Freedom of Information Act 2000 (FOIA)

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **25 March 2019**

Public Authority: **Historic England**
Address: **Room 2/07**
The Engine House
Fire Fly Avenue
Swindon
SN2 2EH

Decision (including any steps ordered)

1. The complainant has requested information on the plaque to Cecil Rhodes on number 6 King Edward Street, Oxford.

2. The Commissioner's decision is that Historic England ('HE') correctly considered the request under the EIR. She agrees that the requested information comprises information within the scope of the regulation 12(4)(e) exception – internal communications. However, the Commissioner considers that the public interest favours disclosure.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

    - Disclose the document "Advice Report".

4. 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

5. On 1 February 2018 the complainant wrote to HE and requested information in the following terms:

"• Any records, or any other information (including emails), that Historic England holds regarding Oriel College's stated intent in December 2015 to remove the commemoratory plaque to Cecil Rhodes on No. 6 King Edward Street, Oxford. (See http://www.politicsweb.co.za/opinion/we-willremove-rhodes-plaque-if-we-can--oriel-coll)

• Any records, or any other information (including emails), that Historic England holds regarding any attempts in the last four years to list the plaque on No. 6 King Edward Street, Oxford, as having special architectural or historic interest. (Some documents may be found under Historic England's Case Number 1432715, but this does not imply that I wish my FOI request to be limited to the documents found under this Case Number if there are relevant documents to be found in other places.)"

6. HE responded on 28 March 2018. It provided information in the scope of the request and stated that some information was withheld in reliance on regulation 12(5)(f) – information provided by a person who was not obliged to provide the information and regulation 12(4)(e) – internal communications.

7. Following this response the complainant corresponded with HE with various queries regarding the information provided. These queries included reference to a document which had been mentioned in the information provided but was not included. This document entitled "Advice Report" was specifically withheld under regulation 12(4)(e).

8. Following this correspondence, on 6 May 2018 the complainant requested an internal review. This request specifically focussed on the document "Advice Report". HE wrote to the complainant on 24 May 2018. It stated that the application of regulation 12(4)(e) to withhold the report was upheld.

Scope of the case

9. The complainant contacted the Commissioner on 7 September 2018 to complain about the way his request for information had been handled. He advised that he was grateful for the 'extremely comprehensive' handling of his request by HE. He went on to explain that he had two "remaining disputes" which he described as:

"1. Several points at which I argue that Historic England has mischaracterised my arguments.

2. Whether the invocation of Regulation 12(4)(e) in this instance survives the public interest test detailed in Regulation 12(1)(b)."

10. The Commissioner considers the scope of her investigation is the application of regulation 12(4)(e) to withhold the Advice Report. HE's interpretation of the complainants' arguments has no bearing on the Commissioner's decision and therefore falls outside the scope of her investigation.

Reasons for decision

11. Regulation 2(1) of the EIR defines environmental information[1]. The Commissioner is satisfied that the withheld Advice Report which concerns a plaque on a building standing within the Oxford Central Conservation Area comprises environmental information falling within regulation 2(1)(c).

12. Regulation 12(4)(e) of EIR states:

    "For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that-

    (e) the request involves the disclosure of internal communications."

13. The Commissioner's published guidance on this exception addresses the content of internal communications. Essentially, an internal communication is a communication that stays within one public authority. As the Commissioner notes in her guidance the term *"internal communications"* is not defined in the EIR and is normally interpreted in a broad sense.

14. HE explained to the Commissioner that the Advice Report forms part of HE's internal discussions about the case. It explained that at the time of the internal review the document had not been sent to DCMS and was prepared for consideration between members of HE staff. The information can therefore be reasonably defined as internal communications.

15. The Commissioner agrees with this assessment and accepts that the information falls within the scope of regulation 12(4)(e).

[1] https://ico.org.uk/media/fororganisations/documents/1146/eir_what_is_environmental_information.pdf

The public interest

16. Regulation 12(1)(b) requires that, where the exception under regulation 12(4)(e) is engaged, 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 her assessment of the public interest test, the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

Arguments in favour of disclosing the information

17. HE acknowledged the explicit presumption in favour of disclosure contained in the EIR. It accepts that it is in the public interest that HE is accountable and open in the way it operates and reaches decisions.

18. The complainant provided the Commissioner with an extremely detailed 56 page dossier explaining his view of HE's application of the regulation and its consideration of the public interest test. He believes that there is a significant public interest in the disclosure of the withheld information to add to the information already in the public domain. He also pointed out that:

    "..if there is little significant public interest in maintaining the 'internal communications' exception, whether there is significant public interest in the document's disclosure is actually of little relevance."

Arguments in favour of maintaining the exception

19. HE explained that consideration of the Rhodes Plaque is still a live issue and under consideration by DCMS. It went on to explain that it considers that its staff must feel able to discuss matters freely and frankly without concern that the information will be made "publicly available prematurely".

20. HE advised the Commissioner:

    "A safe space for internal deliberation and decision making in which to debate live issues away from internal scrutiny is crucial. This matter is on-going and yet to be finalised, and therefore the disclosure of any information which may prejudice this [sic] and is not in the public interest. We feel that release of this information at this point would make it impossible for the DCMS to make their decision and going forward, would undermine the great amount of thought and care that goes into the assessment process for all cases, not just this one."

21. HE added that it considers that better decisions are reached if those involved with making them have the opportunity to debate and express

their views without the risk that those views may be taken out of context.

22. The complainant reminded the Commissioner of her guidance in respect of regulation 12(4)(e) which advises that there should be no blanket policy of non-disclosure of a particular type of internal document; arguments should relate to the content and sensitivity of the particular information. He considers that HE has not addressed itself to the specific content of the document "Advice Report".

23. The complainant provided the Commissioner with many pages refuting HE's determination of the public interest arguments in favour of maintaining the exception. In particular the arguments concerning a 'safe space' for discussion and the 'chilling effect' relied on by HE. In brief, the complainant concluded that HE's 'chilling effect' arguments were insufficient. This is because there is a lack of specificity; a lack of clarity in how the withheld document could be attributed to any specific staff member; and the stated role of HE being to be as objective as possible, which should result in staff not being easily deterred from giving impartial and apolitical advice.

24. The complainant explained that there is already much information already in the public domain regarding the Rhodes plaque. In addition HE has provided a significant amount of information in response to his request. From this he has concluded that there would be limited information contained in the Advice Report that is not already in the public domain. With respect to the 'safe space' arguments stated by HE, the complainant explained his conclusion that:

"The information in Document A represents official view of Historic England, rather than the view of employees within Historic England.

The conclusions of the document are known, as are the broad strokes of Historic England's supporting arguments. However, the specifics of Historic England's supporting arguments are not known.

Many of Historic England's specific arguments may be reasonably inferred from arguments made within and to Historic England during the consultation process.

I argue that the release of the unknown information in Document A would not significantly impact Historic England's safe space."

Balance of the public interest

25. The Commissioner notes that there is no automatic public interest in withholding information because it falls within a class-based exception. Neither should there be a blanket policy of non-disclosure for a particular type of internal document, as referenced by the complainant

in paragraph 22 above. Public interest arguments should be focussed on the protection of internal deliberation and decision making processes.

26. With regard to the arguments advanced by HE, the Commissioner considers that these can be categorised as arguments generally known as safe space and chilling effect arguments.

27. The Commissioner accepts that often significant weight should be given to safe space arguments – i.e. the concept that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction – particularly where an issue is live and the requested information relates to that issue. In the circumstances of this case, at the point that the complainant made his request, the Commissioner acknowledges that a final decision by DCMS had not been announced. However, the 'Advice Report', which comprises the withheld information, nevertheless, is complete.

28. The Commissioner is aware that public authorities often argue that disclosure of internal discussions would inhibit free and frank discussions in the future and that the loss of frankness and candour would damage the quality of discussions or advice leading to poorer decision making. This chilling effect cannot be dismissed, however, civil servants and other public officials are expected to be impartial and robust in meeting their responsibilities and not easily deterred from expressing their views.

29. The Commissioner notes that the debate regarding commemoration of Cecil Rhodes is a topic which has appeared in the public domain for a number of years, often covered by the media.

30. The Commissioner has deliberated on the views expressed by both parties. She has concluded that HE has not provided sufficiently compelling arguments in favour of maintaining the exception. She cannot accept that disclosure of the withheld document will cause a chilling effect on internal discussions at HE. The document does not attribute comment or opinion to any individual and presents an overall view. As such, and in the absence of any specific reasoning, she cannot give significant weight to the chilling effect described by HE. Similarly, she considers that the safe space rationale which is often relevant, is not applicable here. The discussion has taken place and has been generically recorded in the document. The issue has been ongoing for several years and there is already much information in the public domain including material on-line.

31. She understands from HE that DCMS is currently considering the issue. She equally understands that this consideration has been on-going for several years, with no date for a decision from DCMS provided. She notes HE's view that disclosure of the report would make it impossible for DCMS to make a decision, however, without any supporting evidence

she cannot agree. It is clear to the Commissioner, from publicly available information, that strong views are held on both sides of the argument whether or not to maintain or remove the Rhodes plaque, she does not accept that disclosure of the withheld report would render DCMS unable to make a decision.

32. The Commissioner therefore finds that HE has not attributed significant weight to the public interest in maintaining the exception such that it outweighs the public interest in disclosing the information. She is also cognisant of the presumption in favour of disclosure as provided for by regulation 12(2). Consequently, she finds that the public interest favours disclosure of the withheld document.

Right of appeal

33. 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

34. 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.

35. 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 .....

Susan Hughes
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