

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 4 July 2019

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

Decision (including any steps ordered)

1. The complainant has requested various information about Middlesbrough Bus Station. Middlesbrough Council ("the Council") disclosed some information, and withheld the remainder under the exceptions provided by regulations 12(4)(e) and 12(5)(e).
2. The Commissioner's decision is that regulation 12(4)(e) is engaged but that the public interest in the disclosure of the information outweighs that of the exception being maintained, and that the Council has failed to demonstrate that regulation 12(5)(e) is engaged. The Council has also breached the requirement of regulation 5(2).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information, ensuring that any personal data is redacted under the terms of the Data Protection Act 2018.
4. The public authority must take these steps 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 Act and may be dealt with as a contempt of court.

Request and response

5. On 21 June 2018, the complainant wrote to the Council and requested information in the following terms:

Please send

For the year 2017 to Jun 2018

1. All reports and management team reports in relation to Middlesbrough Bus Station

2. Emails sent by [redacted name], [redacted name], [redacted name] and [redacted name] in relation to the Bus Station, Middlesbrough

3. Emails received by [redacted name], [redacted name], [redacted name] and [redacted name] in relation to the Bus Station, Middlesbrough.

6. On 21 August 2018, the complainant refined the request (in respect of parts 2. and 3.) to:

I have reread your response. You state that there are about 1400 emails. I will limit my request to those emails sent to and from [redacted name]. This should assist you greatly.

Please can you send those ASAP.

7. The Council responded on 18 October 2018. It disclosed some information, and withheld the remainder under the exceptions provided by regulations 12(4)(e) and 12(5)(e).
8. Following an internal review the Council wrote to the complainant on 3 December 2018. It upheld its position.

Scope of the case

9. The complainant contacted the Commissioner on 3 December 2018 to complain about the way his refined request for information (of 21 August 2018) had been handled, and specifically that the Council was not entitled to rely upon regulations 12(4)(e) and 12(5)(e) to withhold information.
10. The Information Commissioner's Office ("the ICO") wrote to the Council on 9 April 2019 to direct it to the Commissioner's public guidance, and to request submissions on the application of regulations 12(4)(e) and 12(5)(e). The Council subsequently provided a copy of the withheld information, and its arguments for the applied exceptions.

Reasons for decision

What information has been withheld?

11. The withheld information comprises 325 pages of emails and attachments. These emails and attachments are contained within individual chains that relate to specific subjects. The Council has provided the Commissioner with a spreadsheet that records the subject of each chain, and the exception that it has been withheld under.

Regulation 12(4)(e) – Internal communications

12. Regulation 12(4)(e) 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.

13. The Commissioner's public guidance on this exception¹ defines a communication as encompassing any information which someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others may consult it.
14. The EIR does not provide a definition of what is meant by 'internal'. However, the Commissioner's guidance provides clarification on the scenarios where communications can be defined as such. Such a scenario is where the communications have taken place solely within a public authority.
15. Regulation 12(4)(e) is a class based exception. This means that there is no requirement to consider the sensitivity of the information in order to engage the exception. However, the exception is subject to a public interest test under regulation 12(1)(b), and the exception can only be maintained should the public interest test support this.

Does the information represent internal communications?

¹ https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf

16. The Council has informed the Commissioner that the withheld information represents internal email communications between officers, including senior managers, about Middlesbrough Bus Station. The subjects of these communications include:
- Early drafts of the service plan and priority documentation in respect of the Council's strategic plan.
 - Early discussions about exploring the possibility of external funding support to aid the delivery of a range of projects.
 - Debate on how the delivery of some projects may impact other, pipeline projects.
 - Iterative discussions on strategic masterplan designs and adaptations.
 - Early feasibility work and the generation of speculative ideas.
 - Commercially sensitive information relating to the business and trading of third party organisations.
 - Meetings, discussions and communications with third parties interested in investing, locating, and developing in Middlesbrough – many of which did not progress.
 - Early stage business case development and debate.
17. Having examined the withheld information, and considered the specific circumstances of its creation, the Commissioner is satisfied that it can be properly characterised as communications for the purposes of this exception.
18. As referenced previously, the EIR does not define the meaning of 'internal'. Consequently, in the absence of a definition, a judgment must be made that considers the context of the communications. In this case the information comprises emails and attachments that were sent between council officers for the purposes of their duties. The Commissioner is therefore satisfied that the communications were 'internal' to the Council, and that regulation 12(4)(e) is engaged.

Public interest test

19. Where regulation 12(4)(e) is engaged, it is subject to the public interest test required by regulation 12(1)(b). The test is whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
20. When carrying out the test the Commissioner must take into account a presumption towards the disclosure of the information, as required by regulation 12(2).

21. The Council has provided the Commissioner with its public interest test reasoning, which is paraphrased below.

The public interest in disclosing the withheld information

22. The Council has argued that the disclosure of such information can promote transparency about the Council's decisions, and initiate public debate about these. Disclosure allows the public to understand the issues facing the Council and how they form the basis of subsequent decisions.

The public interest in maintaining the exception

23. In the specific circumstances of this case, the Council has argued that it is critical for officers to have a safe space within which to discuss and consider their options without public intrusion. Where issues may be contentious it is also important that officers are able to seek advice from senior managers.
24. The Council further argues that it is particularly important that officers are able to have free and frank discussions about matters that impact on public land, the public purse, or to avoid escalation of any dispute.

The Commissioner's conclusion

25. The Commissioner has reviewed the Council's public interest arguments, in addition to the withheld information.
26. The Commissioner considers that, whilst the Council has explained, in generic terms, the broad subjects that the withheld information relates to, no explanation has been provided to the Commissioner about its context, other than that it pertains to Middlesbrough Bus Station.
27. The only context to the information that the Commissioner has been able to ascertain, has been through independently searching for online news articles relating to Middlesbrough Bus Station, the latest of which derive from May and June of 2018. From these articles^{2 3}, the Commissioner understands that the Council has considered the

² <https://www.gazettelive.co.uk/news/teesside-news/new-middlesbrough-bus-station-could-14671690>

³ <https://www.gazettelive.co.uk/news/teesside-news/claims-insults-bullying-untruths-middlesbrough-14810298>

demolition and rebuilding of the station as part of the wider redevelopment of the area into a 'Media and Innovation Village', but that this proposal has encountered resistance from councillors.

28. The Commissioner highlights that the ICO, when writing to request the Council's submissions, informed the Council of the following:

Please ensure that your submissions focus on the content of the information that has actually been withheld rather than simply being generic public interest arguments.

29. As the Council has failed to relate its arguments to the particular circumstances of the case, and the content and sensitivity of the specific information, it is not clear how its disclosure would be detrimental, and it is not appropriate for the Commissioner to formulate arguments on the Council's behalf.
30. In the absence of any clear explanation of how the disclosure of the information would be detrimental, the Commissioner must conclude that insufficient public interest in maintaining the exception has been demonstrated.

Regulation 12(5)(e) – Commercial confidentiality

31. Regulation 12(5)(e) states:

For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.

32. The Commissioner's public guidance⁴ on this exception explains that, in order for this exception to be applicable, there are a number of conditions that must be met. These are:

⁴ https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is the confidentiality provided to protect a legitimate economic interest?
- Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial of nature?

33. The Council has informed the Commissioner that the information relates to commercial activity involving both the Council and third parties. The Council has also advised that the disclosure of the information would adversely impact the ability of third parties to operate and compete in their market, and would damage the trust and confidence between the Council and the third parties who engage with it.
34. The Commissioner has carefully reviewed the Council's arguments for this exception.
35. Having done so, the Commissioner cannot identify how the information is commercial in nature. The Council has failed to provide any explanation of the context of the information, and has phrased its arguments in such broad terms, that the Commissioner cannot perceive what actual commercial activity is being pursued.
36. The only context of the matter that the Commissioner has been able to independently ascertain is that outlined in paragraph 27.
37. However, and regardless of the independent searches that the Commissioner has undertaken, the responsibility for demonstrating the correct application of an exception lies with the public authority. In the context of regulation 12(5)(e), it is not appropriate for the Commissioner to formulate arguments on behalf of the Council.
38. In the absence of any clear explanation by the Council of how the information is commercial in nature, the Commissioner cannot conclude that the first condition has been met.
39. On this basis the Commissioner finds that regulation 12(5)(e) is not engaged.

Regulation 5(2) – Time for compliance

40. Regulation 5(2) states that an information request should be responded to no later than twenty working days after the date of receipt. In this case the Council did not respond to the request within the time for compliance. On this basis the Commissioner must find a breach of regulation 5(2).

Right of appeal

41. 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

42. 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.
43. 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
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**