

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 June 2015

Public Authority: Kirby Muxloe Parish Council
Address: The Parish Office
Station Road
Kirby Muxloe
Leicester
LE9 2EN

Decision (including any steps ordered)

1. The complainant has requested copies of papers distributed to councillors in preparation for a particular trustee and parish council meeting. Kirby Muxloe Parish Council agreed to provide the majority of the papers but withheld some items of correspondence on the basis of section 21, draft minutes and policies under section 22 and a legal advice email on the basis of regulation 12(5)(b) of the Environmental Information Regulations 2004 ("EIR").
2. The Commissioner's decision is that the Council has correctly applied the exemptions and exceptions and the information should be withheld. He requires no steps to be taken.

Request and response

3. On 10 December 2014, the complainant wrote to Kirby Muxloe Parish Council ("the Council") and requested information in the following terms:

"please send me the Councillor papers for the KMPC meeting 18th December 2014 and include all the correspondence suitably redacted in accordance with the Data Protection Act. I am willing to pay reasonable costs."
4. The Council responded on 12 December 2014. It stated that it held information within the scope of the request and disclosed the agenda,

minutes from the Tennis Action Group and some financials – the payment schedule and bank reconciliation for the end of November 2014. The Council considered the draft minutes of the November meeting and a draft Model Complaints Procedure with five discretionary policy statements to be exempt from disclosure on the basis of section 22 of the FOIA. Information on non-consolidated payments was withheld under section 21 of the FOIA. The Council stated it would provide information on objections to the accounts on payment of disbursement costs.

5. The complainant requested an internal review of this decision on 18 December 2014 and informed the Commissioner on 2 February 2015 that no internal review response had been sent.
6. Due to the time that had passed the Commissioner agreed to investigate this complaint without an internal review.

Scope of the case

7. The complainant contacted the Commissioner on 2 February 2015 to complain about the way her request for information had been handled.
8. During the course of the Commissioner's investigation the Council provided further detail about the information it held within the scope of the request and what could be disclosed on the payment of disbursement costs. The Council clarified it held a number of items of correspondence which could be provided with the exception of item 73 which was being withheld on the basis of section 42 of the FOIA, item 59 which had previously been withheld on the basis of section 21, minutes of various committees which had previously been withheld on the basis of section 22, and any correspondence submitted by the complainant herself which she had stated did not need to be provided.
9. The Commissioner notes that the information withheld by the Council under section 42 of the FOIA is environmental information and as such should have been considered for disclosure under the EIR. Due to difficulties in obtaining substantive arguments from the Council the Commissioner has taken the decision to consider the legal advice under the equivalent exception of the EIR – regulation 12(5)(b).
10. The Commissioner considers the scope of his investigation therefore to be to determine if the exemptions cited by the Council to withhold some items of correspondence and minutes have correctly been applied and if the regulation 12(5)(b) exception provides a basis for withholding the legal advice.

Reasons for decision

Section 22 – information intended for future publication

11. Section 22 of the FOIA says that information is exempt if, at the time a public authority receives a request for it:
 - the public authority holds it with a view to its publication;
 - the public authority or another person intends to publish the information at some future date, whether determined or not; and
 - in all the circumstances it is reasonable to withhold the information prior to publication.
12. In order to determine whether section 22 is engaged the Commissioner therefore considered the following questions:
 - Did the Council hold the requested information?
 - When the complainant submitted the request, did the Council intend to publish the information at some date in the future?
 - If so, had the Council determined this date when the request was submitted?
 - In all the circumstances of the case, was it 'reasonable' that the Council should withhold the information from disclosure until some future date (whether determined or not)?
13. Section 22 provides a qualified exemption, so public authorities must consider whether the public interest in applying the exemption is greater than the public interest in providing the information. The Commissioner has also therefore considered the public interest arguments in this case.

Did the Council hold the requested information?

14. It is important to keep in mind that the FOIA is about the release of information, not the release of documents. At the time of the complainant's request, the Council stated that it held minutes of various Council and committee meetings in draft form. The minutes are usually discussed and agreed at the next Council meeting before being published.

15. The ICO's guidance on section 22¹ states that:

Documents can go through many drafts before they are finalised. If the intention or expectation, in producing any one of those drafts, is to publish the information in it, the exemption can be considered.

16. The Commissioner is satisfied that, at the time of the request, the Council did hold draft minutes and a draft Model Complaints Procedure and considers it held the information in draft documents.

Did the Council intend to publish the information at some date in the future?

17. In its submission to the Commissioner, the Council said that at the time of the request, it did have a settled intention to publish a final version of the minutes. The minutes were from the previous Council meeting of 20 November 2014 and other draft minutes from Committee meetings. These were to be reviewed (along with the draft Model Complaints Procedure) and authorised at the Council meeting of 18 December 2014 and published the next day on the Council's website.

18. The Commissioner notes the minutes of the Parish Council meeting² have since been published as stated as has the Complaints Procedure³ and the minutes of the Planning Committee meeting⁴.

19. Having considered this information, the Commissioner is satisfied that the Council had intended to publish the information at a future date.

Had the Council determined a publication date?

20. At the time of the request, the Council stated its intention was to publish the minutes the day after they had been agreed at the December Council meeting.

¹ https://ico.org.uk/media/for-organisations/documents/1172/section_22_information_intended_for_future_publication.pdf

² <http://kirbymuxloe.leicestershireparishcouncils.org/uploads/175493f90f8ba09126926536.pdf>

³ <http://kirbymuxloe.leicestershireparishcouncils.org/uploads/1754afc61c07f81717392280.pdf>

⁴ <http://kirbymuxloe.leicestershireparishcouncils.org/uploads/175493f90f8ba09126926536.pdf>

21. The date that information is going to be published does not need to be definite for the section 22 exemption to apply. What is important is that, at the time an information request is made, a settled intention to publish the information in the future exists.
22. In this case the Council intended to publish the information after it had been reviewed and agreed at the Council meeting of 18 December 2014. It stated it aimed to publish this the day afterwards but in any event it had a settled intention to publish the information after the date it was to be agreed.

In all the circumstances, is it 'reasonable' for the Council to withhold the information until some future date?

23. The ICO's guidance on section 22 explains that there is some overlap between the factors public authorities should take into account in deciding what is reasonable, and those which are relevant in balancing the public interest test.
24. A public authority has, however, first to determine whether or not it is reasonable in all the circumstances to withhold the information in order to apply the exemption, before considering whether there is a public benefit in providing the information prior to publication. Public authorities should consider whether or not it is sensible, in line with accepted practices and fair to all concerned.
25. In considering what is reasonable in all the circumstances, a public authority may also wish to consider whether it is the right decision to manage the availability of the information by planning and controlling its publication.
26. In this case, the Council has argued that the draft minutes of any committee or council meeting are published subject to approval by the Committee or Council and to any amendments that will be recorded in the minutes of the meeting at which they are approved. This is set out in the Council's Standing Orders which state that the Council will "*approve the signing of the minutes of the previous meeting as a correct record*".
27. The Council therefore considers it reasonable to not disclose draft minutes and documents which are, by virtue of the Standing Orders, intended to be reviewed and approved at the next Council meetings before they are published.
28. The Commissioner acknowledges that this argument is a legitimate one for the Council to make and, having also considered whether withholding the information is sensible, fair and in line with accepted practices, is

prepared to accept that it is reasonable in all the circumstances for the Council to withhold the information until a future date.

The public interest test

29. Having decided that the exemption under section 22 applied to the draft minutes and policy, the Commissioner has to consider the public interest arguments.
30. Neither the complainant nor the public authority has raised specific public interest arguments in relation to the information withheld under this exemption but the Commissioner recognises the general argument that public authorities can conduct their affairs more effectively when they have a reasonable amount of control over the way information is made publicly available and they are permitted to release it in a planned and managed way.
31. In contrast to this, the Commissioner also accepts there is a public interest in the disclosure of draft versions of documents and minutes as to do so could improve transparency by showing the processes of the public authority.
32. Having considered the public interest arguments in favour of both withholding and disclosing the information the Commissioner considers that there must be an emphasis placed on the Council having the freedom to determine when information should be published rather than having this dictated by individual requests for information.
33. For this reason, on balance, the Commissioner has concluded that the public interest lies in allowing the Council to publish the minutes and complaints procedure in a planned way as final versions and he therefore accepts the Council was correct in its application of section 22 and its decision to withhold the information subject to this exemption.

Section 21 – information accessible to the applicant by other means

34. Section 21(1) provides an exemption for information that is already reasonably accessible to the applicant. It is an absolute exemption and as such no public interest test needs to be applied.
35. In its original response to the complainant the Council cited section 21 in relation to the information held for agenda point 76 which related to non-consolidated payments. In further correspondence the Council also considered section 21 applied to the information held for agenda point 59 – response to objections to 12/13 accounts. The Council provided links to the relevant sections of its website where this information could be found.

36. The Commissioner has reviewed the information available via these links and is satisfied that the Council has correctly applied section 21(1) to this information.

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

37. The Council has withheld information relating to agenda item 73 on the basis of section 42(1) of the FOIA. The Commissioner notes this information is legal advice from solicitors acting on behalf of the Council and the Council acting as Trustees for the Recreation Ground charity in respect of Recreation Ground Charity matters.
38. The information relates to the recreation ground in the local area which is intended to provide a space for local inhabitants. Any information which relates to measures or activities which may affect the use of this land would be environmental information as defined by regulation 2(1)(c) of the EIR. As such the Commissioner has taken the step to consider the decision to withhold this information by considering the analogous exception under the EIR to section 42 of the FOIA. He has therefore looked at the application of the regulation 12(5)(b) exception to this information.
39. Regulation 12(5)(b) provides an exception from the duty to disclose information where the 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.
40. There are two types of legal professional privilege: litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege applies where no litigation is in progress or contemplated. In these cases, communications must be confidential, made between a client and legal adviser acting in a professional capacity, and for the sole or dominant purpose of obtaining legal advice.
41. The category of privilege the Council is relying on to withhold the information is advice privilege.
42. In this case the advice was provided directly to the Council by its solicitors for the sole purpose of providing legal advice on Recreation Ground Charity matters. The Commissioner accepts that the information in the correspondence can be considered to be legal advice provided by solicitors to their clients (the Council) and there is no suggestion that

the privilege attached to this information has been lost by previous disclosures so suggestions regulation 12(5)(b) could be engaged.

43. However, the Commissioner is mindful that there must be an "adverse" effect that would result from the disclosure of the information. He recognises that disclosure of legal advice could undermine the important common law principle of legal professional privilege and that disclosure may adversely affect a lawyer's capacity to give full and frank legal advice and discourage clients from seeking legal advice.
44. In view of the above, the Commissioner is satisfied that disclosure of the requested information would be likely to adversely affect the course of justice and he is therefore satisfied that regulation 12(5)(b) is engaged in respect of the information the Council has withheld.

Public interest arguments in favour of disclosure

45. The Commissioner considers it important to clarify that he has received no arguments from either party in relation to the public interest arguments. He has therefore had to consider the public interest arguments that he considers relevant in the circumstances.
46. The Commissioner acknowledges there is a public interest in ensuring openness and transparency in the operations of a public authority. The advice in question relates to matters around the Recreation Ground charity and there is an argument that disclosure of advice which would impact on the management or operation of this charity is in the public interest as it relates to a public space and sport facility.

Public interest arguments in favour of maintaining the exemption

47. In his previous decisions the Commissioner has expressed the view that disclosure of information relating to legal advice would have an adverse effect on the course of justice through a weakening of the general principle behind the concept of legal professional privilege. This view has also been supported by the Information Tribunal.
48. It is very important that public authorities are able to consult with their lawyers in confidence and be able to obtain confidential legal advice. Should such legal advice be subject to routine or even occasional public disclosure without compelling reasons, this could affect the free and frank nature of future legal exchanges and may deter the public authority from seeking legal advice in situations where it would be in the public interest for it to do so. 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."

Balance of the public interest

49. Although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege, he does not accept, as previously argued by some public authorities, that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner (EA/2007/0055)* were clear:

"The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption". (Para 41)

50. Consequently, although there will always be an initial weighting in terms of maintaining this exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is indeed the case, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice were disclosed by reference to the following criteria:

- How recent the advice is; and
- Whether it is still live.

51. In order to determine the weight that should be attributed to the factors in favour of disclosure the Commissioner will consider the following criteria:

- The number of people affected by the decision to which the advice relates;
- The amount of money involved; and
- The transparency of the public authority's actions.

52. With regard to the age of the advice, the Commissioner accepts the argument advanced on a number of occasions by the Information Tribunal that as time passes the principle of legal professional privilege diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure.

However, the older the advice the more likely it is to have served its purpose and the less likely it is to be used as part of any future decision making process.

53. In many cases the age of the advice is closely linked to whether the advice is still live. Advice is said to be live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted on that basis.
54. In this case the Commissioner understands the advice was provided in November 2014 and was to advise on matters relating to the charity that were ongoing at the time of the request. For this reason the Commissioner has to conclude that at the time of the request the advice was still live in that it was still relevant to discussions and decisions being made about the recreation ground. In light of this the Commissioner considers there is weight to add to the public interest arguments in favour of upholding the exemption.
55. The Commissioner understands the objective of the charity is to provide a recreation ground for local inhabitants and it has a duty to ensure that it makes decisions which keep this objective in mind. Decisions made by the Council as the Trustees of the charity therefore may have an impact on individuals who use the recreation ground. The Council needs to be able to obtain legal advice to guide them on how to manage the charity and make the best use of the recreation ground for local users. The Commissioner therefore considers this adds further weight to the argument that disclosure of the information would not be in the public interest.
56. With regard to the public interest in disclosure of the information; the Commissioner acknowledges there is a general public interest in increased transparency and he understands there will be a general interest in understanding the way in which a public space is managed to ensure that is in the interests of local inhabitants and users of the recreation ground.
57. The Commissioner has weighed up these arguments and in light of the strong inherent public interest in maintaining legal professional privilege and the fact that the advice was still live at the time of the request, the Commissioner has concluded that the public interest favours maintaining the exception and the legal advice contained in the correspondence should be withheld.

Right of appeal

58. 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

59. 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.
60. 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

Pamela Clements
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