

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

Date: 2 November 2015

Public Authority: Four Marks Parish Council
Address: Unit 32
Lymington Barn
Lymington Bottom Road
Medstead
Hampshire
GU34 5EW

Decision (including any steps ordered)

1. The complainant requested information from Four Marks Parish Council ("the council") relating to a reference in council minutes to a legal report on a particular area of land. The council said that the information was excepted under regulation 12(5)(b) and regulation 12(4)(e) of the Environmental Information Regulations 2004 ("the EIR") and the public interest did not favour disclosure. During the Commissioner's investigation, the complainant alleged that the council had not correctly interpreted his request. The council reconsidered the request and identified further information within scope. It withheld some of this information using the exceptions under regulation 12(5)(b) and 12(4)(e) but said that some information was not excepted in its entirety. The Commissioner's decision is that information was correctly withheld using regulation 12(5)(b) and 12(4)(e) and the public interest in maintaining the exception outweighed the public interest in disclosing the information. The Commissioner has ordered the disclosure of the information for which no exception was claimed. He has found procedural breaches of regulations 5(1), 5(2), 14(1) and 14(2) of the EIR.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

- Disclose to the complainant a copy of the letter from the solicitors dated 24 February 2015 and the enclosed invoice dated 18 February 2015 except that the council should redact the information contained within both documents that reveals what it sought legal advice about.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. The complainant requested information from the council on 8 March 2015. For clarity, the request included other numbered points but only the following are relevant to this complaint:

"Item 15.25 of the Minutes of the Council meeting on 18 February 2015 includes the following:

*Legal report on Land to the South of Gloucester Close.
To be discussed under Closed Session.*

1. Please state by whom the report was prepared and give the dates on which the report was requested and received by the Council.

2. For what purpose was this report requested and prepared?

3. What legal or other issues are considered in the report?...

7. Please provide a copy of the report, the instructions given by the Council for its preparation, and all correspondence and other documents held by the Council which relate or refer to the report".

5. The council responded on 8 April 2015. In relation to request 1, the council said that the report referred to in the minutes had been verbal and was received by the council at a meeting on 18 February 2015. The council said that it had not been requested. The clerk was just providing an update of the salient points arising from a meeting with a legal representative. In relation to request 2, the council said that the purpose of the report was to clarify the council's legal position on all actions that had taken place on the area of land concerned. In relation to request 3, the council referred back to its response to request 2. In relation to request 7, the council said that as the report was verbal it could not provide a copy of the report as requested but other

information was held and was excepted under regulation 12(5)(b) of the EIR. It confirmed that the public interest did not favour disclosure.

6. The complainant requested an internal review on 9 April 2015.
7. The council completed a review on 8 May 2015. It said that it wished to maintain its refusal.

Scope of the case

8. The complainant made an eligible complaint to the Commissioner on 31 May 2015. He asked the Commissioner to consider whether the council had correctly relied upon the exception under regulation 12(5)(b) of the EIR.
9. Following clarification about the information being withheld under regulation 12(5)(b), the complainant alleged that the council had misinterpreted his request and that additional information falling within the scope of requests 1-3 and 7 may therefore be held. He asked the Commissioner to consider this as part of his investigation.

Reasons for decision

Regulation 5(1) and 5(2) – Duty to make environmental information available within 20 working days

10. Regulation 5(1) of the EIR provides a general right of access to recorded environmental information held by public authorities. Public authorities should make environmental information within 20 working days unless a valid exception applies in accordance with regulation 5(2).
11. In this case, the council's initial response to the requests was based on the understanding that the report being referred to was the verbal report given by the clerk in the council's meeting on 18 February 2015. When clarification was provided to the complainant that the information being withheld under regulation 12(5)(b) was an email between a solicitor and the council providing legal advice, the complainant alleged that the council should have responded to his request on the basis that the "legal report" was the email from the solicitor. He alleged that further information may therefore be held.
12. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence

and argument. He will also consider the actions taken by the authority to check that the information was not held and he will consider if the authority is able to explain why the information was not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held. He is only required to make a judgement on whether the information was held "on the balance of probabilities".¹

13. The Commissioner considered the complainant's view and agrees that the interpretation suggested by the complainant was objectively reasonable in the circumstances. Unfortunately it was not possible for the complainant to clarify the nature of the information sought because the council did not identify in its response the nature of the withheld information. The council reconsidered the requests and provided a new response to the complainant on 9 September 2015.
14. In relation to request 1, the council confirmed that the email was prepared by a named individual at a particular solicitors firm. It confirmed that a meeting was arranged and took place on 23 January 2015 between the clerk and the solicitor, and the solicitor's legal advice following that discussion was provided on 26 January 2015. In relation to request 2, the council said that the email relating to the meeting and the purpose of it was to seek legal advice on the numerous issues surrounding the area of land in dispute. In relation to request 3, the council said that various legal options open to the council were considered and summarised in the email. In relation to request 7, the council said that no formal instruction had been given to the solicitor other than a request for a meeting, but there had been emails between the solicitor and the council relating to the request for legal advice. The council said that this information was also excepted under regulation 12(5)(b) and the public interest favoured non-disclosure. It said that the council had given its agreement to legal advice being sought at an earlier meeting on 26 November 2014 (Minute 14.162). It said that this information had been withheld following an earlier information request.
15. The Commissioner sought clarification from the council about why the minute was being withheld. The council clarified that the Commissioner has already considered the decision to withhold this information under case reference FER0571565 using regulation 12(4)(e) of the EIR. The

¹ This approach is supported by the Information Tribunal's findings in *Linda Bromley and Others / Environment Agency* (31 August 2007) EA/2006/0072

Commissioner published a formal decision notice relating to this case which may be accessed here for ease of reference:

https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1431763/fer_0571565.pdf

16. The Commissioner questioned the council about whether any further information was held falling within the scope of the requests. The council subsequently identified that in relation to request 7, it also held a letter from the solicitors enclosing an invoice for their fees. The council said that part of this information was excepted under regulation 12(5)(b), specifically the information within both documents which refers to what the legal advice was about, but that there was no reason to withhold the remainder.
17. The council confirmed to the Commissioner that it had searched thoroughly to check that there was no further information within scope. It said that it had checked all the email correspondence and all the files held relating to this area of land, and nothing further had been found referring to this meeting and the legal advice received. There was no evidence to suggest that any information had been deleted, destroyed or mislaid. Although it is apparent that the council did not give sufficient consideration to the scope of the request in the early stages, a problem which mainly arose as a result of the misunderstanding regarding the interpretation of the request as discussed, the Commissioner is satisfied that on the balance of probabilities the council had identified all the information within scope.
18. Some of the additional information identified (the invoice and associated letter) was not withheld by the council in its entirety and the Commissioner therefore considers that the council breached regulation 5(1) and 5(2) of the EIR for not making this information available to the complainant within 20 working days in line with its obligations under the legislation.

Regulation 14(1) and 14(2) – Refusal to disclose information

19. Regulation 14(1) provides that if information is withheld, a public authority must provide a refusal notice in writing and in accordance with the provisions of this regulation. It should specify the reasons not to disclose the information within 20 working days. As outlined above, in this case, the council identified additional information during the Commissioner's investigation which it considered was excepted under the EIR. As the council did not identify and refuse to provide this information within the appropriate timeframe, it breached regulation 14(1) and 14(2) of the EIR.

Exceptions under the EIR

20. In the remainder of this decision notice, the Commissioner will consider the council's decision to withhold the remaining information using the exceptions under regulation 12(5)(b) and 12(4)(e) of the EIR.

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

21. Under this exception, a public authority can refuse to disclose information to the extent that 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 inquiry of a criminal or disciplinary nature". The Commissioner accepts that the exception is designed to encompass information that would be covered by legal professional privilege.
22. The principle of legal professional privilege is based on the need to protect a client's confidence that any communication with his or her legal advisor will be treated in confidence. There are two limbs of Legal Professional Privilege: advice privilege (where no litigation is contemplated or underway) and litigation privilege (where litigation is underway or anticipated). In this case, advice privilege is relevant.
23. The council provided a copy of the relevant email from the solicitor on 26 January 2015 as well as the associated chain of emails between the clerk and the solicitor. It also provided a copy of the invoice and associated letter from the solicitor's firm. As previously mentioned, only the part referring to what the legal advice was about is being withheld under this exception. The Commissioner was satisfied that all of this information represents communications made with a legally qualified person for the dominant purpose of obtaining legal advice. The Commissioner was also satisfied that there was no evidence to indicate that the legal advice had been shared with third parties to the extent that it had lost its confidential character. Therefore he was satisfied that the information was covered by legal professional privilege.
24. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the Information Tribunal highlighted the requirement needed for this exception to be engaged. It has explained that there must be an "adverse" effect resulting from disclosure of the information as indicated by the wording of the exception. In accordance with another Tribunal decision *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the interpretation of the word "would" is "more probable than not".

25. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (EA/2005/0023), the Information Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests". The Commissioner accepts that disclosure of the withheld information would undermine the important common law principle of legal professional privilege. This would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice. He also considers that disclosure of the legal advice would adversely affect the council's ability to defend itself if it ever faced a legal challenge in connection with this issue. The council should be able to defend its position and any claim made against it without having to reveal its position in advance, particularly as challenges may be made by persons not bound by the legislation. This situation would be unfair.
26. In view of the above, the Commissioner was satisfied that it was more probable than not that disclosure of the information would adversely affect the course of justice and he was therefore satisfied that regulation 12(5)(b) was engaged in respect of the relevant legal advice.

Public interest arguments in favour of disclosing the requested information

27. Some weight must always be attached to the general principles of achieving accountability and transparency. This in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities. Disclosure of the legal advice would help the public to understand more about the decision-making process in the council relating to this matter and consider the quality of the legal advice relied upon.

Public interest arguments in favour of maintaining the exemption

28. As already indicated, the Commissioner and the Information Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal advice privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege.
29. It is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice. The Commissioner's published guidance on legal professional privilege states the following:

"Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice".

30. It is also important that if an authority is faced with a legal challenge to its position, it can defend its position properly and fairly without the other side being put at an advantage by not having to disclose its own legal advice in advance.

31. In light of the above, there will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept. The Information Tribunal recognised this in the *Bellamy* case when it stated that:

"...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."

32. The above does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above.

Balance of the public interest arguments

33. To provide some background to this matter, the request relates to an area of land known by some locally as "Storey's Sanctuary", named after a former parish councillor. The land had been unoccupied for many years, and had been used by members of the public, until an owner of a dwelling adjacent to part of the land obtained "Possessory Title". Fencing has also been erected on the land by adjoining landowners. The withheld information relates to the council's consideration of its legal options in relation to this situation.

34. The complainant argued that the public interest in disclosure outweighs the public interest in maintaining the exception. He said that the requested information relates to the deliberations and decisions of a publicly elected body. He said that there had been a lack of transparency about this issue because there is currently no record available to the public providing specific information about what was discussed or the decisions taken. He said that given that the council

had been so secretive, there was an exceptionally strong public interest in disclosure in this case.

35. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their decisions. However, having regard to the circumstances of this case, it is not the Commissioner's view that the public interest in disclosure equals or outweighs the strong public interest in maintaining the council's right to obtain legal advice in confidence.
36. The Commissioner observes that the public interest in maintaining this exception is a particularly strong one and to equal or outweigh that inherently strong public interest usually involves factors such as circumstances where substantial amounts of money are involved, where a decision will affect a substantial amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following his inspection of the withheld information and consideration of the circumstances, the Commissioner did not consider that there were any factors that would equal or outweigh the particularly strong public interest inherent in this exception. The legal advice is recent and the issue was clearly still ongoing at the time of the request. The prejudice caused by any disclosure would have been sufficient to warrant the maintenance of the exception in the circumstances.
37. For clarity, as the Commissioner was satisfied that regulation 12(5)(b) had been correctly applied, it was not necessary to consider the application of regulation 12(4)(e) to the same information in the alternative.

Regulation 12(4)(e) – Internal communications

38. This exception was applied to the closed minute relating to the land in a meeting held on 26 November 2014 (Minute 14.162). This information was deemed to fall within the scope of request 7 because it relates to the legal advice received by the council in 2015.
39. As indicated, this information was previously requested by the complainant on 24 October 2014. Following a complaint to the Commissioner, the Commissioner upheld the council's refusal to provide the information using regulation 12(4)(e) in a decision notice dated 19 May 2015 (see paragraph 15 above). The Commissioner understands that this decision notice is now the subject of an appeal to the First-Tier Tribunal (Information Rights) under appeal number EA/2015/0132 and that it is awaiting determination at the time of writing this notice.

40. As noted above, the dispute about the land was clearly ongoing at the time of the request and there is nothing to suggest that the circumstances had changed so materially that it would warrant the Commissioner taking a different decision relating to the application of this exception. The Commissioner therefore maintains the decision that the closed minute was correctly withheld under regulation 12(4)(e) and the public interest continued to favour maintaining the exception.

Right of appeal

41. 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

42. 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.
43. 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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