion.
25. The complainant said that he recognises officials should be able to have "*a free and frank exchange of views in a protected environment*" but he believes those discussions should be exposed to public scrutiny once the process is complete. The complainant argued that once the discussions are no longer taking place, any negative effect on the Council would be outweighed by the public interest in favour of disclosure.
26. The complainant explained that the Brook Street scheme was in development from 2012 and work concluded in late 2016. He clarified that the only part of this project still to take place is the "after" survey. The complainant argued that his request relates to a historical issue and is not one that is forward-looking or live, nor is it likely to prejudice the Council's current or future activities. He contends that "*nothing said in relation to this scheme is likely to have any negative effect on current or future work by ECC or its stakeholders.*"
27. The complainant argued that the withheld information should be made available because of the following reasons:
 - *"The general public interest of openness and transparency*
 - *It relates only to the Brook Street changes and is unlikely to affect any wider project*
 - *It will show various views on the likeliness of the success of the Brook Street scheme*
 - *It concerns a historical issue and not one that is forward-looking or live in any way, or will affect current or future ECC activities*
 - *It is important to see how the council reaches its decisions at a time when ECC's transport policy and direction is increasingly in question*
 - *It is important to see how the government/local government funding and allocations are increasingly under scrutiny*
 - *It will show whether a decision was made and whether a public consultation was considered*

- *It will show whether ECC took full and proper account of the views of officers, partners and stakeholders – they will welcome public disclosure if such views were discounted without full consideration.”*

28. The Council acknowledged transparency when spending public money, transparency over decision making and also informing public debate.

Public interest arguments for maintaining the exception

29. The Council argued the public interest in favour of maintaining the exception is for free and frank discussions to inform decision making. It explained that it favoured non-disclosure of the requested information because the conversations it records were internal. The Council considered that free and frank discussions must be able to take place in order to maintain the efficiency and effectiveness of the Council.

30. The Council also considered the public interest is to allow the monitoring to run its course and a formal decision to be reached. The term “monitoring”, the Council clarified, relates to *“reviewing over time what effect the changes make to traffic flow on this route, and there is ongoing construction work on the A133 Ipswich Road Harwich Road site which will potentially skew any results of monitoring at present. Until we understand the impacts of the range of changes currently being made in that location we are unable to fully understand the risks associated with any recommended course of action, and therefore are unable at this time to reach a decision about the feasibility of the change from a mini-roundabout to signals, at the junction of Brook Street with East Hill and East Bay, Colchester.”*

31. The Council stated that it had engaged with residents and provided channels of communication for residents to make their complaints about the scheme known. The Council stated that there would have been no disadvantage to the public in not having access to the documentation as the issues were transparent to anyone who utilised the junction controls.

32. The Council argued that the public interest lies in the Council being able to conclude monitoring activities and to freely discuss progress and ongoing issues, including the resolution of complaints, without these being in the public domain. The Council offered the following explanation of its position:

“The public interest is served in the Council delivering an effective solution following a period of internal deliberation and evidence-based decision making which will result in a published outcome. Once a final decision is reached, then there would be diminished grounds for a public interest argument in excepting this information.

The public interest is poorly served by the disclosure of the 'in-scope' data as without the context of the initiating complaints and the contribution of the Contractor, they are of little value."

33. The Council argued that the balance of the public interest favours maintaining the exception and it is of the view that the requested information should not be disclosed.

Balance of the public interest arguments

34. As noted in the Commissioner's guidance, public interest arguments relating to this exception should always relate to the content and sensitivity of the particular information in question, and the circumstances of the request. The Commissioner has reviewed the withheld information in this case in order to determine the public interest in its disclosure.
35. The Commissioner has considered the competing arguments. She accepts that there is a public interest in disclosure in promoting transparency and accountability around decisions made by public authorities. The Commissioner also accepts that there is a public interest in allowing the public to better understand how these decisions are reached.
36. However, any public interest in disclosure has to be balanced against the prejudice that would be caused to the ability of the Council to carry out its responsibilities around the highways work.
37. The Commissioner accepts the Council's argument for free and frank discussions to inform decision making and that these are required in order for the Council to maintain efficiency and effectiveness. She has considered the Council's arguments relating to the need for "thinking space" for discussions. Although the information is not obviously particularly sensitive, the Commissioner agrees that there is a need for a safe space for a public authority to be able to carry out discussions.
38. However, in this case, the Commissioner considers that, as the information request relates to a historical issue and is not live, it is not likely to prejudice current or future Council activities. Disclosing the withheld information in this case is unlikely to have a negative effect on current or future work by the Council or its stakeholders. Having viewed the information which contains email trails between Council staff regarding the scheme and letters expressing opinions, the Commissioner considers disclosure would make the process recorded within the withheld information transparent.

39. The Commissioner has balanced the public interest in the information being disclosed against the Council's argument that it would prevent free and frank discussions regarding decision making.
40. The Commissioner considers that the Council's arguments are weak when balanced against the nature of the information itself, and given the wider public interest in creating greater transparency on the actions of the Council regarding Brook Street highways scheme.
41. The Commissioner has not been persuaded that the Council's arguments outweigh the public interest arguments in favour of disclosure of the information. The Commissioner's decision is that the balance of the public interest lies in disclosing the information withheld under regulation 12(4)(e) in this case.
42. Therefore, the Commissioner's conclusion is that the information was withheld incorrectly and subject to paragraph 45 below, should be disclosed to the complainant.
43. The Commissioner has considered whether the withheld information contains the personal data of any individual and, if it does, whether it would be fair to disclose that data in line with her approach to regulation 13 of the EIR.
44. The names and contact details of Council staff appear within the internal emails. In relation to the MP's letters, the Commissioner finds that the constituents' personal data is exempt.
45. The Commissioner does not consider that it would be fair to disclose the personal data of these individuals, especially with regards to the residents as they are not involved in the decision-making process. The Council should therefore redact that information prior to disclosure.

Right of appeal

46. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

47. 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.
48. 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
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