

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

Decision notice

Date: 26 January 2021

Public Authority: Ditchling Parish Council
Address: Ditchling Village Hall
18 Lewes Road
Ditchling
East Sussex
BN6 8TT

Decision (including any steps ordered)

1. The complainant has requested information regarding the lease for an area of land.
2. The Commissioner's decision is that Ditchling Parish Council is entitled to rely upon regulation 12(4)(b) and that the public interest rests in maintaining this exception. The Commissioner also finds that, on the balance of probabilities, the council does not hold any further information within the scope of the request. However, the Commissioner finds that the council breached regulation 14(2) in its handling of the request.
3. The Commissioner does not require any steps.

Request and response

4. On 14 February 2020, the complainant wrote to Ditchling Parish Council ('the council') and requested information in the following terms:

"Please could the Parish Council release (for my attention) the area of land that has been leased by The Parish Council since 1976 and any associated documentation resulting in the lease from 1976 onwards to include recent correspondence surrounding this matter."

5. The council requested that the complainant provide some further clarification of the request on 11 March 2020.

6. The complainant provided a clarified request on 16 March 2020, which was made in the following terms [numbering added by the ICO]:

[1] "The original documentation to include a copy of the lease and associated plan showing site boundaries both leased by The Parish Council and in The ownership of UK Power Networks or their predecessors

[2] The original correspondence to include letters to UK Power Networks or their predecessors.

[3] Any Historic minutes of meetings associated with the above.

[4] Any recent minutes of meetings and correspondence with UK Power Networks concerning the above.

[5] Please could you also provide the exact instruction given to the fencing contractor in August 2018 in respect of the replacement gate and stock fencing?"

7. On 2 April 2020 the council advised the complainant that there could be some delay due to the Covid-19 pandemic, and therefore it would make contact when access to records would be possible. The council also advised that due to the time period of the request some information would be archived with East Sussex County Council.

8. On 15 April 2020 the council advised that, although it had responded to some of the queries raised relating to [1], access to the documents was still not possible therefore no further response could be issued at this time.

9. The Council issued a refusal notice on 3 June 2020, citing section 14 of the FOIA. The council did not offer an internal review but advised the complainant of his right to complain to the ICO.

10. On 2 September 2020 the Commissioner wrote to the council to advise that the request should be reconsidered under the EIR, and if it was considered that an exception to disclosure applies then the council should issue a revised refusal notice. The Commissioner also advised that the council should conduct an internal review that meets the requirements of regulation 11 of the EIR.
11. The council wrote to the complainant on 27 October 2020 with the outcome of an internal review. It provided a revised refusal notice to withhold the requested information on the basis of EIR 12(4)(b) (manifestly unreasonable requests).
12. During the course of the investigation, the council clarified its response further. It advised that all information in scope of items [1], [2], [4] and [5] had been identified and provided where held. The council clarified that regulation 12(4)(b) applied to item [3] only.

Scope of the case

13. The complainant contacted the Commissioner on 16 June 2020 to complain about the way his request for information had been handled, specifically with regard to the council's refusal to provide the requested records and the delay in responding.
14. During the course of the investigation the complainant confirmed the scope of the complaint to be that further information should be held in regard to [2], and to dispute the council's reliance on 12(4)(b) for [3]. The complainant also requested that the Commissioner investigate the way in which the request was handled by the council.
15. The Commissioner considers that the scope of the case is to establish whether the council has identified and disclosed information that is in scope of [2] and whether it correctly engaged the exception at regulation 12(4)(b) in regard to [3]. She will also consider whether the council made any procedural errors in the way it handled the request.

Reasons for decision

Regulation 5(1) – Duty to make environmental information available on request

16. Regulation 5(1) of the EIR states that: *“a public authority that holds environmental information shall make it available on request.”* This is subject to any exceptions that may apply.

17. 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. She will also consider the actions taken by the authority to check that the information is not 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.
18. The Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency* (EA/2006/0072) in which it was stated that *"there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records"*. It clarified that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is therefore the test the Commissioner applies in this case.
19. In discussing the application of the balance of probabilities test, the Tribunal stated that, *"We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed."* The Commissioner has therefore taken the above factors into account in determining whether or not further information is held, on the balance of probabilities.

The complainants view

20. The complainant states, in regard to [2], that it is difficult to believe that the council holds no correspondence in regard to the tenancy. The complainant states that the private company that owns the land would not have entered into a tenancy lightly.

The Council's response

21. The council advised that it has a document retention scheme and provided the Commissioner with a copy of the document, which is also published on their website.

22. It advised that the retention scheme document outlines a minimum retention period of 1 year for correspondence and emails via the Limitation Act 1980.
23. The council stated that it does not have any correspondence going back 44 years.
24. The council considers it unlikely that the correspondence ever existed, as it relates to a very minor and routine commercial lease that was taken out 44 years ago.
25. The council advised, if it had ever existed, it would have been abandoned many years ago in line with the document retention scheme.
26. The council confirmed that correspondence and emails are not regarded as items falling under any statutory requirement to be kept permanently.

Conclusion

27. The Commissioner notes that in its response to [1], the council has provided the complainant with a copy of the lease and the associated plan.
28. Request item [2] specifically asks for the "*original correspondence*". The original correspondence, it therefore follows, must have originated around 44 years ago, being when the lease commenced.
29. The council maintains that it has no need for the correspondence relating to a minor lease arranged that many years ago, nor is there any statutory requirement to hold the requested information.
30. The council have confirmed that it holds no records of any correspondence from 44 years ago, and this is supported by its document retention scheme. In light of this the Commissioner is satisfied that it has undertaken adequate searches.
31. Having considered the council's responses, and in the absence of any tangible evidence to the contrary, the Commissioner is satisfied that, on the balance of probabilities, the council does not hold any information within the scope of the request item [2].

Regulation 12(4)(b)

32. Regulation of the EIR 12(4)(b) provides that

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

(b) the request for information is manifestly unreasonable;"

33. The council's position is that the request is manifestly unreasonable because of the disproportionate burden it would impose on its limited staffing resources.
34. Regulation 12(4)(b) of the EIR is designed to protect public authorities from exposure to a disproportionate burden or an unjustified level of distress, disruption or irritation in handling information requests. In effect, it works in similar regards to two exemptions within the Freedom of Information Act 2000 ('FOIA'): section 12, where the cost of complying with a request exceeds the appropriate limit and section 14, where a request is vexatious.
35. The EIR differ from the FOIA in that there is no specific limit set for the amount of work required by an authority to respond to a request, as that is provided by section 12 of the FOIA.
36. Specifically, the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004¹ ('the Fees Regulations') which apply in relation to section 12 of the FOIA are not directly relevant to the EIR because the cost limit and hourly rate set by the Fees Regulations do not apply in relation to environmental information. However, the Commissioner accepts that the Fees Regulations provide a useful starting point where the reason for citing regulation 12(4)(b) is the time and cost of a request, but they are not a determining factor in assessing whether the exception applies.
37. The Fees Regulations confirm that the costs associated with these activities should be worked out at a standard rate of £25 per hour per person. For local authorities, the appropriate limit is set at £450, which is the equivalent of 18 hours work.
38. The Commissioner is satisfied that regulation 12(4)(b) sets a fairly robust test for an authority to pass before it is no longer under a duty to respond. The test set by the EIR is that the request is 'manifestly unreasonable', rather than simply being 'unreasonable' per se. The Commissioner considers that the term 'manifestly' means that there must be an obvious or clear quality to the identified unreasonableness.

¹ <https://www.legislation.gov.uk/ukxi/2004/3244/contents/made>

39. It should also be noted that public authorities may be required to accept a greater burden in providing environmental information than other information.
40. Therefore, in assessing whether the cost or burden of dealing with a request is clearly or obviously unreasonable, the Commissioner will take the following factors into account:
- proportionality of the burden on the public authority's workload, taking into consideration the size of the public authority and the resources available to it, including the extent to which the public authority would be distracted from delivering other services;
 - the nature of the request and any wider value in the requested information being made publicly available;
 - the importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue;
 - the context in which the request is made, which may include the burden of responding to other requests on the same subject from the same requester;
 - the presumption in favour of disclosure under Regulation 12(2);
 - the requirement to interpret the exceptions restrictively.

The complainant's position

41. The complaint states that it is incomprehensible how the information requested would be that difficult to find considering that everything is most probably on microfiche and relates to the leasing of a piece of land in 1976.
42. The complainant also stated that the council would not need to review 44 years-worth of documents as it has argued.

The council's position

43. The council advised that all of its meeting minutes, for any purpose, for the period from 2016 onwards are stored in pdf format on the council website and these are available for anyone to view. Earlier years are stored at the East Sussex Keep Archives.
44. The council provided background to item [3]. It stated that the request relates to an issue regarding a small piece of land which is leased to the council by UKPN. The lease has been in existence for 44 years having been taken out in 1976.
45. There had been an error in the siting of some replacement fencing by the council's contractor in 2018. After inspection by the council and

UKPN an alignment error of approximately 70cm was found which had been acknowledged and rectified in 2020.

46. The council advise that from the outset it had stated to the complainant they would rectify any fault caused by their contractor in replacing the fencing. It is the council's opinion that the complainant has sought to turn this into a major issue. The council maintains that the complainant has referred to separate disputes with a local resident and with UKPN regarding the precise location of the boundary fence, neither of which are disputes which the council considers it should be involved in.
47. In terms of further background, the council states that responding to many queries from the complainant in relation to this issue has taken up approximately 50-75 hours out of a working week of only 25 hours. The council acknowledged that it held no detailed records of the time spent to date but stated that it felt the time was already considerable and in excess of the cost limit.
48. The council advised that it does not understand what further issue the complainant is trying to illuminate by way of the request, nor how responding would help to address it. It advised that staff are suffering from stress in responding to the ongoing complaints and information requests from the complainant in relation to this issue.
49. The council maintains that in order to respond to item [3], it would have to investigate 44 years of its monthly meeting minutes.
50. The council provided the following estimation:
 - The council generates one set of minutes per month of the year.
 - 10 minutes are required to retrieve each set of minutes from the files and then to read them in order to identify any information in scope of the request.
 - 10 minutes x 12 months x 44 years = 88 hours work
51. The Commissioner scan read a couple of sets of the council's minutes and notes that this took 3 minutes, without any detailed thinking into the relevance of the information contained within the minutes.
52. The council considers that the minor lease agreement, to which the request refers, has never been an issue in itself and it is therefore highly unlikely to appear in any council meeting minutes.

Is the exception engaged?

53. The Commissioner recognises that the ongoing information requests and conflict between the complainant and the council relate to a disagreement over land boundaries.
54. It is not for the Commissioner to decide upon the merits of any such dispute. However, in order to establish whether or not the burden on the council is proportionate, she does need to consider the nature of the request and any wider value in the requested information being made publicly available.
55. In order to determine the relative burden on the council, the Commissioner notes that the Parish Council has limited resources (25 hours per week) in comparison to a larger public authority.
56. The council estimated around 74 hours of work was required to respond to the request. However, the complainant's view is that the information should be easily available, being in microfiche format. The Commissioner has viewed the minutes, and can confirm that they are in a format that would need to be read in order to understand what is contained, rather than being conducive to the application of an electronic search.
57. Based upon the Commissioner's own assessment of reading a sample of the minutes, a moderate estimate of 3 minutes per set would still result in over 25 hours work, and that is without allowing any additional time for retrieving the files or extracting the in-scope information.
58. The Commissioner has also considered the wider public value of the information. Although the land boundary is clearly a matter of importance to the complainant, she is not aware of any significant interest to the broader community. She therefore considers that it is of limited public value in this respect.
59. Conversely the Commissioner considers that the burden on the council is significant and would require a disproportionate diversion of resources.
60. The Commissioner has considered both positions and she finds that even with her more conservative estimate, there is little basis upon which to justify diverting a significant proportion of the council's resources away from other business in order to fulfil the requirements of the request.
61. The Commissioner believes that complying with the complainant's information request would impose an unreasonable burden to the council. Therefore, the Commissioner's conclusion is that regulation 12(4)(b) is engaged in this case

Public interest in favour of disclosure

62. Regulation 12(4)(b) is a qualified exception, meaning that a public authority may only refuse a request that is manifestly unreasonable if the public interest in maintaining that exception outweighs the public interest in disclosure. Regulation 12(2) of the EIR also provides that the public authority must apply an explicit presumption in favour of disclosure. This means that exempt information must still be disclosed unless there is an overriding public interest in maintaining any exceptions applied.
63. The request relates to an issue that is of concern to the complainant. The disclosure of the requested information may assist the complainant to resolve the issue to some degree and this would potentially have an impact in their lives and wellbeing.

The public interest in the exception being maintained

64. The council referred the Commissioner to the considerable burden and diversion of resources that would be imposed on it in order to respond to the request. It also stated that the minor lease agreement, to which the request refers, has never been an issue in itself and it is therefore highly unlikely to appear in any of the council's meeting minutes.
65. The council stated that it believes there is no wider public interest in consuming a large amount of its scarce resources to respond to this request.

Balance of the public interest

66. The Commissioner recognises the importance of accountability and transparency in decision-making within public authorities, and the necessity of a public authority bearing some costs when complying with a request for information. However, in considering the public interest test for this matter, the Commissioner must assess whether the cost of compliance is disproportionate to the value of the request.
67. The Commissioner is mindful that the council's minutes are published from 2016 onwards on the council's website should the complainant wish to carry out their own search for information recorded in recent years. Earlier years are available from the archives and this information has been passed on to the complainant.
68. Moreover, the Commissioner considers that the specific information that is in scope of request [3] is of limited, if any, wider public interest.
69. The Commissioner's position is that the public interest in this case lies in ensuring that the council's resources are used effectively and are not diverted from its other core services. The Commissioner, therefore,

considers that dealing with the request does not best serve the public interest.

70. Whilst the Commissioner does not wish to negate the purpose and value of the request for the complainant, she nevertheless considers the burden imposed by the request to be manifestly excessive and that it would impact on other services. It is, therefore, the Commissioner's decision that the public interest lies in maintaining the exception.

Presumption in favour of disclosure

71. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner (SGIA/44/2019)*, "If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).
72. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(b) was applied correctly.

Regulation 9 – Duty to advise and assist

73. Regulation 9(1) of the EIR states that:

"A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants."

74. When a request is refused because it is burdensome and thus manifestly unreasonable, the Commissioner considers that the public authority should provide the requestor with advice and assistance such that the request can be refined to bring it within a reasonable cost.
75. The council has advised the complainant that it considers it very unlikely that any information will be held in scope of request [3]. This is because the request is in regard to a minor lease agreement, which has never been an issue in itself.
76. The council has also provided the complainant with details of where to find the minutes that are stored on its website, and how to request

access to the minutes held in the archive. This would enable the complainant to carry out their own search as required.

77. In the circumstances of the case, the Commissioner cannot see any alternative approach that the council could take to suggest a way of narrowing the scope to make it more manageable.
78. In light of the above, the Commissioner has concluded that the Council complied with regulation 9 of the EIR in its response to this request for information.
79. The Commissioner does not require any further steps.

Procedural Matters.

80. Regulation 5(1) of the EIR states that, subject to any exceptions, environmental information must be made available on request.
81. Regulation 5(2) requires that the information be made available promptly, and in any event no later than 20 working days after the date of receipt of the request. Regulation 14(2) requires that refusal notices are also issued within that time frame.
82. In this case, the complainant clarified the request on 16 March 2020. After this date the council provided some partial responses, and also explained that there would be a delay due to the Covid-19 health pandemic. The council issued a refusal notice on 3 June 2020, reliant on section 14 of the FOIA.
83. Following the intervention of the Commissioner, the council provided an internal review on 27 October and revised its position to refuse on the basis of EIR 12(4)(b).
84. The Commissioner is sympathetic to the issues experienced by the council at this time with limited resources during the pandemic. However in providing this reconsidered response seven months after the original request, the Commissioner must conclude that the council failed to issue its refusal notice within the stipulated timescales and thus breached Regulation 14 of the EIR.
85. As the refusal notice has been issued, no further steps are required from the council.

Right of appeal

86. 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

87. 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.
88. 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
Head of FOI Casework and Appeals
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF