

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 8 September 2020

Public Authority: Swards End Parish Council
Address: 33 Rivey Way
Linton
Cambridgeshire
CB1 6LH

Decision (including any steps ordered)

1. The complainant has requested copies of an orchard planting plan which he believes Swards End Parish Council ('the Parish Council') holds. The Parish Council disclosed a copy of the only planting plan it said it held, in response to the request. However, the complainant believed that it held another, earlier version of the orchard planting plan, which it had not disclosed.
2. The Commissioner is satisfied, on the balance of probabilities, that the Parish Council has disclosed to the complainant all the information it holds that falls within the scope of the request.
3. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

4. On 6 June 2019, referring to previous correspondence, the complainant wrote to the Parish Council and requested information in the following terms:

"In my email of 13.03.19 I requested that you provide me with copy of the agreed orchard planting plan. As yet I have not received this yet, so again I request this under the FOI."

5. The Parish Council responded on 25 June 2019. It said:

"Agreed Orchard Plan: There was no formal documented plan discussed at any of the meetings prior to the planting of the orchard. An informal plan was prepared shortly before planting as a guide for the volunteers. A copy of this is attached for completeness".

6. The complainant responded on 30 June 2019, as follows:

*"The planting plan you attached is the actual one used in the planting process. **The one I requested was the agreed plan prior to the intervention of the tree expert.***

...

So can you please send me a copy of the plan as requested."

7. The Parish Council responded on 16 July 2019. It commented that dealing with the complainant's correspondence was ceasing to be an efficient use of its resources, and asked him to take forward any outstanding concerns at a Parish Council meeting. The complainant responded on 21 July 2019, stating that a public meeting was not the appropriate forum for the resolution of his concerns.
8. In an email dated 1 October 2019, the Parish Council explained to the complainant that it had sent him a copy of the orchard planting plan on 25 June 2019. It said that it did not hold any other planting plans for the orchard. It said that in view of previous correspondence on the matter, it deemed the request vexatious under section 14 of the FOIA, and that no further correspondence on the subject would be entered into.

Scope of the case

9. The complainant contacted the Commissioner on 1 November 2019 to complain about the way his request for information had been handled. He believed the Parish Council must hold an earlier copy of the orchard planting plan which it had not disclosed.
10. Although in correspondence with the complainant the Parish Council had expressed the view that the request may be vexatious, it subsequently confirmed to the Commissioner that it was relying on the exception at regulation 12(4)(a)(information not held) of the EIR, in that it did not hold an earlier version of the orchard planting plan.
11. The analysis below therefore considers whether, on the balance of probabilities, the Parish Council has disclosed to the complainant all the information it holds which fell within the scope of his request.

Reasons for decision

Is the information environmental information?

12. The complainant cited the Freedom of Information Act 2000 ('FOIA') in his request for information, however, the Commissioner has considered whether, in fact, it fell to be dealt with under the EIR.
13. Information is 'environmental information' and must be considered for disclosure under the terms of the EIR rather than the FOIA if it meets the definition set out in regulations 2(1)(a) to 2(1)(f) of the EIR.
14. The Commissioner considers the information in this case can be classed as environmental information, as defined in regulation 2(1)(c) of the EIR. This says that any information on measures such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements or factors of the environment listed in regulation 2(1)(a) and 2(1)(b) will be environmental information. One of the elements listed under regulation 2(1)(a) is land.
15. The request is for information about an orchard planting plan. The Commissioner considers the request therefore clearly relates to a measure as defined in regulation 2(1)(c) of the EIR, which would, or would be likely to, affect any of the elements described in regulation 2(1)(a), namely land.
16. The Commissioner is therefore satisfied that the request was for environmental information, and that the request fell to be dealt with under the EIR.

Regulation 12(4)(a) – information not held

17. Regulation 12(4)(a) of the EIR provides that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
18. In this case, the complainant believes that the Parish Council holds more information than has been disclosed to him, in the form of an earlier version of the orchard planting plan than the one disclosed. The Parish Council's position is that it does not hold any other versions of the orchard planting plan.
19. In cases where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner (following the lead of a number of First-tier Tribunal decisions) applies the civil standard of the balance of probabilities when making a determination. In essence, the Commissioner will determine whether it is likely, or

unlikely, that the public authority holds information relevant to the complainant's request.

20. The Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the public authority to check whether the information is held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held.
21. For clarity, the Commissioner is not expected to prove categorically whether the information is held. She is only required to make a judgement on whether the information is held using the civil standard of proof of the balance of probabilities.

The complainant's position

22. The complainant set out the background to his request, as follows:

"One of the councillors came forward with the idea of planting more trees along the left side of the village green.

Allegedly the council consulted widely on the matter but the only record in the minutes was the initial suggestion and for the clerk to pursue donations from the villagers.

The tree planting occurred on Dec 1st and the number of trees had grown to 18, some 10 fruit trees and eight natural species ... we raised questions with the councillor who was managing the operation but his only concern was that the exercise hadn't cost the council a penny on the project development had been recorded in the minutes (neither was correct).

Surprisingly at the meeting on 04.12 it was recorded in the minutes that the fruit trees (orchard) had to be moved to the bottom right of the green but the rest of the trees had been planted as to the agreed plan. However as no plan had been published in the minutes I could not understand why they had to comment on the change so I requested a copy of the agreed plan. The only plan that was sent to me was the actual planting plan (ie orchard shown on right of green) and furthermore no trees at all were planted on the west of the green.

Therefore I am seeking a copy of the agreed plan".

23. The complainant believed that the planting plan that the Parish Council disclosed to him on 25 June 2019 reflected the planting as it was actually carried out. He believed an earlier version of the plan existed. His request that the Parish Council conduct an internal review set out this belief, as follows:

"I refer you to the minute of the 04.12.18 'following a meeting with a tree expert it was agreed to plant the fruit trees in the far right hand side of the Village Green due to space available. The other trees were planted as to the agreed plan.'

Furthermore if there was no formulated plan discussed at any of the meetings prior to the planting how was one produced and in the absence of any plan being shown as part of the minutes why was it relevant to state in these minutes (04.12.18) that the location of the orchard had been changed.

In your letter of the 10.01.18 you state that the 'council consulted widely in all aspects relating to the Community Orchard over a 6 month period, including whether to proceed, how many trees, ask the villagers if they wanted to contribute additional trees, types of tree and location. The plans evolved during this process'.

Yet the only note in the minutes (06.11.18) was to ask the villagers for contributions for additional trees. So when and where were the other results of the consultation discussed for a plan to be evolved."

24. The complainant therefore believed that an earlier planting plan must have been agreed (referred to in the meeting minutes of 4 December 2018 as "*the agreed plan*") and that the Parish Council held a copy of it, which it had not disclosed to him.

The Parish Council's position

25. The Parish Council maintained its position that it only holds one version of the orchard planting plan and that this had been disclosed to the complainant when it originally responded, on 25 June 2019.
26. As is her customary methodology, the Commissioner asked the Parish Council a series of detailed questions about its handling of the request, with a view to evaluating its claim that it had disclosed all the information it held which fell within the request's scope.
27. In response, the Parish Council said that it holds paper and electronic records and both were thoroughly searched, using (for electronic records) the search terms "orchard" and "plan". Records held by individual Parish Councillors were also searched. The searches located the planting plan which was sent to the complainant on 25 June 2019. No other plan was recovered in response to the searches.
28. When asked whether the Parish Council had any other particular reason for believing it did not hold another version of the orchard planting plan, it responded, quite simply, that it knew for a fact that there had only

ever been one version of the planting plan (the one disclosed) and that no other version had ever been created or held. It concluded:

"I really cannot stress enough that only one orchard plan has every [sic] existed and this was sent to [the complainant]".

The Commissioner's conclusion

29. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out in paragraphs 19 - 21, above, the Commissioner is required to make a finding on the civil standard of the balance of probabilities.
30. The complainant has focused on the particular wording of the minutes of the meeting of 4 December 2018, and regards it as proof that an earlier version of the orchard planting plan must exist. The Commissioner can understand why, on the face of it, he might initially have drawn that conclusion. However, she does not agree with him that the term "*the agreed plan*" necessarily implies that an earlier orchard plan must have been created. She considers that it could also refer to an informal, verbal understanding as to how to approach the planting in the early stages of the proposal. If so, this information would not be covered by the EIR, which only gives a right of access to recorded information.
31. The Parish Council has clarified to the complainant several times that the inference he has drawn is incorrect. The Parish Council has also been adamant about this point with the Commissioner, saying that it knows that only one version of the orchard planting plan was ever created.
32. Taking into account its size and available resources (it is a very small public authority served by one, part time, clerk) the Commissioner considers the Parish Council's claims in this regard to be credible and she notes that the complainant has offered no substantive evidence which casts doubt on them, other than his particular interpretation of the wording of the minutes, and the fact that he can find no other information about the decision to plant trees on the green.
33. On the question of whether the Parish Council *should* hold an earlier version of the orchard planting plan, given the discussions there had apparently been around it, it is not the Commissioner's role to make a ruling on how a public authority deploys its resources, on how it chooses to hold its information, or on the strength of its business reasons for holding information in the way that it does as opposed to any other way. Rather, in a case such as this, the Commissioner's role is simply to decide whether or not the requested information is held by the public

authority. On that point, the Information Tribunal in the case of *Johnson / MoJ* (EA2006/0085)¹ has commented that the FOIA:

"... does not extend to what information the public authority should be collecting nor how they should be using the technical tools at their disposal, but rather it is concerned with the disclosure of the information they do hold".

34. The Commissioner considers the same to be the case for the EIR.
35. Having taken all the above into account, the Commissioner is satisfied that the Parish Council has demonstrated that, on the civil standard of the balance of probabilities, it has disclosed to the complainant all the information it holds which falls within the scope of the request, and that it was entitled to claim that regulation 12(4)(a) of the EIR applied in this case in respect of the complainant's request for an earlier version of the orchard planting plan.
36. Although regulation 12(4)(a) of the EIR is a qualified exception, the Commissioner's position is that, where the exception is engaged, it is not necessary to consider the public interest in disclosure, as to do so would be illogical. There cannot be a public interest in information being disclosed by the public authority, if it is accepted that the information in question is not held by the public authority.

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<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i90/Johnson.pdf>

Right of appeal

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

38. 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.

39. 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

Samantha Bracegirdle
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