

**Freedom of Information Act 2000 (FOIA)**  
**Environmental Information Regulations 2004 (EIR)**  
**Decision Notice**

**Date:** 6 October 2014

**Public Authority:** Wickhambreaux Parish Council  
**Address:** Court Cottage  
Stodmarsh  
Canterbury  
Kent  
CT3 1BN

**Decision (including any steps ordered)**

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1. The complainant requested information regarding the sale of Ickham Grazing Marshes by the Church Commissioners, information relating to the Council's application to register Seaton Meadow as a Village Green and information about Seaton Meadow in general. The Commissioner has previously issued a decision notice in respect of this request, (FS50463579) instructing the Council to issue a fresh response within the requirements of regulation 14 of the EIR. In its fresh response, the Council initially relied on regulation 12(5)(b) and regulation 13 of the EIR, however during the course of the Commissioner's investigation, it changed its response in favour of regulation 12(4)(b) of the EIR.
2. The Commissioner's decision is that Wickhambreaux Parish Council was correct to rely on regulation 12(4)(b) in respect of this information.
3. The Commissioner does not require the Council to take any steps.

**Request and response**

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4. On 15 May 2012, the complainant wrote to WPC and requested the following information in respect of the sale of Ickham Grazing Marshes and Seaton Meadow:

*" any further information held by the Parish Council, which includes external correspondences from parish councillors, paper records, letters, emails, information stored on computer, maps, photographs, handwritten notes or any other form of recorded information which covers the time frame from August 2009 to date."*

5. WPC responded on 11 June 2012. It informed the complainant that his request was insufficiently specific and requested further details in order to identify and locate the information. It also cited section 21 in respect of WPC's request to register Seaton Meadow as a Village Green and its response to the objectors providing a link regarding village greens on Kent County Council's website. It relied on section 42 in respect of any legal advice regarding its application and section 22 in respect of any material being collated for the forthcoming Inquiry.
6. On 27 June 2012, the complainant requested an internal review of WPC's application of the exemptions cited pointing out that to the extent that any of the information was environmental information, section 21 would not apply. He also refined his request as follows:

*"Information held by WPC or by others on its behalf which comprises all communications, including, but not limited to, emails sent and received between 1 August 2009 and to date that relate to the sale of the Ickham Grazing Marshes by the Church Commissioners and or the application to register Seaton Meadow as a Village Green and Seaton Meadow in general. For the avoidance of doubt this request includes any communications, including, but not limited to, emails of [named Councillor A],[named Councillor B], [named Councillor C], [named Councillor D] and [named Councillor E] that fall within this time frame and relate to the category of information specified."*

7. Following an internal review, WPC wrote to the complainant on 23 July 2012. It upheld its reliance on the exemptions cited in its refusal notice and in respect of his request for informed to and from named Councillors, stated:
8. *"Correspondence between councillors is not generally covered by FOIA, even when it relates to council business...Such correspondence will only be subject to the FOIA where it relates to the management and administration of the council...Therefore should they exist, any emails between Councillors are not covered by either the FOIA or EIR."*
9. Following a complaint to the Commissioner, a decision notice was issued on 23 June 2013, confirming that the appropriate legislation for the request should be the EIR, and with the exception of the information subject to his ruling in relation to regulation 12(5)(b) of the EIR, to

issue a fresh response to the request, compliant with the requirements of regulation 14 of the EIR.

10. WPC subsequently contacted the complainant on 23 July 2013 asking him to refine his request and issued its fresh response on 13 August 2013. The response cited regulation 12(5)(b) in respect of information it considered was exempt from disclosure by virtue of it attracting Legal Professional Privilege, regulation 13(1) in respect of third party personal information and regulation 3(2) in respect of information held by a third party for its own purposes and therefore whether it had fully complied with its obligations under regulation 5 of the EIR.
11. During the course of the Commissioner's investigation, WPC changed its stance in favour of regulation 12(4)(b) of the EIR.

### **Scope of the case**

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12. The complainant's representative contacted the Commissioner on 11 November 2013 to complain about WPC's amended response. The complainant was not satisfied with WPC's reliance on the exceptions cited in paragraph 10 of this notice and he also expressed concern regarding whether WPC had correctly identified all information falling within the scope of his request.
13. The complainant's representative also requested that the point in time in which the public interest test is considered, should be amended from the time of the original request, to the period between the Commissioner's decision notice (23 June 2013) to WPC's amended response, (13 August 2013). It was considered that the public interest test arguments which may have been relevant at the time of the request when the public inquiry was on-going, were no longer relevant as it had now concluded its investigation.
14. The Commissioner confirmed to the complainant that his remit does not extend to altering the time period that the public interest test should be considered and confirmed that his investigation will be based on the situation at the time of the request.
15. As stated in paragraph 11 of this notice, during the course of the Commissioner's investigation of this complaint, WPC amended its response in favour of regulation 12(4)(b) on the basis that the cost and burden of complying with the request made it manifestly unreasonable.
16. The Court of Appeal has determined *[2011] EWCA Civ 1606 (Birkett / DEFRA)* that this exception should be treated as any other exception in terms of late claiming of an exception. Accordingly, the Commissioner

has no discretion in deciding whether or not to accept a late claim in relation to regulation 12(4)(b), and is therefore obliged to consider it.

17. The complainant has accepted this and been provided with the opportunity to respond to WPC's arguments in support of regulation 12(4)(b). In reaching his decision, the Commissioner has taken into consideration both the arguments of WPC and the submissions in response from the complainant.

## **Reasons for decision**

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### **Regulation 12(4)(b) – manifestly unreasonable**

18. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that the request is manifestly unreasonable.
19. In the Commissioner's view, 'manifestly' means that there must be an obvious or tangible quality to the unreasonableness.
20. The Commissioner considers that the regulation will apply in two sets of circumstances: firstly, where a request is vexatious; or secondly, where the public authority would incur an unreasonable level of costs, or an unreasonable diversion of resources.
21. In this particular case, there is no suggestion that the request is vexatious and WPC considers that the compliance would incur an unreasonable level of costs and require an unreasonable diversion of resources.
22. Unlike section 12 of the FOIA, the EIR does not contain a provision that exclusively covers the time and cost implications of compliance. The considerations associated with the applications of regulation 12(4)(b) of the EIR are instead, broader than with section 12 of the FOIA. In particular, the Commissioner recognises that there may be other important factors that should be taken into consideration before judgement can be made that environmental information can be withheld under this exception:
  - Under the EIR, there is no statutory equivalent to the 'appropriate limit' – the cost limit beyond which a public authority is not obliged to comply with a request – described in section 12 of the FOIA.
  - The public authority can include the time taken/cost of considering whether information is exempt.

- The proportionality of the burden on the public authority's workload, taking into consideration the size of the public authority.
  - The requirement under regulation 12(1) of the EIR to consider the public interest test.
  - The EIR's express presumption in favour of disclosure.
  - The requirement to interpret restrictively the exceptions in the EIR.
  - The individual circumstances of the case.
23. As a starting point, WPC has provided the Commissioner with a section 12, FOIA type estimate of the time necessary to comply with the request.
24. Section 12 of the FOIA states that:
- "Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."*
25. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the 'Regulations') sets the appropriate limit at £450 for the public authority in question. Under these Regulations, a public authority can charge a maximum of £25 per hour for work undertaken to comply with a request. This equates to 18 hours work in accordance with the appropriate limit set out above.
26. A public authority is only required to provide a reasonable estimate or breakdown of costs and in putting together its estimate it can take the following processes into consideration:
- (a) determining whether it holds the information,
  - (b) locating the information, or a document which may contain the information,
  - (c) retrieving the information, or a document which may contain the information, and
  - (d) extracting the information from a document containing it.
27. WPC has included in its estimate, the time it has already spent in determining, locating, retrieving and extracting the information in response to the request and (unlike under the FOIA), the time necessary to consider whether any exceptions may be applicable to any of the information.

28. The Commissioner has therefore considered the table provided by WPC which totals 135.75 hours in all divided into 108 hours spent by its solicitor and 27.75 hours spent by the Council itself.
29. The Commissioner has analysed the table and notes that it is extremely detailed, sometimes appears to duplicate work, and considers that some of the items specified were either not necessary (time spent devising a questionnaire for Councillors) or appear to have taken an unreasonable length of time to complete. He has already queried the table with WPC once and does not consider it an appropriate use of his resources to request further clarification. He has not therefore included the full minute below, but focused on the items he considers most appropriate:
- 6 hours - Combining archived and current emails before 28/6/12 to a folder. Initially, 1880 emails (received and sent) were identified, (many with attachments) but when reviewed, many were internal communications and did not fall within the scope of the request. There was also an unknown number of pages in manual files.
  - 12 hours – solicitor determining, locating retrieving and extracting what electronic information held which is relevant to the request. This included reviewing each document to determine whether held on behalf of WPC or for Kent Law Clinic in its own right. WPC's solicitor identified 464 documents in total.
  - 4.75 hours – various individuals including Councillors reviewing what information they held in both paper and electronic format relevant to the request. WPC has stated that five individuals did not record any time with their responses and therefore considers that this is an under-estimate.
  - 28 hours to review document by document information held by Kent Law Clinic whether any exceptions apply and considering the public interest test.
  - 9 hours to review document by document, 172 documents held by WPC for any exceptions and considering the public interest test.
  - 2 hours – reading three years of minutes to establish whether there was anything falling within the scope of the request.
  - 1 hour – the Clerk retrieving and sending electronic copies of minutes.
  - 3 hours – retrieving material to be disclosed. This included contact with the former Clerk to locate letters from 2009.

- 12 hours meeting with solicitor from KLC and CLJ to review draft decisions about each document and finalise disclosure decisions. This involved considering approximately 1600 pages of documents at a rate of approximately 266 pages per hour.
30. The Commissioner notes that the selected times for specific tasks taken from the table above, total 77.75 hours and even if some are over-estimates, or took an unreasonable length of time, the total time is considered a reasonable estimation for the items described.
  31. WPC has further estimated that it would take an additional 20 hours to re-organise and present the information so that the Commissioner can consider the original exceptions relied on.
  32. The Commissioner wishes to highlight that when he received the withheld information from WPC in January 2014, it was not separated out as such, but included within the files of all information WPC had identified as falling within the scope of the request. It would therefore have been necessary for him to spend a considerable amount of his time sifting through a vast quantity of information, much of it already disclosed to the complainant, to locate the withheld information.
  33. WPC has informed the Commissioner that it presented the information in this way for its own practical purposes. Whilst the Commissioner acknowledges that public authorities have limited resources and will collate information in a manner to make the most efficient use of their resources, he does not consider it an appropriate use of his own limited resources to spend what would amount to a significant amount of time, considering information already disclosed, and notes that it is the responsibility of the public authority to provide the withheld information to him in a readily identifiable form.
  34. Having seen the extent of the work required, the Commissioner is satisfied that the 20 hours is a reasonable estimate.
  35. WPC has also argued that the burden in responding to this request is wholly disproportionate. It has taken into consideration its size and resources as a public authority and has argued that as a small Parish Council, it is dependent on the resources of one elected member to deal this request and others acting in a voluntary capacity.
  36. It does not consider it reasonable that a volunteer should be required to devote more than a few hours a week to responding to FOIA/EIR requests and considers the burden the necessary work required to comply with this request places an unreasonable burden on its resources, especially as it has no budget which would permit it to employ paid staff to deal with this request



37. As stated in paragraph 17 of this notice, the complainant has been given the opportunity to respond to the arguments put forward by WPC and considers that almost two years from the date of the original request is too late for it to rely on regulation 12(4)(b).

38. He has also argued that WPC cannot take into account the time it has taken to compile the information and is relying on the Upper Tribunal decision in *APPGER v IC & MoD [2011] UKUT 153 (ACC) p47 (iii)*.

*"The cost exemption only has meaning if the point is taken early on in the process, before substantial costs are incurred in searching for or collating the information. It relates to an estimate of whether future events 'would exceed' the limit and not whether past ones have. Thus, if material has been gathered together for some purpose including analysis for substantive exemptions such as international relations, it is no longer open to the authority to claim it."*

39. The Commissioner concurs with this view and confirms that if WPC was relying solely on the work already undertaken, he would have no hesitation in dismissing its reliance on this exception. However he notes that this particular case is being considered under the EIR and WPC's late reliance on regulation 12(4)(b) which is much broader and only partly relates to the time already spent, but also includes an estimate of the additional time necessary to comply with the request and the general burden on it as a small parish council. The Commissioner considers that the time already spent therefore provides a useful background when considering the additional burden on WPC to fully comply with the request.

40. The complainant's representative has also raised concerns with the estimate provided by WPC and considers that it is generally greatly inflated. In particular, he has referred to the 8.75 hours estimate for devising a questionnaire, speaking to individuals and completing the questionnaire. The Commissioner has already dealt with this issue in paragraphs 29 and 30 of this notice, and would point out that he has not included the 4 hours relating the questionnaire in paragraph 29 of this notice.

41. The complainant's representative has also raised the issue of whether WPC can include the time spent by its solicitor from the Kent Law Clinic. The Commissioner would however point out that this information is held by Kent Law Clinic on behalf of WPC and is therefore entirely reasonable.

42. The complainant's representative has also argued that WPC is seeking to benefit from its own records management deficiencies and is the author of its own dis-proportionate burden. Whilst the Commissioner would



agree that WPC's records management appears to fall far short of the desired standards, he recognises that it is a small parish council and acknowledges that he can only base his decision on the actual records management of the public authority as opposed to the ideal.

43. In considering whether regulation 12(4)(b) is engaged in relation to this request, the Commissioner has considered the arguments presented by WPC and the response received from the complainant's representative. As stated in paragraph 39 of this notice, whilst he accepts that it would be inappropriate to rely solely on the estimate of time already spent in its attempt to comply with this request, he is mindful that regulation 12(4)(b) is much broader in scope than section 12 of the FOIA and he considers that the time already spent provides a useful insight into the burden on WPC in complying with this request for information.
44. Having been provided with copies of the information WPC has identified as falling within the scope of the request and therefore seeing the additional work necessary for WPC to be in a position to present the information in such a way for him to consider the withheld information, the Commissioner is satisfied that the additional work necessary represents a disproportionate burden on WPC which is a small parish council with very limited resources. The Commissioner is therefore satisfied that WPC were correct to rely on regulation 12(4)(b) in respect of this request. He has therefore gone on to consider the public interest test.

### **Public interest test in disclosing the information**

45. WPC acknowledges the explicit presumption in favour of disclosing environmental information under regulation 12(2) of the EIR.
46. WPC also accepts the general arguments in favour of transparency and accountability in relation to the decision making of public authorities and the expenditure of public money.
47. More specifically, in this case WPC accepts that there is a public interest in disclosure of information concerning its application to register a piece of land as a village green.
48. In addition to the factors in favour of disclosure outlined above, the complainant's representative has argued there is also a public interest in favour of disclosure of the information due to the potential environmental consequences of a successful application to register Seaton Meadow as a village green. It considers that WPC neither properly understood, nor communicated to the public the consequences of its application.

49. Disclosure would also provide transparency regarding the advice and actions of the Kent Law Clinic.
50. Additionally, disclosure of the information would have facilitated public debate which would have avoided a hugely expensive application which ultimately failed due to the resultant public inquiry.
51. The complainant's representative has also argued that the conclusions of the public inquiry were highly critical of WPC's case and made reference to the both the unreliability of its written evidence and suggested its witnesses had a tendency to exaggerate.

### **Public interest factors in favour of maintaining the exception**

52. WPC however considers that the public interest is weighted in favour of maintaining the exception and has stated that it does not consider that there is any wider value in the public having access to the communications which concerned detailed preparation of a case for a public inquiry, nor that they would illuminate any underlying issue of public interest.
53. WPC also has argued that the burden on it as a small public authority would place substantial demands on it and its resources with the likelihood that it would significantly distract it from the key responsibilities of the organisation. It does not consider the failure of it to carry out its key functions to be within the public interest.

### **The balance of the public interest test**

54. The Commissioner has considered the factors both in favour of disclosure and maintaining the exception. He acknowledges the explicit presumption in favour of disclosure under regulation 12(2) of the EIR, and the general public interest in favour of transparency and accountability of public authorities. He also acknowledges the specific public interest in disclosure of information concerning its application to register Seaton Meadow as a village green and the environmental consequences of a successful application.
55. However, the Commissioner does not view the EIR as the appropriate avenue to obtain this information and would point out that the public inquiry which was on-going at the time of the request was the correct avenue by which to do so.
56. The Commissioner has also dismissed the arguments in respect of the conclusions of the public inquiry in relation to the conduct of WPC outlined in paragraph 51 of this notice, as he can only consider the situation at the time of the request.

57. Finally, the Commissioner has attributed to significant weight to the public interest in preventing such a burden on the time and resources of WPC, that it is unable to carry out its key functions. The Commissioner has therefore concluded that the balance of the public interest test is weighted significantly in favour of maintaining the exception that in so doing, that regulation 12(4)(b) of the EIR is engaged in respect of this request for information.

### **Regulation 9 – Advice and assistance**

58. Regulation 9(1) of the EIR states that:

*"A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants."*

59. This regulation places a duty on a public authority to provide advice and assistance to an individual making a request. In instances like this, where a request has been refused because to comply with it would be an unwarranted burden, the Commissioner's view is that the public authority should consider if it can reasonably recommend ways to reduce the scope of the request in order to help the requester obtain information that is of interest to them.
60. The Commissioner notes that complainant's representative has expressed concern that WPC has never attempted to indicate to the requester what information could be provided within an acceptable cost and time limit and considers that a failure to undertake a dialogue on this point is unreasonable.
61. However, the Commissioner would point that WPC has at various times since receipt of this request, asked the complainant to consider reducing the scope of his request, most notably in a letter dated 23 July 2013 which stated:
- "Can you pin point for us what further information you have in mind? Given the amount of work that goes into preparing for an inquiry can you help us to know what we are seeking? Your request is very wide and any refinement would be helpful to us."*
62. The Commissioner notes that this was in the period after the previous decision notice had been issued in 24 June 2013 and before WPC provided its amended response on 13 August 2013. The Commissioner is mindful that the complainant's representative contacted him at the time to ask whether they should attempt to refine the request and his advice at this time was that WPC needed to comply with the steps in his

notice, namely to provide a fresh response compliant with the requirements of regulation 14 of the EIR.

63. The Commissioner considers that this was an appropriate response at that time. The invitation to refine the request remained valid throughout, the sheer scope of the request would have made it difficult for the council to assume any refinement sought and would have needed the engagement of the parties to determine what refinement, if any, would have been appropriate.

## Right of appeal

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64. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

65. 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.
66. 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 .....**

**Andrew White**  
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