

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

Date: 13 March 2013

Public Authority: Walberswick Parish Council
Address: Old Hall
Wenhaston
Suffolk
IP19 9DG

Decision (including any steps ordered)

1. The complainant has requested information from Walberswick Parish Council (the council) relating to an email/letter sent by a named person to the council; legal advice that had been given to the council; and the advice/information it had obtained in order to charge £25 per hour for the parish clerk's time. The council relied initially on section 14 of the FOIA and then withdrew that reliance. It later stated that the requested information was either 'not held' or had been deleted, though some further information was eventually provided.
2. The Commissioner's decision is that, on the balance of probabilities, no further information is held that has not already been supplied by the council to the complainant.
3. The Commissioner requires no further steps to be taken.

Background

4. The complainant had made earlier requests to the council which were subsequently repeated and expanded on when he received no response. Therefore this request had been preceded by requests on 27 July 2010, 7 August 2010 and 1 October 2010 which included requests for what amounted to the same information he repeated on 26 October 2010 in points c), i), j), and k) below.

Request and response

5. On 26 October 2010, the complainant wrote to the council and requested information under points a-o (15 points). Reproduced below are the four points that are the subject of the complaint:

"c) [named person] submitted his letter/e-mail to WPC and your clerk admitted it to the WPC meeting on 21 July and purportedly read out its contents. This document must be in the public domain and should form part of the WPC public record. [second named person] then stated that he agreed 100% with the contents of [named person]'s submission, and duly altered the way he had voted on App/C/10/0188 and strongly supported the Goanna/Makay Ltd proposals. Why, in the circumstances, has the WPC Clerk apparently destroyed the submission submitted to WPC by [named person]? Surely you must have it somewhere in your records, and again I formally request this information from you.

*i) I again formally request information relating to the "recent legal advice" referred to at item 14 on the Agenda of the **6 September 2010 WPC meeting, the minutes of which were only made available to the public after the conclusion of the 4 October 2010 WPC meeting.** Your latest letter does not refer to the point...*

The section above in bold was a later clarification.

j) I also formally request information/documentation related to the "recent legal advice" that constituted the sole subject matter of the Special Walberswick Parish Council meeting publicly advertised, stating that the public would not be permitted to attend, and held on 20 October 2010. Is it really necessary for WPC to be so mysterious and secretive? Why do you not act as openly and transparently as possible? The public are not even aware which matters this advice relates to. The public have no way of knowing which topics have been considered at this WPC meeting. This seems very odd. How can this be, or be seen to be, open, transparent or in the public interest? Is there any precedent or legal justification for proceeding in this manner? Calling a Special meeting, at short notice, just before a scheduled meeting, and entirely excluding the public, seems an unusual manner in which to undertake public business. In addition, to provide no information whatsoever to the public regarding the substantive matters to be considered (other than the abstract and opaque reference to the "recent legal advice") seems even more unusual. No-one I have spoken to has encountered anything quite like this. Have you obtained advice from SALC [Suffolk Association of Local Councils] or the Monitoring Officer at SCDC or the Information

Commissioner's Office or any other, what you obliquely describe as, "relevant authority" about proceeding in this manner? When will the minutes of this Special meeting be made available to the public and what will these minutes consist of?

k) Can you please provide the information requested in paragraph d) iv) of my 1 October letter, namely "information and documentation that includes the advice you claim to have obtained from the "proper authorities" to the effect that you are entitled to charge the public £25 per hour for your Clerk's time spent providing the public information they request from WPC.'

6. The council responded on 2 November 2010 citing section 14(1) and section 14(2) of the FOIA, though incorrectly using the phrase an "exclusion notice".
7. The complainant requested a review of this response on 12 November 2010. On 19 November 2010 the council maintained its original position. On 27 December 2010 a textual error in point i) was corrected by the complainant and he clarified as follows, '...the "recent legal advice" in item 14 of the Agenda of the 6 September 2010 meeting (not as implied in the Agenda for the 4 October 2010 WPC meeting).'
8. The council later withdrew its reliance on section 14 (though the incorrect application of "exclusion notice" does not appear to have been formally withdrawn until 7 January 2013).
9. On 28 September 2011, the council provided the complainant with a response. It concluded that the requested information at points c), i), j) and k) was either 'not held' or had been 'deleted'.
10. On 9 December 2011, the council issued an internal review which addressed the points the complainant had raised in his request for a review. In relation to points c), i), j) and k) the council stated that the information was either not held or had been 'deleted'. However, an additional document of a hard copy email written by an employee of SALC was provided which had subsequently become available that related to the wording of the "exclusion notice".

Scope of the case

11. The complainant contacted the Commissioner on 13 April 2012 to complain about the way his request for information had been handled.

The complainant specifically complained about the council's response to points c), i), j) and k) of his request. He maintained that he had requested the information relating to these points on several occasions and that the council had refused to provide it.

12. The Commissioner considers therefore that the focus of this complaint is whether the council holds information relating to points c), i), j), and k) of the complainant's request and, if so, whether that information has been provided to him.

Reasons for decision

Section 1(1)

13. Section 1 of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request, and if that is the case, to have that information communicated to him.
14. 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. He will also consider the actions taken by the authority to check that the information was not held and he will consider if the authority is able to explain why the information was not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held. He is only required to make a judgement on whether the information was held "on the balance of probabilities".
15. The council maintained in its 28 September 2011 response to the complainant that -
 - In relation to point c): there was a file note attached to the request of 26 October 2010 which said that the information at point c) had been deleted.
 - In relation to point i): the council provided a copy of the notes of the meeting held on 20 October 2010 which was the only information in relation to this point that the council stated it held. The meeting notes contained a reference to an email discussion which was also provided. This email discussion was actually the personal data of a third party individual and should not have been provided. No email discussion

relating to the complainant was found and was therefore 'not held'. If it had been held it would have been his personal information.

- In relation to point j): the council stated that it held no information.
 - In relation to point k): the council maintained that information relating to this point was not held.
16. At internal review on 9 December 2011 it was made clear that the council had again undertaken paper and electronic searches to establish whether any further information relating to this request could be provided. It concluded that the only information it held that had not been provided was a hard copy email written by an employee of SALC (19 October 2010) which had subsequently become available. This email related to the wording of the "exclusion notice" and had been held by a councillor who had responded to further enquiries. This was then provided to the complainant.
17. On 10 October 2012, the council responded to further questions that the Commissioner has put to it on 17 September 2012 regarding the searches it had undertaken for the requested information:
- Point c): the council only held paper copies of emails sent and received during the previous parish clerk's tenure. All paper documentation from 29 August 2010 to 17 December 2010 was checked and no information in relation to an email discussion or in relation to point c) was held.
 - Points (i) and (j): the "recent legal advice" was oral advice given by a solicitor from a named firm at a meeting held at the offices of SALC in October 2010. This was attended by some councillors from Walberswick, a solicitor, a named official from SALC, and a former parish clerk. The meeting was followed by an email to the parish clerk from an official at SALC which set out the wording to be used on each "exclusion notice". The current parish clerk is unaware whether notes were taken at the meeting or not. No notes are held by the council. The named official from SALC told the current parish clerk that no written advice was ever produced by the solicitor. However, at the end of August 2012 the same official sent an email to the parish clerk that had been provided by the solicitor who attended the October 2010 meeting and was dated 19 January 2011. It contained legal advice. This email had apparently been forwarded to the parish clerk but there is no evidence that it arrived. It was not in the possession of the council prior to August 2012, as far as the current parish clerk is able to ascertain. It has since been provided to the complainant on 31 August 2012, though he disputes this.

- Point (k): the council accepts that it did not deal with this point properly. The parish clerk states that she has 10 lever arch files full of documentation relating to freedom of information. Within those files she believes that she has seen a paper copy of an email from a named person from SALC telling the previous parish clerk she could charge £25 per hour for FOI requests. The council accepts that this was clearly incorrect advice as it did not include the stipulation that the charge only related to work beyond the £450 limit on costs.
18. The complainant wrote to the Commissioner on 3 February 2013 stating the facts as he saw them:
- In relation to point c): he states that the council has not provided the information he requested. He cites the evidence of the former parish clerk's letter of 2 August 2010 and certain emails between the clerk and the Deputy Chief Executive Officer at SALC in December 2010 suggesting that there was agreement that this information should not be provided to him. The complainant however accepts that this information may have been subsequently deleted.
 - In relation to point i): the complainant contends that this information must have been held when it was requested but it was not disclosed. He states that some of the relevant information was provided at a much later date in connection with another matter.
 - In relation to point j): the "recent legal advice" was not provided to the complainant. No information was provided to him that concerned the "exclusion notice" that was erroneously applied to him though most of this is likely to be his personal information. He was, however, provided with a third party's personal information.
 - Information relating to point k): he emphasises that the requested information has not been provided. He does not accept that the council did not hold this information when it was requested because he does not think it likely that a council would obtain advice and that advice not be in writing. He has also added that it was stated on a number of occasions that the council said that any information provided by SALC was confidential.
19. The Commissioner notes that some information in relation to points i) and j) has emerged recently. This information has belatedly been provided to the complainant but it would appear that the legal advice was written subsequent to the request and therefore was 'not held' at the time of the request. It is impossible to say now whether this advice was held by the council prior to August 2012.

20. Some information has been deleted in relation to point c) for reasons that, due to the passage of time, it would be hard to establish. The complainant has provided us with a letter, dated 2 August 2010, which was sent by the parish clerk, just after the date of his first request to see the information at point c) on 27 July 2010. This letter queries why the complainant wished to see the requested information. There was other correspondence provided which suggests a degree of obstructiveness by the council. By the time the complainant had made his more detailed 26 October 2010 request this information seems to have been deleted. Whatever the circumstances of that deletion, it would appear that the information was deleted and, although it may not have been held by the 26 October 2010 request, there is a possibility that it was held when the information was first requested in July 2010.
21. The passage of time and the considerable overlap between many of the complainant's requests (though this is in part explained by the inadequate and incorrect initial responses by the council), makes it difficult to determine the balance of probability in this case. However, the Commissioner accepts that the council holds no further information than it has now provided to the complainant.

Section 10(1)

22. Section 10(1) of the FOIA provides that a public authority should comply with section 1(1) within 20 working days. Section 1(1) requires a public authority in receipt of a request to confirm whether it holds the requested information and, if so, to provide it.
23. The council responded to the complainant unacceptably late, significantly beyond the statutory timeframe, and breached section 10(1) of the FOIA.

Other matters

24. The Commissioner has upheld several complaints against the council. There was a period of time when the council did not respond to freedom of information requests in the erroneous belief that its application of 'exclusion notices' made this unnecessary. He also acknowledges that the council's responses to requests for information have been tardy and procedurally incorrect - a situation which it is attempting to remedy. The piecemeal disclosure of information in this case has not been helpful for either the complainant or the

Commissioner in determining whether all the requested information has been provided. In future the council should endeavour to provide all information it holds within the scope of the request in the initial response.

Right of appeal

25. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

26. 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.
27. 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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