

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 22 May 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 information about a road widening scheme. Middlesbrough Council ("the Council") refused the request under regulation 12(4)(b).
2. The Commissioner's decision is that the Council is entitled to rely upon regulation 12(4)(b) to refuse the requests, and has complied with the requirement of regulation 9 to provide advice and assistance. However, the Council disclosed some held information outside the time for compliance, and therefore breached regulation 5(2).
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 14 May 2018, the complainant wrote to the Council and requested information in the following terms:
 1. *Copies of internal emails, letters, file notes, etc. regarding this matter.*
 2. *The date Arup were commissioned.*
 3. *Terms of reference for this assessment.*
 4. *Date report to be completed.*
 5. *Please advise if this assessment is linked with the Joint Strategic Transport Needs assessment and the recently installed ANPR cameras that are monitoring traffic flow, mix and air quality.*
 6. *The rationale underpinning the proposed scheme is to encourage drivers travelling between the A172 to the south of Stainton Way and Middlesbrough town centre to do so via Stainton Way, the A174 Parkway, the A19 and the A66 rather than via the Marton Road Corridor. Please advise if the Principal Transport Planning Officer is aware that air quality on local stretches on the A66 are the second worst in the country? Please can you explain how this scheme will improve air quality across the borough in accordance with Government and EU guidelines?*
 7. *Middlesbrough is one of the 30 UK places and Gibraltar that exceeded the limit of 10 micrograms per cubic metre of fine particle air pollution. Dirty air can cause debilitating diseases and hasten death. Please can the Principal Transport Planning Officer provide details of how this scheme will tackle the problem of air pollution that exceeds the limits set by the World Health Organisation.*
5. The Council responded on 13 June 2018 (under the reference 012823). It refused to comply with part 1 under regulation 12(4)(b), but invited the complainant to refine the parameters of the request. It disclosed information in respect of parts 2-7.
6. On 14 June 2018, the complainant disputed that further information was held in respect of parts 2-7, and submitted the following refined request for part 1:
 1. *Copies of emails, letters, file notes, minutes of meetings, telephone transcripts etc. regarding this matter.*

I am prepared to reduce the scope of my request in order to enable you to undertake a more reasonable search in accordance with Regulation 9(1) of the Environmental Information Regulations regarding your duty to advise and assist.

Start date of search - 15th November 2017

This was the date that [redacted name] first wrote to [redacted name] regarding the Trees on Dixons Bank. In his reply of 6th March 2018, [redacted name] made reference to a noise impact assessment.

People & organisations

[12 redacted names]

Arup

Nature of correspondence including assessments, data, survey results and reports related to:

Environment

Air quality

Pollution

Noise

Trees

Mitigation

Part 1 claims

Compensation

Word strings

Southern Cross Junction

Dixons Bank

A172

Marton Crawl

War memorial

Church Lane

7. Following an internal review the Council wrote to the complainant on 28 June 2018. In respect of the original request, it disclosed further held information that had been identified. In respect of the refined request, it and responded (under the reference 013018) and refused to comply under regulation 12(4)(b).
8. The complainant asked for a further internal review on 20 July 2018.
9. Following a further internal review the Council wrote to the complainant on 17 August 2019 (under the reference 013149). It maintained the application of regulation 12(4)(b).

Scope of the case

10. The complainant contacted the Commissioner on 21 August 2018 to complain about the way his request for information had been handled,

and specifically that the Council was not entitled to rely upon regulation 12(4)(b).

11. The Commissioner considers the scope of the case to be the determination of whether the Council has complied with regulation 12(4)(b) in respect of both the original and refined requests, and whether it has otherwise complied with regulation 9(1), and regulation 5(2).

Reasons for decision

Regulation 12(4)(b) – Requests that are manifestly unreasonable

12. Regulation 12(4)(b) provides:

*For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that-
(b) the request for information is manifestly unreasonable...*

13. The Commissioner has issued public guidance¹ on the application of regulation 12(4)(b). This guidance contains the Commissioner's definition of the regulation, which is taken to apply in circumstances where either the request is 1) vexatious, or 2) where the cost of compliance with the request would be too great. In this case the Council considers that circumstance 2) is applicable.
14. The EIR does not contain a limit at which the cost of compliance with a request is considered to be too great. However, the Commissioner's guidance suggests that public authorities may use *The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004*² ("the Regulations") as an indication of what Parliament considers to be a reasonable charge for staff time. The Regulations specify that £450 is the appropriate limit for local government authorities, and that the cost of complying with a request

¹ <https://ico.org.uk/media/for-organisations/documents/1615/manifestlyunreasonablerequests.pdf>

² <http://www.legislation.gov.uk/ukxi/2004/3244/contents/made>

should be calculated at £25 per hour; this applies a time limit of 18 hours.

15. For the purposes of the EIR, a public authority may use this hourly charge in determining the cost of compliance. However, the public authority is then expected to consider the proportionality of the cost against the public value of the request before concluding whether the request is manifestly unreasonable.
16. In the circumstances of this case, the Commissioner has focussed her determination of regulation 12(4)(b) on the refined request made by the complainant on 14 June 2018. This is because, if the refined request is found to engage regulation 12(4)(b), then this will also apply to the original request.

Is the exception engaged?

17. The Council has informed the Commissioner that an electronic search of officer email accounts (using the parameters of the refined request provided by the complainant) and subsequent manual review of the retrieved emails has identified a total of 1545 separate emails across 12 accounts. This electronic search and manual review has already taken 14 officer hours, and the Council considers that the preparation of these emails for public disclosure (including consultation with involved parties, and any necessary redaction under exceptions) would exceed the time limit of 18 hours.
18. The Commissioner has considered the Council's submissions and recognises that a significant amount of recorded information is held that would fall within the parameters of the complainant's refined request. Whilst the Commissioner considers that the Council has provided only basic evidence in support of its position (namely the total amount of emails broken down by individual inboxes), it is evident that the Council would need to process each email within 69 seconds each in order to fully action the request within the time limit of 18 hours. Having noted that 14 officer hours have already been consumed in the necessary searches for the information, the Commissioner has calculated that this would mean that each retrieved email would need to be prepared for disclosure within 15 seconds each. The Commissioner recognises that, even for an officer with strong familiarity of the subject matter of the emails, and of the terms of the EIR, it is unlikely that this task would be feasible.
19. On this basis the Commissioner accepts that the request is manifestly unreasonable within the meaning of regulation 12(4)(b).

The public interest test

20. Regulation 12(4)(b) is subject to the public interest test set out in regulation 12(1)(b). This specifies that a public authority may only rely on an exception if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

Public interest arguments for disclosure

21. The Council acknowledges that there is a strong public interest in ensuring transparency and accountability in respect of environmental matters. It further recognises that the disclosure of such information can enable individuals to access information which may help them decide whether to challenge a decision made, or action taken, by the Council. This in turn promotes democracy and public participation.

Public interest arguments for maintained the exception

22. The Council considers that compliance with the request would divert it from its core public functions and duties, as the review and preparation of the retrieved emails would need to be undertaken by one of a small number of officers based within the highways team who have the knowledge to do this.
23. The Council has explained that the request relates to the 'A172 Dixons Bank/Stainton Way Highway Improvement Scheme', which has been subject to extensive public consultation. This has included specific consultation with residents in the vicinity of the road during two successive exercises between September 2017 and March 2018, and wider statutory consultation in 2018 (in respect of the wider Local Plan) that also addressed the highway in question, and specifically for proposed works that addressed issues such as congestion.
24. The Council notes that the complainant has had the opportunity to raise their concerns about the Council's handling of the matter with the Local Government Ombudsman, whose investigation found no fault on the part of the Council in relation to this matter.

Balance of the public interest test

25. The Commissioner recognises the inherent importance of accountability and transparency in decision-making within public authorities, and the necessity of a public authority bearing some costs when complying with a request for information. However, in considering the public interest test for this matter, the Commissioner must assess whether the cost of compliance is disproportionate to the value of the request.
26. The Commissioner recognises that the request relates to a subject matter (i.e. the development of a highway in the context of the Local

Plan) that is likely to have significant environmental implications. The disclosure of information about this matter will allow the public to understand that process that the Council has followed in addressing this, as well as information that it has based its decisions upon.

27. However, the Commissioner also recognises that the subject matter has been subject to extensive public consultation, and understands that the Council's handling of the matter has been since considered by the LGO, which found no fault in the Council's handling. In such a scenario, it is reasonable for the Commissioner to conclude that a formal and transparent decision making process has been followed by the Council. It is also recognised that the volume of held emails, spanning a range of individuals and subjects, would require significant public resources to be applied in order to fully comply with the request under the EIR. Whilst the Commissioner has noted the comments submitted by the complainant about local opposition to the proposed works, there is no immediate evidence available to the Commissioner suggests that the actions taken by the Council have been incorrect, improper, or subject to a lack of transparency.
28. Having considered the relevant factors in this, the Commissioner has concluded that the public interest favours the maintenance of the exception.

Regulation 9 – Advice and assistance

29. Regulation 9(1) provides that:

A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

30. This regulation places a duty on a public authority to provide advice and assistance to someone making a request. The Commissioner considers that this includes assisting an applicant to refine a request if it is deemed that answering a request would otherwise incur an unreasonable cost.
31. In this case the Council refused the original request on the basis that it would be likely to engage regulation 12(4)(b), and invited the complainant to refine the parameters by date (suggesting the last 6 months), and by specific subject and officers. The complainant subsequently did this on the 14 June 2018; however, and for the reasons outlined above, this refined request still engaged regulation 12(4)(b), and the Council provided the complainant with breakdown of the total email numbers by officers.

32. The Commissioner recognises that the information sought in the original request is essentially all internal information relating to the highway. However, this matter has seemingly been live and under consideration for an extended period as part of the Council's implementation of the Local Plan, and consequently, a significant volume of information is held. As such, the Commissioner considers that the Council's invitation to refine the parameters of the request by date, specific officer, or subject matter, to be a proportionate attempt to provide advice and assistance. On this basis the Commissioner considers that the Council has complied with regulation 9(1).

Regulation 5(2) – Time for compliance

33. Regulation 5(2) states that information should be made available no later than twenty working days after the date of receipt of the request.
34. In this case the Council disclosed further held information as part of its internal review of 28 June 2018. As this disclosure took place after twenty working days, the Council has breached regulation 5(2).

Right of appeal

35. 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

36. 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.
37. 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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