

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 10 March 2014

Public Authority: East Devon District Council
Address: Council Offices
Knowle
Sidmouth
Devon
EX10 8HL

Decision (including any steps ordered)

1. The complainant has requested copies of East Devon District Council (EDDC) meeting minutes and progress reports on the subject of relocation. EDDC stated that the information was being withheld on the basis that disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation (section 36(2)(b)(ii)). The Commissioner advised EDDC to reconsider the request under the Environmental Information Regulations 2004 (EIR) due to the nature of the information and EDDC applied the regulation 12(4)(e) as it considered all of the information to be internal communications.
2. The Commissioner's decision is that regulation 12(4)(e) is engaged in relation to the minutes of both working party's and the public interest favours maintaining the exception. However, he does not consider the exception is engaged in relation to the project reports and he therefore requires these reports to be disclosed.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the project reports.
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. The complainant had been engaged in correspondence with EDDC from 2012 onwards on the subject of EDDCs proposed relocation from Knowle. During the course of this correspondence there were requests for information and on 14 February 2013 the complainant asked:

"As you have still not replied to my request under FOI for the full, unredacted minutes of all groups involved in the Relocation from Knowle as well as the Relocation Managers formal Progress Report, I would like to formally request for them under the Environmental Regulations Act."

6. EDDC responded on 15 February 2013. It stated that there were two groups involved in the relocation project – one made up of officers and one of Members. The notes and action points from the officers meeting are reported to Cabinet and EDDC therefore considered they should not be disclosed as this may inhibit the free and frank exchange of views. With regard to the progress report EDDC explained that an amended version of the report was made available to the Overview and Scrutiny Committee in July 2012.
7. Following an internal review EDDC wrote to the complainant on 13 May 2013. It stated that it considered the minutes of meetings to be exempt on the basis of section 36(2)(b)(ii) and that the public interest in disclosure was being met by the publication of information on EDDCs website and by the issuing of press statements.

Scope of the case

8. The complainant initially contacted the Commissioner on 17 February to complain about the way his request for information had been handled. Following an internal review the complainant again contacted the Commissioner on 19 May 2013 to ask him to pursue his complaint.
9. After considering the withheld information in this case, the Commissioner concluded that it should have been considered for disclosure under the EIR. This is because the information in the minutes and reports relates to plans and activities which will have a direct impact on the use of land and the landscape. The minutes and reports by their very nature discuss relocation options including how to manage various sites and options for new premises including the possibility of building. It

is the Commissioner's view that this information would be environmental information as it relates to changes to the land.

10. There is information within the withheld information which may not be environmental but it is inextricably linked to that which is and the predominant purpose of the documents is to make a decision on relocation which is likely to involve a factor affecting the state of the environment. As such the information cannot be separated and the information requested by the complainant should have been considered under the EIR.
11. EDDC therefore reconsidered the request under the EIR and considered regulation 12(4)(e) exception to be engaged as the requested information consisted of internal communications.
12. The Commissioner therefore considers the scope of his investigation to be to determine if EDDC has correctly applied the regulation 12(4)(e) exception to withhold the requested information.

Reasons for decision

Regulation 12(4)(e) – internal communications

13. The Commissioner has first considered the application of regulation 12(4)(e) as EDDC consider this to be engaged in relation to all of the withheld information.
14. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. The Commissioner has recently published guidance¹ on regulation 12(4)(e), which includes a description of the types of information that may be classified as 'internal communications.'
15. The first factor that must be considered is whether the information in question can reasonably be described as a 'communication'. In his guidance on the exception, the Commissioner acknowledges that the

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http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_internal_communications.ashx

concept of a 'communication' is broad and will encompass any information someone intends to communicate to others, or places on file so that others may read it.

16. EDDC has identified seven formal progress reports, minutes from the officer's relocation working party meetings and minutes from the members office relocation meetings which constitute the withheld information in this case. The progress reports are produced by Davis Langdon for EDDC and provide updates on the project.
17. The Commissioner is satisfied that the minutes properly constitute 'communications' for the purpose of the exception. The reports would also be considered 'communications' as they are intended to provide updates on the progress of the relocation project to those involved. The Commissioner has therefore next considered whether the minutes and reports constitute 'internal' communications.
18. There is no definition of what is meant by 'internal' contained in the EIR. Consequently, in the absence of one, a judgment on what is an internal communication must be made by considering the relationship between a sender and recipient, the particular circumstances of the case and the nature of the information in question. Typically, however, communications sent between officials within a single organisation are the clearest example of records that will be covered by the exception.
19. EDDC has explained that the meetings to which the minutes relate were intended to discuss thinking and ideas on the issues around relocation and were not decision-making meetings.
20. Generally the minutes from these meetings were only circulated to Members and Officers who attended but were on occasion also sent to EDDCs Senior Management Team and then used to inform reports to EDDC's Cabinet (made up of executive team members). The progress reports followed on from these meetings and provided an update to Members on the work of the relocation project.
21. The Commissioner is satisfied that the minutes from both the officers and members relocation meetings would constitute 'internal' communications as the minutes were only distributed within EDDC and were not sent externally.
22. With regard to the reports, the Commissioner asked EDDC further questions to establish who produced the reports and how they were distributed. After viewing a sample of the reports the Commissioner noted that they appeared to have been produced by an external company, Davis Langdon, for EDDC. EDDC explained that Davis Langdon provide project management on the relocation project and the author of

the reports has been seconded by Davis Langdon to undertake the role of Relocation Project Manager for EDDC.

23. In assessing whether these reports are therefore internal communications, the Commissioner has again referred to his guidance on the regulation 12(4)(e) exception, in particular paragraphs 25-28 which set out the extremely limited circumstances in which communications with a third party are considered 'internal'.
24. His guidance specifies that communications between a public authority and a third party such as a contractor will not normally constitute an internal communication. The Commissioner's view is that the circumstances of a case and the nature of the information may justify an argument that the communication is internal as was the case in *DfT v Information Commissioner*² where an unpaid independent expert advised the DfT on a study and was considered to be "embedded" in the public authority.
25. This does not appear to be the case for the representative from Davis Langdon, the report has the logo of Davis Langdon and is authorised by one of the partners. The report is also signed off by the representative from Davis Langdon who is project managing the relocation for EDDC. The sign-off uses the job title of Senior Project Manager and the contact information for Davis Langdon. As a result, the Commissioner is of the view that the report looks like a product of Davis Langdon and is authorised by a third party to EDDC. As such he does not consider that these project reports can be seen to be 'internal' communications and he does not accept that the regulation 12(4)(e) exception is engaged in relation to the project reports.
26. However, as he does consider the exception engaged in relation to the officers and members group minutes he has gone on to consider the relevant public interest arguments in relation to this information.

Public interest arguments in favour of disclosing the requested information

27. EDDC has not submitted any arguments in favour of disclosing the requested information. However the Commissioner acknowledges the presumption in favour of disclosure inherent in regulation 12(2) of the EIR. He also accepts that there is an inherent public interest in the openness and transparency of public authorities and their decision making process.

² EA/2008/0052

28. Relocation programmes are always likely to generate interest within local communities and groups. However, this does not always equate to a public interest in the release of information. That being said, it is important that a public authority can demonstrate that it is making decisions based on sound judgement and in the interests of the local communities it serves. The release of any information which may help the public to understand the decision-making process of a public authority is likely to be in the public interest.

Public interest arguments in favour of maintaining the exception

29. The main arguments presented by EDDC relate to the potential chilling effect on future deliberations and the maintenance of a safe space in which to debate options. EDDC has argued that if the chilling effect occurred or the safe space was eroded this would not be in the public interest as it may affect the future decision-making process of EDDC and lead to less frank discussions and decisions being made without full consideration of all the options.
30. EDDC has also argued that much of the public interest in disclosure has been met by the routine disclosure of information around the relocation³ on dedicated pages on EDDCs website. In addition, EDDC has explained that it has held stakeholder meetings and the planning application process is still open to public scrutiny.
31. EDDC argues that the timing of the request, coming at a point when decisions on relocation are still being debated with a view to reach a conclusion by 2016 is significant. EDDC therefore considers that minutes dating back as far as 2011 are still likely to carry a strong public interest argument for being withheld as they are still relevant to the ongoing project.

Balance of the public interest

32. The Commissioner recognises that, inherent in the exception provided by regulation 12(4)(e) is the argument that a public authority should be afforded private space for staff in which issues can be considered and debated, advice from colleagues be sought and freely given and ideas tested and explored to protect the integrity of the internal deliberation and decision making process.

³ <http://www.eastdevon.gov.uk/movingandimproving>

http://www.eastdevon.gov.uk/communications_and_consultation.htm?newsid=964

33. The Commissioner also recognises that public authorities often require a safe space in which to debate issues without the hindrance of external comment and to develop their policies or opinions free from outside interference. However the Commissioner has to consider the specific information in dispute in this case in order to determine whether this safe space is still relevant and important, taking into account the timing of the request and the content and context of the particular information in question.
34. The Commissioner considers that the need for a safe space will be strongest when an issue is still "live". Once a public authority has made a decision, a safe space for deliberation will no longer be required and the public interest is more likely to favour disclosure.
35. In this case, the Commissioner accepts that the remaining withheld information (the minutes of officers and members groups) constitutes internal advice and deliberations on the future location of EDDC at a time when all potential options were still being considered. The Commissioner is satisfied that at the time of the request the issue was still on-going and no final decision had been made.
36. The Commissioner acknowledges that there is a general public interest in public authorities being as accountable and transparent as possible regarding their decision-making processes. He appreciates that the issue of relocation had been the subject of local interest⁴ and some controversy. The Commissioner therefore accepts that this indicates there is some public interest in transparency regarding the decision-making process but he must be clear that an interest in an issue from members of the public does not necessarily indicate there is a public interest in disclosure.
37. It is his view that disclosure would not lead to increased engagement on the issue as EDDC have already provided opportunities to engage through consultations and, more recently, public forums which is standard for most projects undertaken by public authorities. He does accept that disclosure may be in the public interest as when the opportunities to engage arise, the more information on the decision-making process and options available may result in better informed

⁴ <http://www.exeterexpressandecho.co.uk/East-Devon-campaigners-stage-surprise-protest/story-20008533-detail/story.html>

<http://saveoursidmouth.com/2013/11/07/save-our-sidmouth-invited-as-stakeholder-to-tomorrows-knowle-briefing-by-eddc/>

debates and engagement. For this reason he does acknowledge there is some public interest in disclosure as better informed debates will assist the decision-making process and ensure that all options are thoroughly debated and considered.

38. However, he also recognises the strong public interest in affording a public authority safe space in which to deliberate over important issues, options and risks and to make decisions accordingly. The Commissioner, as already outlined, notes that at the time of the request no firm decision on the best relocation option had been made, so there was a strong argument for maintaining the exception so as not to interrupt the process.
39. In addition to this, as a counter to the public interest in disclosure to increase transparency, it can be argued this is a very high level, general argument which does not take account of the need to maintain a 'safe space' for decision-making and the ability to make robust decisions based on frank advice.
40. In reaching a decision on where the balance of the public interest lies in this case, the Commissioner has attached particular weight to the fact that no formal decision had been made at the time of the request, the need to avoid any impact on the decision making process by premature disclosure of the requested information, and the lack of compelling public interest arguments in favour of disclosure.
41. For the reasons set out above the Commissioner considers that, in all the circumstances of the case, the public interest in maintaining the exception set out in regulation 12(4)(e) outweighs the public interest in disclosure and he therefore accepts that the minutes of both working parties should be withheld.
42. For clarity, the Commissioner does now require EDDC to disclose the project reports as the regulation 12(4)(e) exception has not been found to be engaged.

Right of appeal

43. 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

44. 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.
45. 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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