

Freedom of Information Act 2000 (FOIA) / Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 13 October 2014

Public Authority: Melton Borough Council
Address: Council Offices
Parkside
Station Approach
Burton Street
Melton Mowbray
LE13 1GH

Decision (including any steps ordered)

1. The complainant has requested information relating to Melton Mowbray Town Estate. Melton Borough Council disclosed some information, confirmed that other information was not held and withheld some information under the exception for the course of justice (regulation 12(5)(b) of the EIR).
2. The Commissioner's decision is that Melton Borough Council:
 - Disclosed all the requested information not subject to exceptions it holds and complied with regulation 5(2) of the EIR;
 - correctly applied regulation 12(5)(b) to withhold some of the requested information.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 6 April 2014, the complainant wrote to Melton Borough Council (the "council") and requested information in the following terms (reproduced using the council's lettering system):

"(a) Since 2000, Melton Borough Council has made annual payments to the Town Estate re market stalls in the cattle market.

Please tell me the specific reasons that MBC has made those payments to the Town Estate i.e. the reasons given by the Town Estate to MBC when the Town Estate first required the payments.

(b) What proof was provided by the Town Estate in 2000 that the manorial/market charter rights had been obtained by the Town Estate and what proof was provided that the rights had been retained, i.e. that they had not been disposed of and that they had not lapsed.

(c) Could I also please see information held regarding the charter, the charter rights and the contract between the Town Estate and Melton Borough Council including the following:

- The actual contract between MBC and the Town Estate*
- Correspondence including any correspondence sent by MBC to the Town Estate which was not answered.*
- Notes and/or minutes of meetings and discussions and notes of phone calls."*

5. The council responded under the FOIA on 6 May 2014. It provided some of the requested information and confirmed that other information was not held.
6. Following an internal review the council wrote to the complainant on 27 June 2014. It stated that it had revised its position and decided that the request fell to be handled under the EIR. The council provided some additional information, confirmed that further information was not held and stated that some information was being withheld under the exception for the course of justice (regulation 12(5)(b)).

Scope of the case

7. On 15 July 2014 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly confirmed that further information was not held and whether it had correctly applied the exception in regulation 12(5)(b) of the EIR.

Reasons for decision

Regulation 5 – information held

9. Regulation 5 of the EIR requires public authorities to provide environmental information, usually within 20 working days of receipt of a request.
10. The complainant considers that the council has failed to provide all the information it holds in relation to all elements of their request.
11. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities
12. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
13. In order to establish where the balance of probabilities lies in this case the Commissioner approached the council with a range of standard questions he uses in such scenarios. He has set summarised the council's responses under relevant headings below.

Searches conducted by the council

14. The council has stated that further searches, relating to the Melton Mowbray Town Estate (the "Estate") and the Cattle Market were carried out during the period of the internal review, between 2 June and 27 June 2014. Searches were made of the council's Contract Register, records held by its Legal Services team, records held on the council's Committee drive and by its Property Services team (the part of the council's service currently responsible for the management of the council's Cattle Market activity).
15. The council confirmed that, in the case of the Committee drive, searches were carried out against records relating to the committees dealing with Cattle Market matters and, in particular, in relation to the period in 2000 relating to the formation of the contract between the council and the Estate in November 2000. The council stated that the items recovered from these searches were provided to the complainant as enclosures A to C with its internal review letter of 27 June 2014.

Explanation for why further information is not held

16. The council confirmed to the Commissioner that it advised the complainant that the original contract documents and any related correspondence which would have been held in Legal Services were destroyed in a fire at the council's old offices on 30 May 2008. It stated to the Commissioner that this was, therefore, the date at which other information falling within the scope of the request was destroyed and ceased being held by the council.
17. The council explained to the Commissioner that, following the fire, it quickly established that its Legal Services, Policy and Performance, Human Resources and Street Scene and Environmental services had lost almost all their paper-based records. It stated that this is because these services were situated on the first and second floors of the central block of the old council offices (the most badly damaged parts of the building complex).
18. The council confirmed to the Commissioner that, from a records management perspective, all paper records (with the exception of a file for the management of the Cattle Market, the contents of which the council disclosed to the complainant as enclosure "D") were effectively destroyed on 30 May 2008. The council explained that the Cattle Market Management file only survived because it was being used in an office on the ground floor of the old building. However, this file did not contain a copy of the November 2000 Contract Agreement, so no copy of this document is held by the council. The council stated that legal documents relating to this contract would normally be held in accordance with statutory time limits; original paper copies were lodged permanently in the council's Deed Store which was destroyed in the fire.
19. In relation to part (b) of the request, which relates to "proof" regarding the existence of the Estate's market right, the council stated that this would require a copy of a document not retained by the council, namely, a copy of the conveyance document dating from 1849-50, of the manorial and market right conveyed from the family of Lord Palmerston to the Estate.
20. The council confirmed that, if it had held a copy of this document, it would also have been lost in the fire as it would have been retained in the (destroyed) Deed Store. The council further confirmed that no correspondence, notes of discussions or phone calls or other information relating to this matter have been located, beyond the information provided to the complainant at the internal review stage.

The complainant's view

21. Whilst the motivations of the requester are not normally relevant, in this case it is clear that the complainant has a particular interest in and has concerns about the legal standing of the Estate. The complainant has questioned the veracity of the council's position in relation to this substantive matter. However, concerns about the content of information provided in response to requests for information fall outside the Commissioner's remit, except where there is direct evidence that an authority has altered or deleted information *after* a request has been received. In this case the Commissioner has not been presented with any such evidence so he has not considered the substantive matter further.
22. In relation to the council's explanation that much of the requested information was destroyed in the 2008 fire, the complainant has argued that this is not credible. They have asserted that it is inconceivable that the important information retained in the Deed Store would not have been reproduced as quickly as possible following the fire. The complainant considers that the council should have obtained relevant copies of the information from the Estate.
23. Whilst the Commissioner is alive to the complainant's concerns he is also mindful that it is for public authorities to decide what records need to be made or retained in order to satisfy business purposes or statutory duties. In this case, the council has provided a detailed and cogent explanation of why the information is not held and he has no reason to believe that this is not true. The council has confirmed that the information is still not held so, clearly, it has decided that it is not necessary for the relevant information to be reproduced. It is not the Commissioner's role to decide whether this is an appropriate course of action but rather to determine whether requested information is held on the day a request is made.

Conclusion

24. Having considered the council's responses to the request and its submissions to the Commissioner and the matters raised by the complainant, the Commissioner is satisfied that, on the balance of probabilities, the council has correctly confirmed that no further relevant information is held. He has, therefore, concluded that the council complied with regulation 5(2) of the EIR.
25. The Commissioner notes that the council has, in responding to the request, spent some considerable time addressing the matters raised by the complainant; in his view, surpassing its obligations under the EIR.

Regulation 12(5)(b) – course of justice

26. The council has withheld some of the requested information under regulation 12(5)(b) of the EIR. The information relates to the legal position regarding markets as they relate to both the council and the Estate.

27. Regulation 12(5)(b) of EIR states that:

"(...a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-)

the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature."

Is the exception engaged?

28. In reaching a decision as to whether the council has correctly applied the exception, the Commissioner has considered some relevant Tribunal decisions which clarify how the exception works. In the case of *Kirkaldie v ICO & Thanet District Council* [EA/2006/0001] the Tribunal stated that:

"The purpose of this exception is reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation".

29. The Commissioner has also noted the views of the Tribunal in *Rudd v ICO & The Verderers of the New Forest* [EA/2008/0020], which stated that:

"...the Regulations refer to 'the course of justice' and not 'a course of justice'. The Tribunal is satisfied that this denotes a more generic concept somewhat akin to 'the smooth running of the wheels of justice'...Legal professional privilege has long been an important cog in the legal system. The ability of both parties to obtain frank and comprehensive advice (without showing the strengths or weaknesses of their situation to others) to help them decide whether to litigate, or whether to settle; and when to leave well alone has long been recognised as an integral part of our adversarial system".

30. Legal professional privilege ("LPP") protects the confidentiality of communications between a lawyer and a client. It has been described by the Tribunal in *Bellamy v ICO & DTI* [EA/2005/0023] as, "a set of rules

or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation¹”.

31. There are two types of privilege – legal advice privilege and litigation privilege.
32. In this case, the council considers the withheld information is subject to LPP and that release of the withheld information would adversely affect the course of justice.
33. The council has claimed advice privilege in relation to the withheld information, on the basis that the withheld information constitutes a communication between a professional legal advisor and client (the council’s solicitor and the council). The council has stated that the communication was for the dominant purpose of obtaining legal advice, in this case, from the council’s solicitor regarding the existence and status of the Estate’s market right. The council has confirmed that the information was communicated in a legal adviser’s professional capacity as formal legal advice, explicitly labelled as confidential from the council’s solicitor to the council as client.
34. Having viewed the withheld information the Commissioner is satisfied that it constitutes a communication between a lawyer and a client, in this case, the council and that this advice has not lost the quality of confidentiality.
35. In relation to the adverse affect to the course of justice which disclosure would cause, the council has confirmed that disclosure would disadvantage the council’s interests in any proceedings in favour of the private interests of third parties. The council has further argued that disclosure of the information would undermine confidence in the general principles of LPP, a principle which is integral to the smooth course of justice. The Commissioner notes that disclosure in this case would also unfairly disclose the council’s legal position, something which a potential opponent or litigant would not be required to do.
36. The Commissioner is satisfied that there is a real potential that disclosure would result in the council being discouraged from seeking

¹ EA/2005/0023, para 9

legal advice, particularly in relation to matters which are potentially damaging to its interests and which would inhibit the effectiveness of its public function. The Commissioner has concluded that it is more likely than not that disclosure of the withheld information would result in adverse effect to the course of justice.

37. As regulation 12(5)(b) is subject to a public interest test the Commissioner has gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure.
38. Regulation 12(1)(b) requires that, where the exception in regulation 12(5)(b) is engaged, then a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out his assessment of the public interest test, the Commissioner has applied the requirement of regulation 12(2) which requires that a public authority shall apply a presumption in favour of disclosure.

Public interest in disclosure

39. The council has stated that there is a public interest in disclosing the information as it would enable it to be established whether it has correctly or otherwise deemed the market right of the Estate to be valid. The complainant has questioned the validity of the right and disclosure of the information would address their interest in resolving this question, one way or the other.
40. The Commissioner considers that there is a strong public interest in disclosing information that allows scrutiny of a public authority's decisions. His view is that it helps create a degree of accountability and enhances the transparency of the process through which such decisions are arrived at. He considers that this is especially the case where the public authority's actions have a bearing on the environment.

Public interest in maintaining the exception

41. The council has argued that there is other information in the public domain which explains the basis for its position in relation to market rights of the estate. The council has argued that it has directed the complainant to these other resources and that disclosing the legal advice would not add anything to what is already in the public domain and would not, therefore, contribute to the public understanding of the matter.
42. The Commissioner considers that there is a strong public interest in the council not being discouraged from obtaining full and thorough legal

advice to enable it to make legally sound, well thought out and balanced decisions for fear that this legal advice may be disclosed into the public domain. The Commissioner considers that disclosure may have an impact upon the extent to which legal advice is sought. This in turn may have a negative impact upon the quality of decisions made by the council which would not be in the public interest.

43. The Commissioner notes that disclosure of the information would be unfair since parties seeking to challenge the council's legal position would not be obliged to disclose any equivalent advice they had received in relation to this issue. Disclosure would, therefore, adversely affect the council's ability to defend its legal position. There is a public interest in maintaining the integrity and fairness of the course of justice and there are alternative appropriate remedies in place for those wishing to challenge the council's position in this matter.

Balance of the public interest

44. In considering where the balance of the public interest lies, the Commissioner has given due weighting to the fact that the general public interest inherent in this exception will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the course of justice.
45. The council maintains that there is no overwhelming public interest in this case which would warrant disregarding the principle of LPP. It considers that disclosure of the information would, in addition to weakening confidence in this general principle, also result in adverse affect to the council's ability to defend its position in the event of a challenge. The Commissioner also notes that there is no evidence that the council has publically misrepresented any legal advice regarding the substantive matter.
46. The Commissioner is satisfied that disclosure would be likely to affect the candour of future exchanges between the council and its legal advisers and that this would lead to advice that is not informed by all the relevant facts. In turn this would be likely to result in poorer decisions being made by the public authority because it would not have the benefit of thorough legal advice.
47. Whilst the Commissioner understands that the complainant has an interest in accessing the information, he has not been provided with any evidence which shows that disclosure would serve the wider public interest in this case and to the extent that would warrant any adverse affect to the course of justice.

48. The Commissioner acknowledges that the complainant has concerns about the legal status of the Estate's market rights, however, these are matters which are better pursued via other legal routes. He acknowledges that it is entirely reasonable for requesters to seek information in order to understand a public authority's decision making or its position in relation to any given matter over which it has responsibilities. However, he does not consider that it is either the purpose of the EIR or within its statutory reach is to provide parties with an alternative mechanism to raise concerns in cases where other, appropriate legal remedies are available.
49. The Commissioner has concluded that, in this case, the balance of the public interest favours maintaining the exception. He has, therefore, concluded that the council has correctly applied the exception to the withheld information.

Right of appeal

50. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

51. 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.
52. 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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