

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 18 November 2013

Public Authority: North Somerset Council
Address: Town Hall
Weston-super-Mare
BS23 1UJ

Decision (including any steps ordered)

1. The complainant requested internal correspondence within North Somerset Council (the Council) relating to licences for outdoor eating and drinking. The Council disclosed some information but withheld the remainder and cited the following exceptions from the EIR:

Regulation 12(3) (personal information)

Regulation 12(5)(b) (adverse effect to the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature)

Regulation 12(4)(e) (internal communications)

2. The Commissioner's decision is that the Council cited regulation 12(3) correctly and regulation 12(5)(b) correctly in relation to some of the information withheld under that exception. However, in relation to the remainder of the information for which 12(5)(b) was cited, and all the information in relation to which regulation 12(4)(e) was cited, the Commissioner finds that these exceptions were cited incorrectly.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information specified in the schedule provided with this notice to the Council in relation to which regulation 12(5)(b) was cited, and all of the information in relation to which regulation 12(4)(e) was cited.

4. The Council 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 13 March 2012, the complainant wrote to the Council and requested information in the following terms:

"Please would you supply copies of any email and written correspondence (including telephone attendance notes) passing between members of the [North Somerset Council] executive members, officers and elected members in relation to any Highways matter for Regent Street, Marine Parade and Pier Square with particular emphasis on licensing issues between the period April 2011 and January 2012."

6. After a delay, the Council responded substantively on 26 June 2012, with a response providing further explanation sent on 18 July 2012. Some information was disclosed, with the remainder withheld under the following exceptions from the EIR:

Regulation 12(3) (personal information)

Regulation 12(5)(b) (adverse effect to the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature)

Regulation 12(4)(e) (internal communications)

7. The complainant responded on 21 July 2012 and requested an internal review. The Council responded with the outcome of the internal review on 21 September 2012. The conclusion of the review was that some of the information previously withheld under regulation 12(5)(b) was now disclosed, but that this and the other exceptions cited were upheld in relation to the remainder of the withheld information.

Scope of the case

8. The complainant contacted the Commissioner initially on 8 January 2013 to complain about the partial refusal of her information request. The complainant indicated that she did not agree with the reasoning given by the Council for the refusal of her request and also referred to the delay by the Council in responding to her request.

9. On 26 April 2013 the complainant supplied to the ICO copies of her correspondence with the Council concerning her information request. At this stage her complaint was accepted for investigation.

Reasons for decision

Regulation 2

10. The first question for the Commissioner to address here is whether the information is environmental in accordance with the definition given in regulation 2(1) of the EIR, which defines environmental information as follows:

"any information in written, visual, aural, electronic or any other material form on –

(a) the state of the environment, such as air and atmosphere, water, soil, land and landscape and natural sites including wetlands...

(b) factors, such as substances, energy, noise, radiation or waste, emissions...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...and activities affecting or likely to affect the elements and factors referred to in (a) and (b)...".

11. The view of the Commissioner is that this information is 'on' a plan that falls within the scope of regulation 2(1)(c). As the wording of the request suggests, the information requested by the complainant concerns the issue of licensing for an outdoor eating and drinking area. The decision to grant or revoke such a licence would result in an impact upon several of the elements and factors referred to in regulations 2(1)(a) and (b). The information in question is, therefore, environmental under regulation 2(1)(c) and it is correct to consider this request under the EIR.

Regulation 5

12. Regulation 5(2) states that a response should be provided within 20 working days of receipt of a request, albeit that regulation 7(1) provides that the time to respond to a request can be extended to 40 working days where the complexity of the request makes this necessary.

13. In this case the Council did not provide a substantive response to the request within either 20 or 40 working days. In so doing the Council breached the requirement of regulation 5(2). The Commissioner comments further on this breach in the "*Other matters*" section below.

Regulation 12(3) / 13

14. Regulations 12(3) and 13 provide an exception for information that is the personal data of an individual aside from the requester and where the disclosure of that personal data would be in breach of any of the data protection principles. Consideration of this exception is a two-stage process. First, the information in question must constitute the personal data of an individual aside from the requester, and secondly, it must be considered whether disclosure of that personal data would be in breach of any of the data protection principles.
15. Turning first to whether the information in question constitutes personal data, the definition of personal data is given in section 1(1) of the Data Protection Act 1998 (DPA) as follows:

"personal data' means data which relate to a living individual who can be identified-

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller".

16. The withheld information in this case consists of redactions from emails, the remainder of the content of which were disclosed to the complainant. An individual is identifiable in relation to each of these redactions, either as they are the sender or recipient of the email, or due to what is stated within the redacted content. The Commissioner accepts, therefore, that this information is personal data in accordance with the definition given in section 1(1) of the DPA.
17. Turning to whether disclosure of this information would be in breach of any of the data protection principles, the Commissioner has focussed here on the first principle, which requires that personal data be processed fairly and lawfully, and particularly whether disclosure would be in general fair. In forming a view on whether disclosure would be fair, the Commissioner has taken into account the reasonable expectations of the data subject, the consequences of disclosure upon the data subject and whether there is legitimate public interest in the disclosure of this information.

18. Some of the information in question here is *sensitive* personal data according to the definition given in section 2 of the DPA, as it relates to the data subjects' physical health or condition. This information is covered separately here as there are distinct factors that apply when considering the fairness of disclosing sensitive personal data.
19. Sensitive personal data has, by its very nature, been deemed to be information that individuals regard as the most private information about themselves. Disclosure of this type of information is likely to have a detrimental or distressing effect on the data subject, and so the Commissioner considers that it would be unfair to disclose those parts of the requested information that are sensitive personal data.
20. Turning to the remainder of the information, the Commissioner is of the view that the data subjects would hold an expectation that this information would not be disclosed. The emails record views provided to the Council by individuals about the licensing process to which the complainant's information request related. The Commissioner accepts that these individuals would not wish these emails to be disclosed with information that identifies them included and that they would have made their comments to the Council in the expectation that their personal data would not be disclosed.
21. As to what the consequences of disclosure upon the data subjects may be, the Commissioner believes that disclosure counter to the expectation of privacy identified in the preceding paragraph may be distressing to those individuals. He also accepts that distress may result through damage to relationships between the data subjects and others within their community who may hold a different view on this licensing issue.
22. Having found that the data subjects would hold an expectation that this information would not be disclosed, and that disclosure of it would be likely to result in distress, the conclusion of the Commissioner is that the first data protection principle would be breached through disclosure. This applies to both the sensitive and the non-sensitive personal data.
23. Overall, the Commissioner notes that the Council has withheld only parts of the content of these emails; they were disclosed to the complainant in redacted form. His view is that taking the approach of only withholding that content which was clearly personal data was a sensible and proportionate approach by the Council which provided to the complainant access to the majority of the content of these emails.
24. The Commissioner has found that this information does constitute personal data and that disclosure of it would breach the first data protection principle. His conclusion is, therefore, that the exception provided by regulation 12(3) / 13 is engaged and the Council is not

required to disclose any of the information redacted under this exception.

Regulation 12(4)(e)

25. This regulation provides an exception for information that constitutes internal communications. If the information in question conforms to the description of 'internal communication', the exception is engaged. However, this exception is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exception does not outweigh the public interest in favour of disclosure.
26. The Commissioner notes here first that the wording of the request suggests that any information falling within the scope of it would constitute an internal communication. Having reviewed the information in question, which consists of emails and attachments to those emails, the Commissioner is satisfied that all of these documents, bar one, can be accurately characterised as internal communications. In relation to those documents, regulation 12(4)(e) is, therefore, engaged.
27. The one document in relation to which the Commissioner is not satisfied that the exception is engaged is an email attachment with the title "*Proposed changes paper*". This appears to have been prepared and circulated for external consultation and is not, therefore, an internal communication. The exception provided by regulation 12(4)(e) is not, therefore, engaged in relation to that document. At paragraph 3 above, the Council is now required to disclose this document.
28. In relation to the remainder of the information, for which regulation 12(4)(e) is engaged, the next step is to consider the balance of the public interest. In forming a conclusion here, the Commissioner has taken into account the general public interest in the transparency and openness of the Council, as well as the requirement in the EIR to interpret the exceptions restrictively and, as made explicit in regulation 12(2), has applied a presumption in favour of disclosure. This is in addition to factors that apply specifically in relation to this information.
29. Covering arguments in favour of maintenance of the exception, the Council has advanced two main arguments here. The first of these is to enable a drafting process to be carried out away from the possibility of disclosure. The second argument concerned the necessity of providing a private space to discuss issues, in this case relating to the licensing process.
30. In relation to the first argument, concerning maintaining a private space for the drafting process, the view of the Commissioner is that it is

questionable whether this is an argument relevant to this exception. Regulation 12(4)(d) provides an exception specifically for materials that are in the course of completion. That would be the relevant exception to cite for this argument.

31. It is also the case that this argument is not relevant to the majority of the information in question here. This consists of emails that had been finalised and sent prior to the date of the request; they were not being drafted at the time of the request.
32. The Commissioner does, however, accept that this argument is relevant in relation to one document, an email attachment titled "*Decision Notice Pier Square St Café*". This appears to have been in draft form at the time of the request and, in relation to that document, the Commissioner accepts that the maintenance of a private space in which to carry out the drafting process is a relevant argument in favour of maintenance of the exception. The weight that this factor carries is reduced, however, owing to its limited relevance to this exception and would have carried greater weight had it been cited in relation to regulation 12(4)(d).
33. Turning to the second argument advanced by the Council, concerning a safe space within which its staff can carry out internal communications related to the drafting process, this argument is of central relevance to the interests represented by this exception. The Commissioner recognises that the licensing process would have benefitted from the maintenance of a private space. As part of this process Council staff would have been required to comment and make judgements upon third parties; it is reasonable to argue that staff may have been inhibited in doing so had they been concerned that those third parties may have had access to those comments.
34. That the Council has the ability to carry out the licensing process effectively is in the public interest. Inhibiting staff from contributing fully to that process would be likely to have a detrimental effect upon that process. The maintenance of a safe space in which to carry out that process is a valid argument in favour of maintenance of the exception.
35. Turning to arguments in favour of disclosure of the information, the complainant argued that the public interest favoured disclosure in order to demonstrate that the licensing process had been carried out effectively. The complainant raised issues about whether this process had been effective and believed that disclosure was necessary in order to deal with these issues.
36. The Commissioner agrees that there is a valid public interest in disclosure of this information in order to demonstrate the efficacy of the licensing process. This contributes to the presumption in favour of

disclosure required by regulation 12(2) and is a valid factor in favour of disclosure of the information.

37. Furthermore, having reviewed the content of the information in question, the view of the Commissioner is that it is in the public interest for information relating to that specific licensing process to be disclosed. Whilst what can be said in this notice about the content of the withheld information is very limited, this content does reveal that the specific process recorded in this information was not straightforward.
38. When making her complaint to the ICO, the complainant stated that a decision had initially been taken to withdraw a licence from a particular premises for an outdoor seating area. That licence was subsequently reinstated on appeal. Given that the licensing decision taken by the Council was subsequently overturned, the Commissioner believes that there is a public interest in understanding the full background to this chain of events; and that satisfying this interest requires disclosure of the information in question.
39. Whilst the Commissioner has recognised a public interest in preserving a private space in order to carry out the licensing process, in relation to the specific licensing process recorded within the information in question, his conclusion is that this is outweighed by the public interest in favour of disclosure. At paragraph 3 above, the Council is, therefore, required to disclose this information.

Regulation 12(5)(b)

40. This regulation provides an exception for information the disclosure of which would adversely affect the course of justice, the ability of a person to receive a fair trial, or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature. Consideration of this exception requires two stages. First, the exception must be engaged as disclosure of the information would adversely affect one of the processes described in the exception. Secondly, this exception is qualified by the public interest, meaning that the test described at paragraph 25 above must be applied.
41. Covering first whether this exception is engaged, the reasoning of the Council for the citing of this exception is that some of the information falling within the scope of the request is covered by legal professional privilege (LPP). LPP provides for the confidentiality of communications between a legal adviser and client that are for the main purpose of providing legal advice.
42. The Commissioner accepts that this argument is relevant to this exception on the basis that disclosure contrary to LPP would adversely

affect the processes described in regulation 12(5)(b). Deciding whether this exception is engaged therefore requires reaching a conclusion as to whether the information in question is covered by LPP.

43. In relation to the majority of the documents in question here, the Commissioner accepts that these are covered by LPP. They are confidential communications from the Council's solicitors to other staff within the Council for the primary purpose of providing legal advice, or else refer to legal advice given elsewhere. In relation to this information, the exception provided by regulation 12(5)(b) is, therefore, engaged.
44. However, in relation to other information withheld under regulation 12(5)(b), the Commissioner does not accept that this would be covered by LPP. This because the content of these emails does not appear to include legal advice. As the Council has advanced no alternative argument as to why disclosure of these emails would adversely affect the course of justice, the conclusion of the Commissioner is that the exception provided by regulation 12(5)(b) is not engaged in relation to these emails.
45. The Commissioner has reached a similar conclusion in relation to several email attachments. In relation to one of these, the argument of the Council appeared to concern confidentiality of legal advice provided to the complainant by her legal advisers. As the complainant had stated to the Council that she waived any claim to LPP in relation to legal advice provided to her, regulation 12(5)(b) is not engaged in relation to that attachment.
46. In relation to the other email attachments, the content does not record legal advice and so is not covered by LPP. The emails and attachments in relation to which the Commissioner has found that regulation 12(5)(b) does not apply have been identified in a schedule provided to the Council separately and at paragraph 3 above the Council is now required to disclose these.
47. The next step in relation to those emails where the Commissioner has found that regulation 12(5)(b) is engaged is to consider the balance of the public interest. As with regulation 12(4)(e), the Commissioner has taken into account here those factors that relate specifically to the information in question, as well as the requirement to apply a presumption in favour of disclosure.
48. Covering first arguments in favour of disclosure of this information, the same factors as covered in relation to 12(4)(e) above also apply here. The subject matter and content of this information mean that there is a valid public interest in favour of disclosure of this information.

49. As to the public interest in favour of maintenance of the exemption, in any case where regulation 12(5)(b) is found to be engaged on the basis that the information in question is subject to LPP, it is necessary to take into account the inbuilt public interest in this exception; that is, the public interest in the maintenance of LPP. The inbuilt public interest in legal professional privilege was noted by the Information Tribunal in the case *Bellamy and Secretary of State for Trade and Industry* (EA/2005/0023):

"...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest....it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..." (paragraph 35).

50. However, in *DBERR v Dermot O'Brien* (EWHC 164 (QB)) the High Court noted that the inbuilt public interest in legal professional privilege should not mean that section 42(1) of the FOIA, and by inference regulation 12(5)(b) of the EIR, is, in effect, elevated to an absolute exemption. This means that, whilst the inbuilt weight in favour of the maintenance of legal professional privilege is a weighty factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is outweighed by the factors favouring disclosure.
51. In line with the relevant case law, the Commissioner has accorded significant weight to the maintenance of LPP. Whilst the Commissioner remains mindful that this should not mean that this exception becomes effectively absolute, it is the case that there will need to be particularly strong public interest grounds for the public interest in the maintenance of LPP to be overridden. Having reviewed the withheld information and taking all the circumstances into account, the view of the Commissioner is that there are not sufficiently strong grounds in favour of disclosure in this case and so he considers that the public interest in maintaining LPP outweighs the public interest he has recognised in favour of disclosure of this information. The Council is not, therefore, required to disclose the information in relation to which the Commissioner has found that regulation 12(5)(b) is engaged.

Other matters

52. The Commissioner has found above that the Council breached the EIR in failing to respond to the request within 20 working days. Neither did it respond within the permitted extension of 40 working days. A record of

this breach has been made; should evidence from other cases suggest that this is a recurrent issue with information requests made to the Council, further action may be taken.

Right of appeal

53. 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: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

54. 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.
55. 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

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