



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2019/0108

**Decided without a hearing
On 7 February 2020**

Before

JUDGE BUCKLEY

MALCOLM CLARKE

PAUL TAYLOR

Between

MIDDLESBROUGH COUNCIL

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

CHRISTINE BELL

Second Respondent

DECISION

1. For the reasons set out below and in the attached closed annex the Tribunal dismisses the appeal.
2. The requested information, with personal information redacted (names and contact details of Council staff and third parties), should be disclosed within 28

days from the later of the date of promulgation of this decision or the determination of any application for permission to appeal by Middlesbrough Council ('the Council') or any subsequent appeal.

3. The closed annex will be released in a redacted form after the later of the expiry of the deadline for permission to appeal or the conclusion of any appeal.

REASONS

1. The parties have consented to this appeal being determined without an oral hearing.

Factual background

2. The Second Respondent, Ms Bell, works for Boro Taxis, which had applied for planning permission to open a taxi office at an address in the Council's area. Planning permission was refused. The decision was preceded by a long period of discussions, in part by email, between Boro Taxis and the Council and also by internal discussion at the Council with input from third parties. Although the Council took the view that from a planning perspective the development was acceptable in principle, it was refused in part because of what appear to be irreconcilable objections from different parts of the Council: Highways objected to cars picking up passengers at the front (traffic), Environmental Health objected to cars picking up at the rear (noise nuisance).

Request

3. Ms Bell made her first request to Middlesbrough Council ('the Council') on 1 March 2018:

This request relates to the planning application submitted for the premises known as [address redacted], Middlesbrough submitted by this company [Boro taxis].

This request relates to the time period 21 March 2017 to the date of release of the information requested.

This request relates to the following officers and members:

[list of names redacted]

1..

...

10...

And to include any personal assistants of the above named where applicable.

Members

11

...

14...

Please provide all correspondence sent to or from the above named individuals. The correspondence to include, but not limited to, emails, letters, texts, reports (including management reports such as LMT, DMT & CMT (but not limited to those report types)) and all types of file and log notes made.

4. The Council replied by email dated 21 March 2018 indicating that it was considering the request as a request for information under the Environmental Information Regulations 2004 (EIR) and refusing the request in reliance on regulation 12(4)(b) on the basis that the request was manifestly unreasonable.
5. Ms Bell sent an amended request by email dated 21 March 2018, limiting the request as follows and removing two names from the list. This amended request is the request with which we are concerned.

This request relates to the time period 5 June 2017 – 31 December 2017

This request excludes information that is available on the Council's website and excludes correspondence sent to our planning consultant [*email address redacted*]

This request relates to the following officers and members [*names redacted*].

Please provide all correspondence sent to or from the above named individuals. The correspondence to include, but not limited to emails, letters and log notes made.

6. Miss Bell complained to the Council on 14 May 2018 that they had not responded to her request. This was treated by the Council as a request for an internal review.
7. The Council wrote to Ms Bell by letter dated 13 June 2018 with the outcome of the internal review. The Council disclosed some information, including some redacted information, but relied on regulation 12(4)(e) EIR (internal communication) and regulation 12(5)(f) (interests of the person who provided the information to the authority) to withhold the remaining information.

Decision Notice

8. In a decision notice dated 7 March 2019 the Commissioner decided that regulation 12(4)(e) was engaged but the public interest favoured disclosing the information. She decided that regulation 12(5)(f) was not engaged because there was no evidence of harm to the third party's interests which was real and of substance and therefore she was not satisfied that disclosure would adversely affect the interests of the third party. She determined that the Council had breached regulation 5(2) (time for compliance). The Council were required to disclose the information with personal information (names and contact details of Council staff) redacted.

Appeal

9. The Appellant's notice of appeal challenges the Commissioner's decision notice on the grounds that regulation 12(5)(f) was engaged and the public interest favours maintaining both regulation 12(5)(f) and 12(4)(e), in particular because:
 - 9.1. The Commissioner erred in concluding that there was no demonstrable adverse effect under regulation 12(5)(f);
 - 9.2. The Commissioner's conclusion on the public interest is wrong because:
 - 9.2.1. It fails to properly acknowledge the importance of the 'safe space' for thought; and
 - 9.2.2. The public interest has already been sated in an issue which is only of interest to the second respondent.

Commissioner's response

10. In relation to regulation 12(5)(f) the Commissioner submits that the Council has failed to establish that disclosure would adversely affect the interests of the person who provided the information.
11. In relation to the public interest, the Commissioner submits that the Council has overstated its need for a private thinking space, particularly as the planning application had been refused by the date of the request. The Council's argument about the chilling effect are based on unwarranted speculation about how Council officers and employees might feel when imagining future EIR requests.

Response of the Second Respondent

12. The planning decision was made 13 days before the relevant request and over 3 months before the date of the internal review.
13. Ms Bell sets out her concerns that the planning process was inappropriately and/or improperly interfered with. If this was not the case, there would be no reason for the Council to want to withhold the documents.
14. It is unlikely that there could be any adverse effect on third party interests at the date of the request because the application had been refused. Any third party information should have been disclosed as part of the planning process if they were considered as part of the determination of the planning application. If they were not, then it is difficult to see why they exist.
15. The public ought to be able to ensure that there is proper scrutiny and consideration of planning applications and that they are not determined taking into account undisclosed third party information.
16. The fact that officers held conflicting views was already known: these views had been openly exchanged. Disclosure would therefore not affect the ability of officers to have a frank exchange of views.

17. Releasing such information would make the process more transparent. The public should have access to information and the ability to challenge impropriety.
18. The need for a safe space diminishes once a decision has been made. In relation to the chilling effect, Ms Bell relies on paragraph 49 of the ICO Guidance on s 36 of the Freedom of Information Act 2000 (FOIA).

Legal framework

19. The relevant parts of regulation 12 EIR provide that a public authority may refuse to disclose environmental information requested if an exception to disclosure applies under regulation 12(4) or (5) and, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Under regulation 12(2) a public authority must apply a presumption in favour of disclosure.
20. Regulation 12(4)(e) provides that a public authority may refuse to disclose information to the extent that-
 - (e) the request involves the disclosure of internal communications.
21. Regulation 12(5)(f) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the interests of the person who provided the information where that person-
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - (iii) has not consented to its disclosure
22. 'Would adversely effect' should be interpreted in the sense that the adverse effect has to be identified and the Tribunal must be satisfied that disclosure "would" have that adverse effect, not that it "could" or "might". (See **Mersey Tunnel Users v ICO and Halton Borough Council** EA/2009/0001).
23. If the conditions of 12(4)(e) or (5)(f) are met, the information must only be disclosed to the extent that in all the circumstances the public interest in maintaining the exception outweighs the public interest in disclosure.

The Task of the Tribunal

24. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

Issues

25. It is not in dispute that the request should be considered under the EIR. It is also not in dispute that any personal information should be redacted.
26. The issues we have to determine are:
- 26.1. Is regulation 12(4)(e) engaged, i.e. does the request involve the disclosure of internal communications?
 - 26.2. Is regulation 12(5)(f) engaged, i.e.
 - 26.2.1. Was the person who supplied the information under, or could they have been put under any legal obligation to supply it to that or any other public authority?
 - 26.2.2. Did that person supply it in circumstances such that that or any other public authority is entitled apart from the EIR to disclose it?
 - 26.2.3. Has that person consented to its disclosure?
 - 26.2.4. Would disclosure adversely affect the interests of that person?
 - 26.3. Does the public interest in maintaining the exception outweigh the public interest in disclosing the information?

Evidence and submissions

27. We have read and were referred to an open and a closed bundle of documents. We have taken into account the evidence and the open and closed submissions of the parties.

Discussion and Conclusions

Reg 12(4)(e) - is the exception engaged?

28. Having reviewed the withheld information we conclude that the emails between council employees and attachments are internal communications and therefore the exception is engaged.

Reg 12(4)(e) - public interest balance

29. Regulation 12(4)(e) is not an absolute exception. Employees of a public authority exchanging internal emails about a planning application are expected to be aware that such emails are potentially disclosable under the EIR. Any general chilling effect is likely to have been caused by the enactment of the EIR, not by disclosure in this particular appeal.
30. We accept that there is a need for a safe space for candid discussion whilst the planning application process is ongoing, and disclosure before a decision has been made is not likely to be in the public interest. Once a decision the public interest in

arguments in favour of maintaining the confidentiality of those discussions greatly recede.

31. When considering the public interest in maintaining the exception we note the purpose behind the exception of preserving a private space of internal communications. In our view the closed bundle consists of a mainly anodyne discussion of the planning issues at play in the application for planning permission and we agree with the Commissioner that there is nothing in the withheld information that could be described as particularly sensitive.
32. Turning to the public interest in favour of disclosure, we note that there is nothing in the closed bundle which supports Ms Bell's fears that the planning application was being dealt with differently than normal, or that the application was being controlled for no good reason by the Chief Executive of the Council. We consider that this illustrates the public interest in the information being released: transparency allows the public to see how decisions are being made and can provide reassurance that the proper processes are being followed. Disclosure allows the public to be better informed, rather than having to guess at what might have been going on behind the scenes. It is in the public interest that public authorities are accountable and that the public, with greater knowledge, can participate more effectively environmental decision making.
33. We accept that other than this general public interest in transparency and accountability, there is little specific public interest in disclosure of the specific information contained in the mainly anodyne discussions in the internal emails.
34. Taking into account all the matters set out above, and bearing in mind the presumption of disclosure in reg 12(2), we find that in all the circumstances the public interest in maintaining the exception does not outweigh the public interest in disclosure.

Reg 12(5)(f) - Third party 'A'

35. We consider first the argument in relation to the third party 'A' (identified in the attached closed annex). We accept that A was not under any obligation to supply the information, that the Council was not entitled apart from the EIR to disclose it, and that there is no evidence before us that A consents to the disclosure of the information. The remaining condition for the engagement of reg 12(5)(f) is that disclosure would adversely affect A's interests.
36. For the reasons set out in the closed annex we have concluded that disclosure would adversely affect A's interests and therefore reg 12(5)(f) is engaged.
37. Turning to the public interest balance and taking into account the presumption of disclosure we conclude, for the reasons set out in the closed annex, that the public

interest in maintaining the exception does not outweigh the public interest in disclosure.

Reg 12(5)(f) - Third party 'B'

38. In relation to third party 'B' (identified in the attached closed annex). We accept that B was not under any obligation to supply the information, that the Council was not entitled apart from the EIR to disclose it, and that there is no evidence before us that B consents to the disclosure of the information. The remaining condition for the engagement of reg 12(5)(f) is that disclosure would adversely effect B's interests.

39. For the reasons set out in the closed annex we have concluded that the Council has not established that disclosure would adversely affect B's interests and therefore reg 12(5)(f) is not engaged.

Conclusion

40. For the reasons set out above, the appeal is dismissed.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 2 March 2020

Promulgation date: 5 March 2020