

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 2 February 2021

Public Authority: Kirklees Council

Address: Civic Centre 3
Market Street
Huddersfield
HD1 1WG

Decision (including any steps ordered)

1. The complainant has requested a copy of the legal advice held by Kirklees Council (the council) which formed the basis of an email sent to local residents about the repair of a collapsed churchyard wall.
2. The council initially refused the request, citing regulation 12(5)(b). Following the intervention of the Commissioner, the council then provided some information to the complainant.
3. However, the Commissioner has identified one further set of information that is relevant to the request which was not released by the council. It is her decision that the council is not entitled to rely on regulation 12(5)(b) in respect of this information.
4. Furthermore, as the council failed to provide its internal review response within the statutory time period of 40 working days, it has breached regulation 11(4) of the EIR.
5. The Commissioner requires the council to take the following steps to ensure compliance with the legislation:
 - Release the highlighted information set out within the Confidential Annex attached to this decision notice.
6. The council 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

7. On 26 February 2020, the complainant wrote to the council and requested information in the following terms:

'At 18:04 on 23/01/2020 I received an email from an officer of Kirklees Council, [contact details redacted-to be referred to as Officer A in this decision notice], which stated the following (underlining is mine):

"Over the past week, more in-depth enquiries have been made with our Legal Officers regarding the issue of the trees immediately behind the affected walls, as the Church is responsible for the trees. We had requested clarity on liability if the trees were the cause of the wall collapse. This enquiry has resulted in our Legal Team confirming that the Council are only responsible for the maintenance of the churches land in terms of grass cutting an area that was granted a faculty in 1973/74, specifically after an overgrown area was turned to a place of beauty."

My request is to see copies of the correspondence (or record of correspondence) in which the Legal Team provided [Officer A] with the information stated in [Officer A's] email above, along with copies of any other correspondence on this matter that the legal team provided, either to [Officer A] or to other Kirklees Council officers.

I fully understand and accept that, owing to its obligations under the GDPR Act, the council will be unable to provide any personal information that could be used to identify the individual correspondents, and I will therefore be satisfied to receive copies of the requested correspondence with all names and contact information redacted, along with any other steps required to anonymize the disclosed data.'

8. On 9 March 2020, the council issued a refusal notice to the complainant. It confirmed that it held copies of email exchanges between council officers and legal advisers which contained advice about '*responsibility and liability*', in relation to the trees which were situated next to the walls of St Michael's Church. The council advised the complainant that it regarded such information to fall under the exception at regulation 12(5)(b) of the EIR.
9. The council confirmed to the complainant that it had also considered the public interest test, and it explained why it was satisfied that this lay in favour of withholding the requested information in this instance.

10. On 15 April 2020, the complainant requested an internal review. On 22 June 2020, the council issued its response; it maintained its previous decision confirming that the withheld information was legally privileged and should be withheld.

Scope of the case

11. The complainant contacted the Commissioner on 3 July 2020, to complain about the way her request for information had been handled.
12. In her consideration of the complaint, the Commissioner noted that when the complainant had requested an internal review, she had argued that the necessary criteria for the information to be subject to legal professional privilege had not been met. She presented a number of points to explain why she believed this to be the case.
13. The Commissioner regards it to be most pertinent that the complainant stated that the content of the communications she had requested had already been disclosed in the email sent to residents by Officer A on 23 January 2020. She argued that because of this, the loss of confidentiality had led to a loss of privilege. In addition, she advised that she accepted that the 'requested document' might contain additional information and that this may therefore be redacted before disclosure.
14. In the complainant's representations to the Commissioner, she again confirmed that she acknowledged that any relevant documents should be redacted to *'limit the information provided to that which the council officer had already disclosed.'*
15. The Commissioner confirmed to the complainant that her investigation would focus only upon the matter of whether the council was correct to withhold copies of any email exchanges between council officers and legal advisers which confirmed the details set out within Officer A's email of 23 January 2020. The complainant subsequently confirmed that this was a correct summary of her complaint.
16. During the initial stages of the Commissioner's investigation, the council maintained its previous position that it was entitled to withhold the information that had been requested under regulation 12(5)(b). It also provided the Commissioner with a copy of the withheld information.
17. When considering the withheld information, the Commissioner found that the council had taken a much broader approach to the terms of the request than was necessary. It had identified a lot of information that, in the Commissioner's view, extended beyond that which the complainant

states that they require. In addition, some information was created after the date of Officer A's email; it would also appear that other information did not relate to matters concerning St Michael's Church. The Commissioner has therefore excluded such information from her investigation.

18. Given the above, the Commissioner asked the council whether it would like the opportunity to reconsider the matter, focussing only on that information which had been withheld that related to legal advice which could be directly linked to the contents of Officer A's email.
19. The council, upon further review, then provided copies of some information to the complainant. An email which was disclosed that was sent by a legal adviser to council officers contained the following information:

'In the absence of any agreement or formal Order in Council closing the churchyard and passing maintenance responsibility to the Council under Section 215 of the Local Government Act 1972 the Council has no legal responsibilities in respect of maintenance.

The Deed Packet for this one revealed no formal agreement or maintenance or responsibility for maintenance having been transferred to the Council under Section 215.'

20. The council also provided the complainant with a copy of a letter which it had received from the MoJ dated 16 January 2020; this was sent in response to an information request made by a council officer for confirmation *'that St Michael's Church has not got a closed Churchyard and that all the area of maintenance and repairs are with the PCC [the Parochial Church Council]'* The MoJ responded to confirm that it did not hold any information relevant to the request.
21. The Commissioner is aware that maintenance of a churchyard is usually the responsibility of the PCC. However, section 215 of the Local Government Act 1972¹ provides for notice to be given by a PCC to the local civil authority (usually a parish, town or district council). This transfers liability to the local civil authority; however, such a notice can only be given when a churchyard is closed for further burials by an order in Council.

¹ <https://www.legislation.gov.uk/ukpga/1972/70/section/215>

22. The Coroners and Burials Division of the MoJ holds a complete list of churchyards that have been closed at any point. Given this, the Commissioner accepts why the council regards the MoJ's response to its information request to be of some relevance in this instance. Whilst it does not form a communication which, in itself, is legal advice, it is relevant to the information which was provided by a legal adviser set out in paragraph 19 of this decision notice. It is also relevant to the content of Officer A's email dated 23 January 2020.
23. The Commissioner viewed the information which was released by the council to go some way in satisfying the request; however, it did not include any legal advice which supports Officer A's comments that the council *'are only responsible for the maintenance of the churches land in terms of grass cutting an area that was granted a faculty in 1973/74, specifically after an overgrown area was turned to a place of beauty.'*
24. Given this, the Commissioner contacted the council again and, after further consideration, the council released some additional documents to the complainant which it confirmed would be available to the public upon request. Whilst again it is not information which directly forms advice sent by a legal adviser, the Commissioner does regard it to be directly relevant to advice which was given, and certain comments which were included within Officer A's email, as set out within paragraph 23 of this decision notice.
25. The released documents were as follows:
 - A copy of a letter from the Church Council to the council dated 23 January 1985, which confirmed a copy of the Faculty was attached. The letter also referred to the contents of a letter from the Rector to the council dated 11 June 1974, stating that whilst a written response to this letter could not be located, a meeting on 20 March 1975 recorded the outcome and that the council had *'agreed to take over grass cutting of the newly levelled churchyard including the area to the north side of the church.'*
 - A copy of the Faculty dated 18 April 1973 (which is referred to in Officer A's email). This Faculty sets out some improvement works that were to be carried out in relation to the 'Garden of Rest' within the churchyard.
 - A copy of a letter to the council dated 25 April 1985 which had attached the letter of 11 June 1974 from the Rector to the council.

- A copy of a letter dated 11 June 1974 where the Rector asks the council to treat the correspondence as an application for the council to undertake the cutting of the grass. It is perhaps pertinent to note when considering the content of Officer A's email that the Rector refers to funds granted to carry out improvement works in the churchyard that would '*transform what was an eyesore into a grassed and landscaped area of beauty*'.
 - A copy of a document titled '*Responsible Care for Churchyards-A brief practical guide for parishes*'. This sets out details of the responsibilities of churchyards, including maintenance.
26. Following the disclosure of information by the council, the complainant advised the Commissioner that she had given the matter careful consideration. However, as she believed that there may be some additional information held by the council which, if released, would be of public interest, she asked the Commissioner to issue a formal decision on the matter.
27. The Commissioner, having had regard to the information which has now been released by the council, considers the scope of her investigation to be as follows:
- Whether there is any additional information held by the council that is relevant to the request and, if so, whether the council is entitled to rely on regulation 12(5)(b) in respect of that information.

Reasons for decision

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

28. Regulation 12(5)(b) provides an exception to the general duty to disclose environmental information where a 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 enquiry of a criminal or disciplinary nature.
29. In order to reach a view as to whether the exception is engaged in this case, the Commissioner has firstly had to identify whether there is any additional information that has still been withheld by the council that is relevant to the request. She has found one set of information which, whilst very limited in content, she regards to fall within the scope of the request.

30. The Council has argued that the withheld information is subject to Legal Professional Privilege (LPP). The Commissioner accepts that LPP is a central component in the administration of justice, and that advice on the rights, obligations and liabilities of a public authority is a key feature of the issues that constitutes the phrase 'course of justice'. For this reason, the Commissioner has found in previous cases that regulation 12(5)(b) of the EIR will be relevant to information which attracts LPP.
31. The Commissioner regards there to be two limbs of LPP: advice privilege (where no litigation is contemplated or underway), and litigation privilege (where litigation is underway or anticipated). With regards to the latter, there must be a real prospect or likelihood of litigation rather than just a fear or possibility.
32. The council has explained that a retaining wall within the churchyard at St Michael's Church partly collapsed in 2019 into the gardens of a number of neighbouring properties. It states that some residents had queried whether the council was responsible for the cost of the wall.
33. The council has advised that the subject matter of the information which has been withheld is the legal responsibility for maintenance of a churchyard at St. Michael's Church, and the structures within that churchyard, specifically a retaining wall. It claims that such information is clearly subject to advice privilege and that, arguably, it also attracts litigation privilege, because the two categories are not mutually exclusive. The council goes on to say that the emails were created for the sole purpose of obtaining and communicating legal advice about the status of the churchyard and responsibility for the wall and thus attract LPP. Furthermore, it states that at the time that the information was created, there was no agreement between all relevant parties about who was responsible for the cost of the repair of the wall. It states that it regards it to be the case that on that basis it was also reasonable for the council to consider that litigation was likely.
34. Whilst the council provided further details about why the information could also be subject to litigation privilege, the Commissioner is sufficiently satisfied that the information which has been withheld that is relevant to the request was made for the dominant (main) purpose of seeking or giving legal advice. She therefore does not regard it to be necessary to set out, and then consider, the council's arguments as to why the information could also be covered by litigation privilege.

35. The Commissioner's guidance on LPP² states that the key to deciding whether the right to claim LPP has been lost (as argued by the complainant) will be to consider whether any previous disclosures to the world at large mean that the information can no longer be said to be confidential.
36. In this instance, the Commissioner regards the information set out in Officer A's email to be an unrestricted disclosure; this means that the information has been disclosed to the world at large with no restrictions on its future use. The Commissioner is therefore satisfied that LPP cannot be applied to the small amount of withheld information that is under consideration as it does not have the necessary quality of confidence.
37. The Commissioner regards it to be appropriate in this particular case to record that the council has been extremely co operative with the ICO throughout this investigation, and it has been clear that there has been a focus on trying to resolve the matter for the complainant.
38. Nonetheless, the Commissioner does find that the council is not entitled to rely on regulation 12(5)(b) in respect of the remaining set of information which has been withheld that is relevant to the request. She therefore requires the council to that information which is set out within the Confidential Annex attached to this decision notice.

Procedural matters

Regulation 11 – representations and reconsideration (internal review)

39. Regulation 11(4) is relevant in this case; this requires a public authority to inform the requester of the outcome of the internal review as soon as possible and not later than 40 working days after that date on which an internal review was requested.
 40. The complainant submitted her internal review request on 15 April 2020, but the council did not provide its response until 22 June 2020. The Commissioner appreciates that the current COVID-19 pandemic is likely to have had an impact on the council's resources and its ability to
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² https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

respond in a timely manner. However, given that there has been a failure to meet the statutory timescales, the Commissioner must find that the council has breached regulation 11(4) of the EIR.

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@justice.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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