

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 7 March 2023

Public Authority: Nuneaton and Bedworth Borough Council
Address: Town Hall
Coton Road
Nuneaton
CV11 5AA

Decision (including any steps ordered)

1. The complainant has requested information with regards to a Memorandum of Understanding¹. Nuneaton and Bedworth Borough Council (the council) provided some information and refused the remaining under regulation 12(4)(e) of the EIR – Internal Communications. The complainant has disputed the refusal and is of the view that further information is also held, that has not been provided.
2. The Commissioner's decision is that regulation 12(4)(e) of the EIR is engaged to the information that has been withheld and the Commissioner is satisfied that the council has located all the information falling within the scope of the complainant's request.
3. The Commissioner does not require any steps.

¹ A a statement of serious intent – agreed voluntarily by equal partners – of the commitment, resources, and other considerations that each of the parties will bring. It has moral force, but does not create legal obligations.

Request and response

4. On 18 July 2022 the complainant made the following information request:

"I would like to understand the decision by NBBC council to withdraw from the Memorandum of Understanding (attached) about housing numbers and to reject the Coventry overspill. The full title of the MOU is "Memorandum of Understanding relating to the planned distribution of housing within the Coventry & Warwickshire Housing Market Area (HMA)"

Can I please see any documents, advice, or correspondence, in the last 3 years, relating to withdrawing from the MOU, including materials, discussions, etc, leading up to a decision to withdraw, and any responses from the other local authorities involved. I do not require personal information."

5. The council responded on 15 August 2022 providing:
- a link to the motion presented at Full council and minutes.
 - Planning Advisory Service Report with an attached internal email researching other motions.
6. The council refused to provide the remaining information under regulation 12(4)(e) of the EIR – Internal Communications.
7. The complainant requested an internal review on the 15 August 2022 disputing the council refusal to provide the internal communications.
8. The council provided an internal review on 7 September 2022 upholding its initial response.

Scope of the case

9. The complainant contacted the Commissioner on 9 September 2022 to complain about the council withholding the internal communications and does not consider all the withheld information would be internal.
10. During the Commissioner's investigations, the council located a record of a closed council minute and has stated, to the Commissioner, that it is also withholding it under regulation 12(4)(e) of the EIR.
11. The scope of the case is for the Commissioner to determine whether the council is correct to rely on regulation 12(4)(e) of the EIR to withhold the internal communications.
12. The Commissioner will also determine whether the council holds any further information other than what is being withheld as internal communications.

Reasons for decision

Regulation 12(4)(e) of the EIR – Internal Communications

13. 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.
14. The Commissioner has published guidance² on regulation 12(4)(e) of the EIR which includes a description of the types of information that may be classified as 'internal communications'.
15. The information being withheld in this case under this exception is email correspondence between council officers and a closed council minute dated 14 July 2021.
16. The Commissioner has viewed the information and is satisfied that this information constitutes internal communications and that the exception at regulation 12(4)(e) of the EIR is engaged.

² <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/regulation-12-4-e-internal-communications/>

Public Interest Test

17. Although regulation 12(4)(e) of the EIR has been found to be engaged in this case, the exception is subject to the public interest test as required by regulation 12(1) of the EIR.
18. The public interest test is to determine whether in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Public Interest in favour of disclosure

19. The council recognises that the general principles of open and transparent government provides accountability and an insight into decisions made on matters relating to the environment.
20. The complainant is of the opposing view to that better decisions are made and reached in private, out of public sight and hearing. He states there is strong evidence that better environmental decisions are reached with full public participation.
21. The complainant says that this position is supported by a vast meta study of public participation in environmental decisions carried out by the highly prestigious and authoritative US National Academies of Sciences³.
22. The complainant quotes:

"Conclusion 1: When done well, public participation improves the quality and legitimacy of a decision and builds the capacity of all involved to engage in the policy process. It can lead to better results in terms of environmental quality and other social objectives. It also can enhance trust and understanding among parties. Achieving these results depends on using practices that address difficulties that specific aspects of the context can present.

The panel found that participatory processes have sometimes made matters worse. However, it also found that across a wide variety of environmental assessment and decision contexts, there are practices that can simultaneously promote quality, legitimacy, and capacity"

³ <https://nap.nationalacademies.org/catalog/12434/public-participation-in-environmental-assessment-and-decision-making>

23. The complainant also refers to the Tribunal Case⁴ of 'DfES v Information Commissioner and the Evening Standard (EA/2006/0006, 19 February 2007', and says it demonstrates that the argument for frank internal discussion does not always prevail.

Public interest in maintaining the exception

24. The council state that it is important that it is able to maintain a safe space for thinking in order to discuss the merits of proposals and the implications of decisions internally without outside interference.
25. The councils has explained that in this instance, the content of the email between council officers indicates the council's Leader's thoughts on the issue, which were given in the spirit of trust and openness to those officers, with the implied understanding that this would be considered confidential. The minute of the closed meeting was also in order to discuss the council's position on the MOU and actions to take on it.
26. The council has told the Commissioner that there was a decision to step away from the MOU on 14 July 2021, this withdrawal has not happened and the MOU is actually still a live ongoing issue until it adopts the Local Plan.
27. The council's position is that as the MOU is still ongoing, there is a stronger public interest in maintaining the exception to the withheld information.
28. The Commissioner issued a decision notice⁵ on 31 March 2022 which sets out his position that:

"the Commissioner accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This may carry significant weight in some cases. In particular, the Commissioner considers that the need for a safe space will be strongest when the issue is still live" but "that if planning matters relating to the development were completed then the risk of prejudicing the planning process would be reduced" before concluding "However, this is not the case, therefore the need to

⁴ <https://informationrights.decisions.tribunals.gov.uk/Public/search.aspx>

⁵ <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4020070/ic-104397-s8c0.pdf>

maintain the safe space gives more weight to the argument for maintaining the exception.”

Balance of the public interest

29. The Commissioner's guidance on this exception explains that although a wide range of internal information will be caught by the exception, public interest arguments should be focussed on the protection of internal deliberation and decision-making processes. This reflects the underlying rationale for the exception being that it protects a public authority's need for a 'private thinking space'.
30. With regard to attributing weight to the public interest arguments in favour of maintaining the exception, the Commissioner accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This may carry significant weight in some cases. In particular, the Commissioner considers that the need for a safe space will be strongest when the issue the withheld information relates to is still live.
31. The Commissioner appreciates that there is a strong public interest in matters concerning decision around an MOU. The Commissioner accepts that disclosure of the withheld information would provide the public with an insight into the council's decision making and thought processes.
32. The Commissioner notes from the council that the withdrawal from the MOU has not actually happened and so is still a live issue until it adopts a fresh local plan. The Commissioner therefore accepts that the council required a safe space in order to deliberate issues around making a decision. He also recognises the danger of a 'chilling effect' on future internal deliberations about the subject matter of the request being caused through disclosure of the withheld information.
33. Having considered the relevant facts and the circumstances of this case, the Commissioner's view is that the balance of the public interest favours maintaining the exception. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(e) was applied correctly.

Regulation 12(4)(a) of the EIR – Information held/ not held

34. Regulation 5(1) of the EIR requires a public authority that holds environmental information to make it available on request.
35. Regulation 12(4)(a) of the EIR allows a public authority to refuse to provide the requested information if it does not hold it at the time of the request being received.

36. 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).
37. In this case, the council has provided some information to the complainant and withheld the remaining.
38. The council has told the Commissioner if any further information were held falling within the scope of the request, then it would be held by either the council's Leader, Elected Members and Directors.
39. The council has told the Commissioner that searches were conducted on their emails and shared drive for anything that mentions the MOU. It has confirmed that this is where any further information, if held, would be located.
40. It confirmed that no information would have been deleted or destroyed and it would be held electronically.
41. The Commissioner on review of the above, is satisfied that the council has checked for the information in the most relevant places and therefore finds, on the balance of probabilities, the council holds no further information falling within the scope of the request and so the exception at 12(4)(a) of the EIR applies.

Public interest test

42. Regulation 12(1)(b) of the EIR requires a public interest test to be carried out if a request is refused under any of the exemptions set out under regulation 12 of the EIR.
43. However, as no further information has been found to be held, the Commissioner can only find that the public interest in maintaining the exemption at 12(4)(a) of the EIR outweighs any public interest in disclosure, simply because there is no further information to disclose.

Right of appeal

44. 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

45. 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.
46. 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

Daniel Perry
Senior Case Officer
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