

Freedom of Information Act 2000 ('FOIA')
Environmental Information Regulations 2004 ('EIR')
Decision notice

Date: 19 March 2013

Public Authority: St Ives Town Council
Address: The Guildhall
Street An Pol
St Ives
Cornwall
TR26 2DS

Decision (including any steps ordered)

1. The complainant has requested information relating to Dog Control Orders on beaches in the St Ives area including a copy of a report presented to St Ives Council ('the council') by a member of the public. The council refused to supply the report, citing exemptions under the Freedom of Information Act 2000 ('the FOIA'). The Commissioner considered that the request should have been handled under the Environmental Information Regulations 2004 ('the EIR') and has decided that the information should be withheld under the exception at regulation 13(1). The Commissioner does not require any steps to be taken.

Background

2. The Commissioner understands that Penwith District Council was responsible for the implementation of Dog Control Orders ('DCOs') in 2008. In June 2008, the Chief Environmental Health Officer from Penwith District Council attended a meeting of the council where town councillors requested a review of the beach DCOs in view of the level of complaints received from members of the public about the new arrangements. At intervals from 2008 to 2010, the town council renewed calls for a review, with representations made to Cornwall Council after Penwith District Council ceased to exist. In 2011, Cornwall

Council said that it was not going to review any of the individual DCOs but it would instead allow local town and parish councils to carry out a review for their area if they chose to do so.

3. On 17 February 2011, the town council's Environment Committee decided to recommend to council that in principle the town council carry out a review of beach DCOs. Following this, in March 2012, the withheld information was received by the council. On 11 April 2012, the Environment Committee recommended consultation on a 24 hour seasonal ban on Porthminster, Porthmeor, Porthgwidden and Carbis Bay beaches. The Committee's recommendation was for a whole year ban on Harbour breach. Between April 2012 and November 2012, the council carried out its formal consultation process, generating 991 responses to the questionnaire and a significant amount of correspondence. The council arrived at the decision about the DCOs on 7 November 2012 and the details were published in council minutes, including an overview of the considerations and reasons for arriving at the decision that was made. The council said that throughout the process it had posted information about the review on its website and it also published the consultation documents. The council said that records of all committee meetings are also published.

Request and response

4. On 9 October 2012, the complainant wrote to the council via the 'Whatdotheyknow' website and requested information in the following terms:
 - "1. The number of people who have contacted you, in any form, to OPPOSE the proposed DCOs on beaches in the St Ives area.
 2. The number of people who have contacted you, in any form, to SUPPORT the proposed DCOs on beaches in the St Ives area.
 3. A copy of any report composed by a Working Group set up by your Council to conduct the consultation and explore options, including their conclusions and recommendations.
 4. A copy of the Minutes of any meetings at which the consultation results have been discussed, particularly any meetings at which the decision about whether or not to introduce the measures is discussed. This includes any upcoming meetings relating to the final decision.
 5. A copy of any documentation relating to a decision being reached, including any supplementary paperwork related to the decision.

IF THE DCO IS INTRODUCED:

6. Evidence supporting any allegations of dog attacks on any of the beaches included in the proposed Order, and evidence of any kind of medical harm arising from any allegations made against dogs or their owners by people supporting the DCO introduction.
 7. Copies of supporting documentary evidence from respectable authorities, such as local police, hospitals, the RSPCA, the Coastguard or any other relevant authorities that support the decision.
 8. Copies of any documentary evidence that discredits claims made in support of the DCO introduction, along with any relevant paperwork demonstrating why such evidence has been dismissed.
 9. Evidence that the decision to introduce DCOs on the relevant beaches complies with the Defra guidelines, ie that it is a measured response to a real threat and also that appropriate provision has been made for dog owners to properly exercise their dogs nearby, on a beach that is suitable for such purposes and which complies with the legal demands placed on dog owners to provide such exercise for them."
5. The council initially responded on 27 October 2012 stating that it does not hold some of the requested information, providing links to publically available information, and seeking clarification of some aspects of the request.
 6. On 29 October 2012 the complainant provided some clarification and stated that the '[named individual] report' ('the report') is missing.
 7. On 6 November 2012 the council provided the complainant with the following reasons why it would not be releasing the 'report':
 - "The document was not presented as a report to the council or its committees
 - Inclusion of the author's name in the request takes away the opportunity to separate the individual's comments and opinions from their identity
 - The author of the document has stated that he wishes the document to be considered confidential to town councillors
 - Section 41 of the Freedom of Information Act 2000 provides for information to be exempt if the publication of the information would constitute an actionable breach of confidence
 - Article 8 of the Human Rights Act 1998 provides that 'everyone has a right to respect for his private and family life, his home and his correspondence'

- Information contained in the document is publicly available by other means
 - The decision not to disclose respects the confidentiality of those who had given comments and views to the author which were subsequently included in the document
 - The author of the document has advised that they intend to produce a version to be held by the town council and available for anyone to see – Section 22 of the Freedom of Information Act provides for the non-disclosure of information intended for future publication.”
8. Further correspondence followed between the complainant and the council in which the complainant expressed her views as to why ‘the report’ should be disclosed and the council stated that ‘the report’ was the subject of another request which was now with the Commissioner for a decision to be made. The complainant confirmed that she would make a separate complaint to the Commissioner.

Scope of the case

9. The complainant contacted the Commissioner on 10 November 2012 to complain about the way her request for information had been handled. The complaint was focussed specifically on ‘the report’.
10. On 13 February 2013 the Commissioner issued a decision notice on a case (reference FS50465680) where the requested information was exactly the same as this case, i.e. ‘the report’. That decision notice upheld the council’s decision to withhold the report because release of the information would breach the first data protection principle. The Commissioner contacted the complainant on 18 February 2013 to inform her of this decision and request that she withdraw her complaint on the basis that the requested information is identical. However, the complainant responded on 26 February 2013 requesting that her complaint be considered individually.
11. The Commissioner has considered the council’s reasons for withholding ‘the report’ as supplied to him during the investigation of case reference FS50465680. During that investigation, the council sought to rely on the exemption at section 40(2) of the FOIA. As the Commissioner considered that the request should have been handled under the EIR, he has considered the application of the exception at regulation 13(1) of the EIR which relates to third party personal data.

12. Although this decision notice draws on the arguments contained in the decision notice for FS50465680, the Commissioner has considered the arguments for disclosure provided by the complainant in this case.
13. For clarity, this decision notice only covers 'the report'. The council's response to the other elements of the complainants request has not been considered as the complaint made to the Commissioner was focussed specifically on 'the report'.
14. In correspondence to the Commissioner, the complainant has alleged that a specific councillor who admitted a personal interest in this matter used his vote in the final decision on the matter in conflict with his obligations as a town councillor. The Commissioner has not commented on or considered this matter as it is not within his jurisdiction.
15. In correspondence with the council, the complainant alleged that the author of 'the report' used sympathetic friends within the council to push forward his personal views and ensure that his wishes regarding beach use in St Ives are met. She stated that this is corruption which needs investigating. The Commissioner has not considered the allegation of corruption as it is not within his jurisdiction and he is aware that the complainant has stated that she will pursue the matter with every possible authority who may be able to investigate the matter.

Reasons for decision

Is the information environmental?

16. Environmental information must be considered separately under the terms of the EIR. Regulation 2(1)(c) of the EIR provides that information on plans, activities, measures etc. affecting or likely to affect the elements of the environment will be environmental information. One of the elements listed is land. The Commissioner has considered the purpose of an exclusion of dogs on beaches. It is clear that at least in part, the proposal is intended to protect against individuals being exposed to dog faeces and urine on the beaches. It is clear that allowing dogs on to the beaches affects the land. The information should therefore be considered under the EIR.

Regulation 13(1) – Third party personal data

17. This exception provides that third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act 1998 ("the DPA").

Is the withheld information personal data?

18. Personal data is defined by the DPA as any information relating to a living and identifiable individual. The withheld information comprises of representations made to the council by a member of the public, submitted in the form a report, relating to the issue of dogs on beaches in St Ives. The council has highlighted that the report contains a mixture of personal views and information taken from other sources, which may be publicly available. The Commissioner considered that it was appropriate to consider that the whole of the report is the personal data of the individual since it comprises of his representations, personal views and photographs. Even where sources of publicly available information have been included, the individual has still selected those sources to present his case to the council and the information therefore reflects his personal views and work on this issue. The information is also likely to represent the personal information of others whose opinions or images have been included in the report.

Would disclosure breach the Data Protection Principles?

19. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

Reasonable expectations

20. Whether or not the disclosure of information was within the reasonable expectations of an individual is not merely about consent although seeking the views of the individual concerned will often be a reliable indicator of what was expected, which is a useful starting point. The council consulted the individual concerned who confirmed that he did not wish nor expect the information to be publicly disclosed although his intention had always been to prepare a version of the document for public disclosure at a subsequent date. The council provided the Commissioner with a copy of the written objection to the disclosure sent by the individual as evidence of the individual's views. It is therefore clear that in this case the individual has clearly expressed that he did not expect the information to be publicly available. The next step is to consider whether or not this was a reasonable expectation to have had in the circumstances.

21. The council explained that it received a copy of the document which was sent to the town council office and then circulated to councillors by the individual. The council said that it was not a formal report to the council or its committees. It was submitted by an individual member of the public and not commissioned or requested. It was submitted in the form of a report by the individual but the council considered that the form it took does not mean that it should depart from the usual way correspondence from members of the public is treated as confidential.
22. The complainant has stated that everyone knows who the author of the report was and as he has not attempted to hide his identity (the complainant told the Commissioner he had spoken to local papers about his wishes to see DCO's introduced), he cannot expect the council to protect his identity. The Commissioner appreciates that there may be local knowledge of who is in favour of DCOs and even who wrote the report, but it does not follow that 'the report' should be disclosed to the general public under the EIR.
23. The Commissioner considers that the complainant has not presented sufficiently persuasive evidence that would allow him to conclude that the disclosure of the report would have been within the reasonable expectations of the author. He considers that members of the public regularly contact public authorities with the intention of presenting a view and influencing others, which they are entitled to do, and this does not mean that they should not expect the correspondence to be confidential.

Consequences of disclosure

24. The council explained to the Commissioner that the issue of dogs on beaches is a contentious one and disclosure of an individual's personal views could lead to conflict and therefore distress. The Commissioner is aware of the existence of a dog owners group created to oppose the new DCO, and a group supporting the DCO, so it is clear that there is some strength of feeling over this matter.
25. The complainant has pointed out that a Facebook group supporting the DCO has been set up, on which some very misplaced allegations are being made against dog owners and those who are arguing against the ban. She has said that...

"Those who oppose the extended DCO could argue that they are concerned about possible repercussions against them, for trying to stand up for their rights; and the majority of them do not hold powerful positions within the council, or have contacts there who might provide them with assistance or protection."

26. The Commissioner has had regard to the contentious background to this particular matter. He is mindful of the council's comments about the difficulties that this issue has caused amongst some members of the community and he considers that the risk of conflict resulting from the disclosure of the report is a strong possibility. The Commissioner accepts that this could cause unwarranted distress to the individual concerned.
27. The council also argued that disclosure could result in the individual concerned or others being unwilling to express their views to the council in future or being less candid if they feared that the correspondence would not be kept confidential.

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

28. The complainant has said that it is her understanding that the author of 'the report' has been living with the niece of St Ives Town Councillor for at least the last decade. She has stated that if this information is correct, it questions any argument on the part of the council or the author that he submitted his report as a 'private' member of the public. The complainant's concern is that it could be argued that the author's relationship with a councillor's niece would have given him easier access to that councillor, and possibly therefore to the council itself, than could normally be expected by 'private' members of the public who were not involved in a live-in relationship with a relative of a member of the council in question.
29. The Commissioner does not view the relationship as evidence that the author was treated as anything other than a private individual who made representations to the council in that capacity. He is mindful that there are potentially many individuals who have connections with councillors but it does not necessarily follow that those individuals are given preferential treatment. As the Commissioner considers that the author of 'the report' is a private individual, it is reasonable for him to have expected confidence. As the council has explained, it was not clear when the report was submitted to the council whether the author expected it to be publicly available. Nothing was said at the time to indicate this and the author has subsequently confirmed that this had not been his intention and, as stated in paragraph 20, has explicitly refused his consent for release of the information.
30. The complainant has also said that it is her understanding that at a public consultation meeting a councillor went outside to place a call to the author of 'the report' asking his permission to 'let the dog owners have the Harbour Beach'. She has said that this information seems to have been openly shared with a number of people present at the meeting that evening and, if this information is correct, it is difficult to

see how it can be argued that the author was treated as a 'normal member of the public' in this matter. She said that no 'private' or ordinary member of the public could expect that a councillor would leave a meeting to make a telephone call asking his permission on a decision that would normally fall strictly within the purview of the town councillors themselves. She also stated that she wonders why any councillor, on any council, would go to the trouble of telephoning a 'private' member of the public about a council decision, when that member of the public hadn't bothered to turn up to a meeting that was clearly open to any 'private' members of the public who wished to attend. As with the relationship mentioned in paragraphs 29 and 30, the Commissioner does not view this unverified information as evidence that the author was treated as anything other than a private individual.

31. The complainant has stated that she cannot see any evidence that there was a problem with the restrictions as they have been, allowing dogs on the beaches at night and in the early mornings. She said that 'the report' was used as a basis from which to launch the current DCO consultation and it should therefore be released into the public sphere since it has been used to influence and affect the general public and impacts on their rights. The complainant also stated that she cannot understand why the council would undertake a public consultation into extending the existing DCOs at St Ives and then completely ignore the results of that consultation, unless they had a specific (and thus far, undisclosed) reason for doing so and that the results of the public consultation showed overwhelmingly that the general public was against any extension of the current DCOs.
32. The council rejects the complainant's claim that it relied heavily on the contents of the withheld information. The council said that the withheld information was not, as suggested by the complainant, a fundamental document that led to the recommendation on 11 April 2012. It was one of many documents and items of correspondence that had been taken into account over the previous 5 years. The council said that it was not the case that it had received the complainant's report and suddenly decided that it was a good idea to review the DCOs. It pointed out that it had in fact been pursuing a review of the beach DCOs essentially since they were enacted in 2007. Since 2007, there had been correspondence with Penwith District Council and subsequently, Cornwall Council. The council said that it had consistently called for a review and had amassed a correspondence file on the topic. The council said that the arguments and information presented in the withheld report were not unique and a considerable number of representations and information had been taken into account in the review process up until the date of receipt of the document.

33. The council also said that the document was not considered to be instrumental or decisive in the council's decision-making process. The Commissioner considers that on this occasion, the complainant has not presented any strong evidence to contradict this assertion. He has taken into account how long the council had been pursuing the issue and he agrees with the council that the individual's report should be seen in this wider context. The Commissioner notes that the formal decision to implement the changes was only made following consultation with the public and the reasons for these changes were described in the public minutes. Therefore, it would be an over-simplification to say that the council relied on the report from one individual and this resulted in changes being made to the DCOs which have not been adequately explained. In the Commissioner's view, the council has been sufficiently transparent about the reasons for the decision and the Commissioner also notes the intention to be more transparent about the contents of 'the report' in future, when the individual is prepared to consent to the disclosure. The complainant suggests that continuing to withhold 'the report' will, in fact, serve only to increase bad feeling against the author, the report's other contributors, and the councillors who are perceived to have shown them special consideration. She said that she would have thought that any likely repercussions would probably have occurred by now and believes that if the report was anonymised, the council could quite easily 'make a clean breast of it' with its public and publish it, complete with the 'personal' views of those who contributed to it. She suspects that its contents are actually a lot less contentious than people have assumed and that public trust is likely to be further damaged if disclosure is refused. She thinks that a decision to publish the anonymised report would restore public faith in a council which, at the moment, seems to have sullied its reputation through its conduct in this matter. She wonders if it really is worth all the trouble, to protect a 'private' individual who so many people obviously already regard as being responsible for the current dispute over the beaches in St Ives?
35. The Commissioner has considered whether the report could be released in an anonymised form. However, he does not consider that to be possible as the correspondence related to the request, which is publically available via the Whatdotheyknow website, specifically mentions the author's name.
36. Taking all of the above into account, the Commissioner concludes that it would be unfair to the individual concerned to release 'the report'. It has not been clearly demonstrated that the disclosure would have been within the reasonable expectations of the individual concerned and there is a strong possibility given the background that disclosure would cause unwarranted distress. He acknowledges that there is a legitimate interest in knowing that the council has acted appropriately but there are other mechanisms to ensure this. The Commissioner was not

persuaded, for the reasons described above, that the complainant had presented a sufficiently strong case to justify the disclosure in the public interest. As the Commissioner has decided that the disclosure of this information would be unfair, and therefore in breach of the first principle of the DPA, he has not gone on to consider whether there is a Schedule 2 condition for processing the information in question. The Commissioner has therefore decided that the council was entitled to withhold the information under the exception at regulation 13(1).

Right of appeal

37. 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

38. 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.
39. 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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