

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 7 March 2019

**Public Authority:** Middlesbrough Council  
**Address:** P.O. Box 500  
Civic Centre  
Middlesbrough  
TS1 9FT

#### **Decision (including any steps ordered)**

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1. The complainant requested from Middlesbrough Council (the Council) information relating to the planning application about a specific property in Middlesbrough. The Council disclosed some information and withheld other information under the EIR - regulations 12(4)(e) (internal communications) and 12(5)(f) (interests of information provider).
  2. The Commissioner's decision is that the Council failed to respond within the statutory time limits and breached regulation 5(2). She has concluded that the exception at regulation 12(4)(e) is engaged. However, the balance of the public interest favours disclosure of the information. The Commissioner also finds the Council's reliance of regulation 12(5)(f) was incorrectly applied.
  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 requested 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.
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## Request and response

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5. On 1 March 2018, the complainant wrote to the Council and requested information in the following terms:

*"Please treat this email as an FOI request and please deal with this request in accordance with the FOI Act.*

*This request relates to the planning application submitted for the premises known as [address redacted] Middlesbrough, submitted by this company.*

*This request relates to the time period 21 March 2017 to the date of the release of the information requested. This request relates to the following officers and members [names redacted]*

*And to include any personal assistants of the above named where applicable Members [names redacted]*

*Please provide all correspondence sent to or from the above named individuals. The correspondence to include, but not limited to, emails, letters, texts, reports (including management reports such as LMT, DMT & CMT (but not limited to those report types)) of file and log notes made."*

6. On 21 March 2018 the Council responded. The Council considered that to fully comply with the request would be manifestly unreasonable under regulation 12(4)(b) of the EIR as it would require an extensive manual and electronic search to locate, retrieve and compile the information. The Council also, however, provided a link to the Council's online planning application portal and said that some of the requested information may be contained within this.
7. On the same day the complainant submitted a revised FOI request relating to the same planning application specified in the first request and narrowed it down in relation to both time period and number of officers / members. The new information request was as follows:

*"...the time period 5 June 2017 – 31 December 2017*

*This request relates to the following officers and members [names redacted]*

*Please provide all correspondence sent to or from the above named individuals. The correspondence to include, but not limited to, emails, letters, and log notes made."*

8. Following correspondence from the complainant to the Council in which she chased its response to her request, on 14 May 2018 the complainant submitted a complaint to the Head of Legal Services and Monitoring Officer.
9. On 13 June 2018 the Council responded and it no longer relied on regulation 12(4)(b). The Council reported 226 pages of information had been identified and it released to the complainant 123 pages of correspondence containing information relating to the request. The remaining 103 pages of documentation, the Council withheld as it considered that this information fell under regulations 12(4)(e) (internal communications) and 12(5)(f) (interests of information provider) of the EIR.

### Scope of the case

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10. The complainant contacted the Commissioner on 13 June 2018 to complain about the way her request for information had been handled.
11. She stated that her request relates to a "*simple planning application for a small taxi office in the town centre*" and objected to the refusal under regulations 12(4)(e) and 12(5)(f).
12. The complainant specifically asked for an investigation regarding the following:
  - The Council's failure to respond within the statutory time frames,
  - the withholding of some of the requested information,
  - the Council's application of the exceptions and the released information redacted without an explanation,
  - the lack of an explanation in the Council's subsequent description provided in relation to the withheld information.
13. The Commissioner will consider whether the Council responded within the statutory time limit. The following analysis will also focus on what information is being withheld by the Council and whether it had correctly applied the regulation 12(4)(e) and 12(5)(f) exceptions to withhold this information.
14. With regard to the complainant's concern that the Council's subsequent response in relation to the redacted information was lacking in detail, the Commissioner's view is that the refusal notice was adequate.

Therefore, the Commissioner does not consider this specific concern highlights a breach of the EIR.

## Reasons for decision

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### Is the information environmental?

15. The Council dealt with the complainant's request under the provisions of the EIR on the grounds that the requested information satisfies the definition of environmental information provided by Regulation 2 of the EIR.
16. In regulation 2(1) of the EIR environmental information is defined as;  
*"any information in written, visual, aural, electronic or any other material form on: (a) the state of the elements of the environment such as ....land, landscape and natural sites including wetlands...biological diversity...(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".*
17. The Commissioner has considered the withheld information in this case, which consists of email correspondence between the Council staff concerning the planning application for the property in question. Most of the information contains officers' internal exchange of views with other officers which the Council considered necessary in order to develop advice. Also included, were development matters and issues discussed at meetings relating to the proposed project.
18. 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 regulation 2(1)(a) and/or 2(1)(b). She is, therefore, also satisfied that the Council considered the request under the correct access regime, and has considered whether it applied the exceptions correctly.

### Regulation 5(2) – time for compliance

19. The EIR places requirements on public authorities at regulation 5(2) which states that:

*"Information shall be made available ... as soon as possible and no later than 20 working days after the date of receipt of the request."*

20. In this case the complainant submitted her revised request on 21 March 2018 and the Council responded on 13 June 2018. As the Council failed to issue a response within the statutory time limit, the Commissioner finds that it has breached regulation 5(2) of the EIR.

### **Regulation 12(4)(e) – internal communications**

21. 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.
22. As the Commissioner notes in her guidance on the application of regulation 12(4)(e)<sup>1</sup> that the term "*internal communications*" is not defined in the EIR and is normally interpreted in a broad sense.
23. From reviewing the withheld information, which includes documents, notes and emails between senior officers and officers within the Council regarding the planning application for the particular property, the Commissioner is satisfied that this information has been shared between officers of the same public authority; that is, the Council. As the information concerned is only between the Council staff, it is reasonable for it to be defined as internal communications.
24. Some of the emails falling within the scope of the request include attachments. 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.
25. 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, and to the documents and notes, as all these materials are internal communications.

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<sup>1</sup>[https://ico.org.uk/media/fororganisations/documents/1634/eir\\_internal\\_communications.pdf](https://ico.org.uk/media/fororganisations/documents/1634/eir_internal_communications.pdf)

## **The public interest test**

26. Regulation 12(1)(b) requires that, where the exception under regulation 12(4)(e) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out her assessment of the public interest test, the Commissioner is mindful of the provision at regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

### **Public interest arguments in favour of disclosure**

27. The Council said that it is aware of the explicit presumption in favour of disclosure at regulation 12(2) of the EIR and it acknowledged that it is in the public interest that the Council is open in the way that it operates. It is also aware that there is always some public interest in the promotion of transparency and accountability of public authorities, greater public awareness and understanding of environmental matters, a free exchange of views, and more effective public participation in environmental decision-making.
28. The Council recognises that the decisions made by the officers have an impact on the lives of the general public and there is a public interest in this process being transparent. It also said that it recognises that greater transparency makes public authorities more accountable and increases trust.
29. The Council considers there to be a public interest in providing the public with the information it requires in order to be satisfied that the process by which the Council develops policy is of "a high quality." It furthermore acknowledged transparency when spending public money, transparency over decision making and also informing public debate.
30. The complainant stated that as this request relates to a planning application, then all objections should be in the public domain. She considers all objections to a planning application should be detailed on the Council planning portal.

### **Public interest arguments in favour of maintaining the exception**

31. The Council explained that the information that is covered by regulation 12(4)(e) forms part of its internal discussions about the planning application submitted for the specified premises. The Council said that if the information was made publicly available, it may prejudice this process, which would not be in the public interest, as it would "impinge on our 'space to think.'"

32. The Council argued that if officers feel restricted in their ability to make decisions due to concerns that the record of their decisions may be disclosed under a future EIR request, this may impact on officer's ability to internally debate issues relating to policy formulation freely.
33. The Council said that once a decision was reached, the officers would not expect their communications in arriving at that point to be disclosed, and disclosure could lead to them being less candid in expressing their views. The Council explained that this would detract from the full and frank exchange of views necessary during policy formulation and would jeopardise the ability to take decisions based on full advice and consideration of all options. The Council argued that releasing the requested information would breach the trust of the third parties with whom the Council were in discussions with.
34. 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**

35. 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.
36. 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. She is of the view that there is a particular public interest in information relating to planning processes, and agrees with the Council that there is a public interest in disclosure of the information in question in order to inform about the spending of public money, transparency over decision making and also informing public debate.
37. However, the public interest in disclosure has to be balanced against the public interest in preserving a private space for internal communications.

38. The Commissioner accepts the Council's argument for free and frank exchange of views and that these are necessary in order for the Council to take decisions based on advice and consideration of all of the options relating to the planning project. She has considered the Council's arguments relating to the need for "thinking space" for discussions and how important it is that this process is not interrupted. The Commissioner agrees that there is a need for a safe space for a public authority to be able to carry out discussions. The Commissioner has reviewed the contributions from both the complainant and the Council, and she does not consider the withheld information is particularly sensitive. This information relates to the planning application for the premises in question.
39. The Commissioner accepts that disclosure of internal communications could potentially have a chilling effect on future contributions and that the risk of such an effect is arguably higher if information is disclosed whilst the planning project was live and ongoing. However, the Council confirmed that, whilst the planning project in question was live at the time of the request, decisions had been made relating to the project. A refusal of planning permission was issued on that day and a subsequent appeal was also refused. Therefore, the Commissioner does not consider disclosure of the internal communications in question, could potentially have a chilling effect on future contributions as a decision had already been made in this case by the date of the request.
40. As with all cases, the content of the withheld information is key to determining the weight that should be attributed to such arguments. Having viewed the information which contains email trails between Council staff regarding the planning project and letters expressing opinions, the Commissioner considers disclosure would make the process recorded within the withheld information more transparent.
41. The Council's lack of argument has made it difficult to justify its reliance of the exception. The Commissioner also considers that there is little value or indeed public interest in favour of maintaining this exception in respect of the withheld information.



42. 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. The Commissioner considers that the Council's arguments are weak when balanced against the nature of the information itself – the planning application for a specific property in Middlesbrough. This information, in the Commissioner's view, is not deemed to be sensitive as its content does not contain anything of a private or confidential nature or even anything that could be offensive. Also, given the wider public interest in creating greater transparency on the actions of the Council regarding the plans for this specific property.
43. 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.
44. Therefore, the Commissioner's conclusion is that the information was withheld incorrectly and subject to paragraph 45 below, should be disclosed to the complainant.
45. 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. The names and contact details of Council staff appear within the internal emails – the Commissioner finds that this personal data is exempt.
46. The Commissioner does not consider that it would be fair to disclose the personal data of these individuals. The Council should therefore redact that information prior to disclosure.

#### **Regulation 12(5)(f) – Interests of information provider**

47. The Council also withheld some information within the 103 page document under regulation 12(5)(f).
48. Regulation 12(5)(f) provides an exception in relation to information provided to a public authority from another person and sets out four requirements which must be met for this exception to be engaged. First, disclosure must result in an adverse effect to the person who provided the information to the public authority. Having established that an adverse effect would occur, three tests must also be met:
  - (i) the person was not under any legal obligation to supply that information to any public authority;

- (ii) the person supplying the information did not supply it in circumstances in which the public authority is not entitled, apart from under the EIR, to disclose it; and
  - (iii) the person supplying the information has not consented to its disclosure.
49. Similarly to regulation 12(4)(e), this exception is also qualified by the public interest.

*Adverse Affect*

50. The Council's basis for citing this exception was that the information in question forms part of the Council's discussions with third parties, concerning the planning application submitted for these specific premises. The third parties are employees in the planning services, housing department and environmental services and they had provided the information in question to the Council.
51. The Council said that the third parties were under no legal obligation to supply the information to the Council and that they had not consented to the disclosure of the information.
52. As with all the exceptions in regulation 12(5), the threshold necessary to justify non-disclosure, because of adverse effect, is a high one. The effect must be on the interests of the person(s) who voluntarily provided the information and it must be adverse.
53. In considering whether there would be an adverse effect in the context of this exception, a public authority needs to identify harm to the third party's interests which is real, actual and of substance (i.e. more than trivial), and explain why disclosure would, on the balance of probabilities, directly cause the harm.
54. As the Tribunal in the case of *John Kuschnir v Information Commissioner and Shropshire Council* (EA/2011/0273; 25 April 2012)<sup>2</sup> noted, there is no requirement for the adverse effect to be significant – the extent of the adverse effect would be reflected in the strength of arguments when considering the public interest test.

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i750/2012\\_04\\_25%20Mr%20Kuschnir%20decision.pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i750/2012_04_25%20Mr%20Kuschnir%20decision.pdf)

55. However, the public authority must be able to explain the causal link between disclosure and the adverse effect, as well as why it would occur.
56. The need to point to specific harm and to explain why it is more probable than not that it would occur reflects the fact that this is a higher test than 'might adversely affect', which is why it requires a greater degree of certainty. It also means that it is not sufficient for a public authority to speculate on possible harm to a third party's interests.
57. On the issue of the adverse effect, the Council's reasoning was that the withheld information was submitted to it as the local planning authority, related to sensitive commercial information and that this was submitted on a confidential basis specifically related to a planning application. The Council explained that some of the information contained within the correspondence highlights the "*fragile business position*" of the third party and that disclosure of this information would provide an advantage to any competitors or potential customers looking to acquire business premises which the third party deal with.
58. The Council is of the view that if the requested information is disclosed, this would have a negative impact on businesses which some of the third parties handle. This, the Council said, would undermine any future relationship with third parties and that they would be less willing to engage with the Council if it thought that such sensitive information might be disclosed under a future EIR request, to the world at large. The Council argued that the disclosure of the withheld information would adversely affect the third parties for the reasons provided above.

### **The Commissioner's conclusion**

59. The withheld information consists of email correspondence, documents and notes between the Council and third parties. This concerns the planning application for the property in question and also development matters relating to the property and which had been discussed at meetings. The Commissioner does not accept that the disclosure of this information would have an adverse effect, as there is no evidence of harm which is real, actual and of substance to the third party's interests. In this instance, the confiders were employees in the planning services, housing department and environmental services and they had provided the information in question to the Council.
60. The Commissioner is not persuaded that disclosure of the withheld information would adversely affect the interests of the third parties in this case. Therefore, the exception is not engaged and the Commissioner has not gone on to consider the public interest test.

## Right of appeal

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61. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

62. 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.
63. 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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