

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 15 August 2019

Public Authority: Middlesbrough Council
Address: PO Box 500
Middlesbrough
TS1 9FT

Decision (including any steps ordered)

1. The complainant has requested reports and emails from Middlesbrough Council ("the Council") regarding Middlesbrough bus station.
2. The Commissioner's decision is that the Council has correctly applied regulations 5(1) and 12(4)(b) of the EIR, and it has complied with the requirement of regulation 9 to provide advice and assistance.
3. The Commissioner does not require the public authority to take any steps.

Request and response

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

"Please send for the year 2017 to June 2018

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

2 emails sent by [Named person 1], [Named person 2], [Named person 3] and [Named person 4] in relation to the Bus Station, Middlesbrough

3 emails received by [Named person 1], [Named person 2], [Named person 3] and [Named person 4] in relation to the Bus Station, Middlesbrough."

5. The Council responded on 3 July 2018. It stated that no information was held in regard to point one of the request. It advised that it was refusing the remainder of the request under section 12 of the FOIA – Cost of compliance exceeds appropriate limit.
6. The complainant requested an internal review on 7 July 2018. Within this request, the complainant also provided a clarified request for information in the following terms:

"I am writing to request an internal review of Middlesbrough Council's handling of my FOI request 'Bus Station'.

A request naming four officers, one specified subject matter and a time period is not excessive.

I request that you ask those officers named to interrogate their emails by using the two words 'bus station' or 'media village' or 'TMIV' as you will be aware that the media village is to be located where the bus station is currently situated.

Considering the amount of press coverage regarding the bus station it seems very unlikely there are no reports of any kind have been written and I urge you to re read my request and check again. What checks did you actually carry out?

If no reports of any kind are available it would seem that project management needs to be investigated as how can this project be managed or developed without any reports."

7. The Council provided a further response, treating it as a clarified request. The Council also advised that it considered that the request fell under section 14(1) of the FOIA.
8. Following the complainant submitting their appeal to the Commissioner, the Commissioner contacted the Council and advised that the request fell under the Environmental Information Regulations 2004 (EIR) and as such, she will consider the response under the EIR.

Scope of the case

9. The complainant contacted the Commissioner on 13 August 2018 to complain about the way his request for information had been handled.
10. The Commissioner considers the scope of the case to be the determination of whether the Council has complied with regulation 5(1) in respect of the first request, regulation 12(4)(b) in respect of the

remainder of the requests and whether it has otherwise complied with regulation 9(1).

Reasons for decision

Regulation 5(1) - Duty to make available environmental information on request.

11. Regulation 5(1) of the EIR states that

"Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request."

12. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request).
13. The Commissioner asked the Council to explain what searches were carried out for relevant information, whether it had held any information at any point that fell within the scope of the complainant's request and whether it has a record of its deletion or destruction if it had been deleted or destroyed.
14. The Council responded to the enquiries and described the searches it had undertaken. This is in relation to the request of 7 July 2018, where the complainant believed that a number of items that had been provided as a list in disclosed information, were reports.
15. The Council has advised the Commissioner that the items the complainant listed are not reports, and as such, do not fall within the scope of the request.
16. The Commissioner is satisfied from the Council's explanation, along with evidence provided, that the requested information are not reports and as such, do not fall within the scope of the request. The Council has advised that no reports have been produced during the timeframe in which the complainant's request covers.

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

17. 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..."*

18. 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.
19. 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 should be calculated at £25 per hour; this applies a time limit of 18 hours.
20. 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.
21. In the circumstances of this case, the Commissioner has focussed her determination of regulation 12(4)(b) on the refined request of 7 July 2019. If regulation 12(4)(b) is engaged in respect of the refined request, then it will, by default, be engaged in respect of the original, wider request.

Is the exception engaged?

¹

<https://ico.org.uk/media/fororganisations/documents/1615/manifestlyunreasonablerequests.pdf>

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

22. The Council has informed the Commissioner that it has carried out an extensive manual paper search of records, filing systems, committee papers and an extensive electronic search of its email records.
23. It informed the Commissioner that the searches found no reports which fall within the scope of the request and that in excess of over 1400 emails, including attachments and chains, were located. This search has taken the Council five officer hours to complete. The Council advised that it would exceed the appropriate fee limit of 18 hours to process the emails.
24. 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 request. From the evidence provided by the Council, the Commissioner has determined that the Council would need to process each email within 33 seconds, in order to fully action the request within the time limit of 18 hours. The Commissioner recognised 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.
25. On this basis, the Commissioner accepts that the request is manifestly unreasonable within the meaning of regulation 12(4)(b).

The Public Interest Test

26. 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

27. The Council acknowledges that there is a public interest in ensuring transparency in its relationships with external third parties. It also recognises that the disclosure of such information can promote public debate, assist with the public's understanding of issues, allow individuals to understand decisions made and that it ultimately promotes accountability and transparency in terms of decision making.

Public Interest arguments for maintaining the exception

28. The Council considers that compliance with the request would divert a disproportionate amount of its resources from its everyday core functions.

29. It also explained that reviewing and preparing the information for possible disclosure would result in a burden to the Council.

Balance of the public interest test

30. The Commissioner recognises the importance of accountability and transparency in decision making within public authorities. However, there is a strong public interest in not placing a manifestly unreasonable burden on public authorities. 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.
31. The Commissioner recognises that the request relates to a subject matter that would have significant environmental implications should it be brought into practice. The disclosure of information about this matter will allow the public to understand the process that the Council has followed in addressing this, as well as information that it has based its decisions upon.
32. The Commissioner's position is that the public interest in this case lies in ensuring that the Council's resources are used effectively and are not diverted from its other core business functions. From the information provided, the Commissioner considers that dealing with the request does not best serve the public interest.
33. Taking all the above into account, the Commissioner considers that the public interest in maintaining the exception outweighs the public interest in complying with the request.
34. The Commissioner's decision is therefore that the Council was entitled to rely on regulation 12(4)(b) of the EIR to refuse the request.

Regulation 9 – Advice and assistance

35. 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."

36. 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.

37. In this case the Council refused the original request on the basis that it would exceed the appropriate fees limit. It added that it does not have the necessary resources to carry out a search of the size requested.
38. The Council advised the complainant that it may be possible to provide some of the information if the scope of the request is limited and a more specific subject matter is provided. The complainant subsequently did this on 21 August 2018. The response to this has been considered in decision notice FER0803872.
39. The Commissioner recognises that the information sought in the original request is essentially all internal information relating to the creation of a potential new bus station. As this is a matter which appears to have been under consideration for a number of years, there is a significant volume of information held by the Council. As such, the Commissioner considers that the Council's invitation to refine the parameters of the request, 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).

Right of appeal

40. 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@justice.gov.uk

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

41. 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.
42. 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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