

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 10 August 2017

Public Authority: Brightlingsea Town Council
Address: The Parish Hall
Victoria Place
Brightlingsea
Essex C07 0BP

Decision (including any steps ordered)

1. The complainant has requested information held by Brightlingsea Town Council (council) which relates to a land ownership and registration dispute. He also asked for information relating to a '2001 booklet'. Whilst the council provided some information in relation to the booklet, it withheld other information that it had identified as being relevant to the request under section 43(2) of the Freedom of Information Act 2000 (FOIA). The council claimed that the disclosure of this information would be detrimental to its commercial interests.
2. Following the Commissioner's intervention, the council agreed to review matters under the EIR. Having revised its position it then withheld the requested information under the exception for the course of justice-regulation 12(5)(b).
3. The Commissioner's decision is that the council has correctly applied regulation 12(5)(b) to the withheld information. It should be added that the Commissioner has determined that some of the withheld information provided to her by the council for consideration is the personal data of the requester. Therefore, this information has been removed from the scope of the request and has not formed part of her decision.
4. The Commissioner does not require the council to take any steps.

Request and response

5. On 11 January 2017 the complainant wrote to the council and requested information in the following terms:

“With the possibility of an impending court case where both sides will have to disclose all evidence, under the freedom of information act please could you supply me with all evidence and documents that the town council have supplied to the solicitor acting on your behalf including his legal opinion in this particular case and or any correspondence from land registry.

Also under the freedom of information act please could you confirm if a subsequent booklet which overrides the 2001 document highway byways wayleaves is in existence if no subsequent booklet is available please could you confirm if all of the areas mentioned in the above book including the rights of ways mentioned are also correct or is it just the one area that mentions the hard and it's access that is incorrect.”

6. The council responded on 7 February 2017 and refused to provide the requested information. The council advised that section 43(2) was engaged and that the release of the information would be detrimental to council's commercial interests.
7. The complainant contacted the council on 8 February 2017 to question why the council took the view that the disclosure of the information requested would be detrimental to the council's commercial interests. The complainant also raised concerns that his question about the 2001 booklet remained unanswered.
8. The council responded on the same date to advise that there was no other subsequent booklet to the 2001 booklet. With regards to the other information requested, the council advised that its decision remained unchanged.

Scope of the case

9. The complainant contacted the Commissioner on 13 February 2017 to complain about the way in which his request for information had been handled. He believed that questions he had raised remained unanswered and that he should have been supplied with further information in response to his request.
10. The Commissioner noted that the complainant has raised several concerns during the investigation about the content and use of the '2001 booklet'. The council had advised the complainant that no subsequent booklet has been issued. The council also advised the Commissioner that the booklet itself was written on an advisory basis by a consultant and was never formally adopted by the council. The Commissioner is satisfied that the council has provided an appropriate response to the question from the complainant about whether a subsequent booklet

exists and does not view the additional concerns raised by him to fall within the scope of the EIR or her remit. She therefore does not intend to consider any other matters relating to the '2001 booklet' further.

11. The Commissioner has viewed the information that the council believes to be relevant to the request. She considers that information sent from the Land Registry Office to the council, and to the council's solicitor, to be the personal data of the complainant, as defined by section 1 of the Data Protection Act 1998 (DPA). This is because this information both identifies the complainant and his involvement in the case, thereby revealing something about his intentions and personal life. Given this, such information will not be considered further within this decision notice.
12. The Commissioner has gone on to determine whether the remaining information falls under the scope of the EIR or the FOIA. This relates primarily to correspondence between the council and its legal representatives. She has then considered whether or not any of the withheld information should have been disclosed in response to the request.

Reasons for decision

Correct Access Regime

13. The council initially refused the request for the information because it considered it to be exempt under section 43(2) of the FOIA. This relates to information, which, if disclosed, would prejudice commercial interests. In later correspondence the Commissioner notes that the council refers to section 42 of the FOIA, stating that the information is exempt from disclosure as it is subject to legal professional privilege.
14. Having considered the information that has been withheld, the Commissioner is satisfied that the EIR is the correct access regime and not the FOIA in this instance.
15. The definition of environmental information is set out at regulation 2(1) of the EIR. In the Commissioner's opinion regulations 2(1)(a) and (c) are most relevant in this case:

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on-

- (a) *the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its*

components, including genetically modified organisms, and the interaction among these elements:

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements:'

16. The information requested relates to what has become a legal dispute over the registration and ownership of a piece of land. It is the Commissioner's opinion that this can be seen as information on a measure that is likely to affect the land itself. How a piece of land is registered, and to whom, and information held relating to any legal dispute relating to this is, in the Commissioner's opinion, likely to affect the use of that land and thus have a direct effect on it. Therefore, the information requested is not so far removed from the measure as to prevent it from being environmental information within the meaning of 2(1)(c) of the EIR. The Commissioner is satisfied that the requested information is environmental information, and the EIR is the correct access regime.
17. Whilst the council, throughout the Commissioner's investigation, maintained its view that the information requested fell under the scope of the FOIA, it did still comply with the Commissioner's request to reconsider the information under the scope of the EIR.

Regulation 12(5)(b)-Course of justice

18. The council states that if it is the case that the information in dispute falls under the EIR, it would view it to be excepted from disclosure under regulation 12(5)(b). This is because it believes it to be subject to legal professional privilege.
19. 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.
20. There is no specific exception within the regulations referring to information that is subject to legal professional privilege. However, both the Commissioner and the Tribunal have previously decided that regulation 12(5)(b) encompasses such information.
21. In the case of *Kirkaldie v the Information Commissioner and Thanet District Council*, (Appeal Number: EA/2006/001), The Tribunal expressed the view that the purpose of section 12(5)(b) was reasonably

clear. It said that it "*exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the rights of individuals or organisations to a fair trial.*" It therefore accepted that this Regulation "*covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation*" (para. 21).

22. The principle of legal professional privilege is based on the need to protect a client's confidence that any communication with his or her legal advisor will be treated in confidence. There are two limbs of legal professional privilege: advice privilege (where no litigation is contemplated or underway) and litigation privilege (where litigation is underway or anticipated). There must be a real prospect or likelihood of litigation rather than just a fear or possibility.
23. In this case, the council sought to rely on litigation privilege stating that the dispute over the ownership and registration status of a particular piece of land is due to be heard at a Land Registry Tribunal. It goes on to say that any advanced knowledge of the legal advice which it has sought and received would prejudice the defence which the council would be able to mount against the allegations that have been made.
24. The Commissioner understands the reasoning for the council's application of litigation privilege and accepts that this is relevant to the majority of the information that has been withheld. However, she is of the view that it may be appropriate to apply advice privilege to certain elements of the information that has been withheld. In any event, having viewed the information, the Commissioner is satisfied that the withheld information as a whole is covered by legal professional privilege.

The public interest test

25. Regulation 12(1)(b) requires that, where the exception in regulation 12(5)(b) is engaged, then 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 has applied the requirement of regulation 12(2) which requires that a public authority take account of the express presumption in favour of disclosure.

Public interest arguments in favour of disclosing the requested information

26. The Commissioner considers that there is a strong public interest in disclosing information that allows scrutiny of a public authority's

decisions. Her view is that it helps create a degree of accountability and enhances the transparency of the process through which such disclosures are arrived at. This, in turn, can help to increase public understanding, trust and participation in the decisions taken by public authorities.

27. The Commissioner also acknowledges that, in this case, public interest may be generated given that the issue which has arisen is about land that is owned by a public authority and the outcome of the dispute may affect its future use and development.

Public interest in maintaining the exception

28. The information relates to a live dispute about ownership of a piece of land which is to be heard at a Land Registry Tribunal in due course. Disclosing the information could undermine the council's ability to defend its position in any future litigation relating to the matter and that would not be in the public interest.
29. The Commissioner recognises that it is very important for public authorities to be able to consult with their lawyers in confidence to obtain legal advice. She also understands that if the information were disclosed, other interested parties would then have the benefit of scrutinising the council's advice without having to reveal the advice that they may have obtained.
30. There is a strong public interest in the council being able to effectively carry out its legal obligations and prepare for proceedings without damaging the integrity of a 'live' dispute and harming the course of justice.

Balance of the public interest arguments

31. The Commissioner notes that the proceedings to which the information relates are still ongoing. She accepts that this factor carries considerable weight in favour of maintaining the exception as disclosure would reveal the council's position on the ownership and registration of the land in dispute, providing an insight to those challenging the position which would not be reciprocated. There is also a significant public interest in ensuring that the council is able to obtain full and frank legal advice in matters such as this. In the Commissioner's view, this weighs heavily in the balance of the public interest test in this case.
32. Furthermore, the Commissioner considers that maintaining the integrity of the legal process is one of the core intentions behind the course of justice exception and previous decisions issued by the Commissioner and the Information Tribunal have recognised that, where the process is ongoing, disclosure would likely prejudice this integrity.

33. The Commissioner acknowledges that the complainant believes that there should be openness and transparency with regards to the ownership of land which may, or may not, be correctly registered by the council as this could have an impact on the local community in terms of its use and development. However, the Commissioner is mindful that these matters are likely to be addressed via the Land Registry Tribunal which is due to be heard at a later date.
34. Whilst the Commissioner considers that the arguments in favour of disclosure have some weight, she does not consider that, in the circumstances of this particular case, they are outweighed by the arguments in favour of maintaining the exception under regulation 12(5)(b).
35. For this reason the Commissioner finds that the public interest in maintaining the exception is stronger than that in disclosing the information relevant to the request.
36. The Commissioner therefore accepts that the council was correct to apply the exception in regulation 12(5)(b) to the request.

Other matters

37. The Commissioner notes the references made by the complainant to the council's obligations to provide the information under the 2014 Open Local Government Act. The complainant has indicated that they believe this reinforces their right to access that information which has been withheld.
38. The Commissioner believes that the complainant is making reference to '*The Openness of Local Government Bodies Regulations 2014*' (OLGBR). This was introduced to promote transparency with regards to both public and private meetings conducted by bodies, including district councils. However, the Commissioner understands that this does not oblige councils to publish all information held about meetings and information can still be exempt from disclosure to the public under such statute. The Commissioner has had some difficulty seeing how the OLGBR is relevant to the information that has been withheld in this instance. In any event, if the complainant believes that the council has not complied with its obligations under the OLGBR, this would not be a matter for the Commissioner to consider.

Right of appeal

39. 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

40. 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.
41. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF