

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

Decision notice

Date: 14 December 2017

Public Authority: Niton and Whitwell Parish Council

Address: Streamside
High Street
Whitwell
Ventnor
PO38 2QQ

Decision (including any steps ordered)

1. The complainant has requested the disclosure of an email from a third party which the complainant says was shown to him at a meeting of parish councillors on the Castlehaven Village Green. The complainant has also requested copies of all internal communications regarding himself and his wife.
2. The Commissioner's decision is that Niton and Whitwell Parish Council is entitled to withhold the email requested by the complainant in his first request in reliance on Regulation 12(5)(b) of the EIR. The Commissioner has decided that the Council is entitled to rely on Section 40(1) of the FOIA or Regulation 5(3) of the EIR, in respect of the complainant's second request, on the grounds that the information he seeks is his and his wife's personal data and which the public authority has already considered under the provisions of the Data Protection Act 1998.
3. The Commissioner requires the public authority to take no further action in this matter.

Request and response

4. The complainant has submitted two requests for information to Niton and Whitwell Parish Council. The first request was submitted on 19 June 2017 and the second request was submitted on 21 June 2017.

5. The complainant's first request is for a copy of an email from a named person. The complainant identified the email he seeks by advising the Council that he was invited to participate in a meeting on the Village Green attended by members of the Parish Council and the Leader of Isle of Wight Council. The complainant asserted that he was shown the email sent by the named person, and he believes indicated the email alleged that the complainant intended to fence along the edge of the land owned by the Parish Council.

6. In his second request, the complainant asked the Council to supply him with:

"...copies of all internal communications regarding my wife and I. Should there be any communication which you consider should not be provided to me I require it to be clearly identified together with full details of why you consider its content justifies it being withheld."

7. On 7 July 2017, the Council wrote to the complainant to advise him that it was refusing his request. The Council stated:

"Niton and Whitwell Parish Council has obtained legal advice on the subject of its custodianship of Castlehaven Village Green, on which there has been internal correspondence via electronic mail. The advice is subject to Litigation Privilege and is exempt under Section 42(1) of the Freedom of Information Act 2000.

Except under certain circumstances, which do not prevail here, correspondence between councillors is not covered by the Freedom of Information Act, even where it relates to Parish Council business, including the discussion of issues which affect the Council

Thus the information you have requested is either subject to Litigation Privilege or constitutes correspondence between councillors, or both and will not be supplied."

8. The Council advised the complainant that it has no complaints procedure.

Scope of the case

9. The complainant contacted the Commissioner 18 July 2017 to complain about the way his request for information had been handled. On 20 November 2017, the complainant, referring to the email he had requested, advised the Commissioner of the following:

"I refer to the email from Parish Councillor [name redacted] which both I and the female Parish Councillor who showed it to me (whose name they still will not tell me but I suspect is [name redacted] clearly understood to mean that I intended enclosing land I have no right to. In view of what we both reported the email to say, and because of previous similar Parish Council issues that the police investigated, the police decided to do a criminal investigation into possible Misconduct in Public office. The police have been shown what the Parish Council claim is the email which concerned us. They cannot show it to us but it is obviously not the email we saw.

It is shorter and deals only with the small piece of land we own and simply states accurately what I proposed. In view of its content, simply summarizing what I wrote, it begs the question why the Council did not ever say that my detailed summary of the email I read was incorrect. Also, how can an email which simply repeats what I wrote be protected by Litigation Privilege (which the police say is a matter for you not them). It seems clear that in the intervening 5 months the original email has been replaced by one which is honest, obviously nothing to do with litigation but which is being kept from me to make it difficult for me to expose this perversion of evidence."

10. The Commissioner has focussed her investigation on the complainant's first request for information.
11. This is because the complainant's second request is for information which is the personal data of complainant himself and his wife. As such, the second request falls to be considered under the provisions of the Data Protection Act 1998 ("the DPA") rather than under the provisions of the FOIA. The Commissioner has already provided the complainant with an assessment made under section 42 of the DPA in respect of a subject access request which includes information encompassed by both of the requests referred to above.
12. The Commissioner has considered the contents of the email which the Council is withholding from the complainant and the circumstances which attach to that email. She has decided that the Council should have considered the complainant's first request under Regulation 12(5)(b) of the Environmental Information Regulations 2004.
13. This is because the withheld email concerns disputed land and the intentions of a person to enclose and occupy that land. As such, the information can be said to satisfy the definition of environmental information provided by Regulation 2 of the EIR: The information can properly be characterised as a measure or activity likely to affect the land or landscape.

Reasons for decision

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

14. Regulation 12(5)(b) provides an exception from the duty to disclose information where the 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 inquiry of a criminal or disciplinary nature”. The Commissioner accepts that the exception is designed to encompass information that would be covered by legal professional privilege.
15. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the Information Tribunal highlighted the requirement needed for this exception to be engaged. It explained that there must be an “adverse” effect that would result from the disclosure of the requested information. Another Tribunal decision – *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the Tribunal interpreted the word “would” as being “more probable than not”.
16. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (EA/2005/0023) the Information Tribunal described legal professional privilege as, “a fundamental condition on which the administration of justice as a whole rests”. The Commissioner accepts that disclosure of legal advice would undermine this important common law principle. She further accepts that disclosure would in turn undermine a lawyer’s capacity to give full and frank legal advice and would discourage people from seeking legal advice.
17. In this case the Council has confirmed to the Commissioner that the withheld email is subject to legal professional privilege on the grounds that litigation is anticipated and is extremely likely. This being the case, the Commissioner accepts that the disclosure of the withheld email would likely adversely affect the course of justice by virtue of being detrimental to the Council’s ability to defend itself in the legal action which is anticipated.
18. The Council argues that the withheld information attracts litigation privilege rather than advice privilege. It is information comprising an email written by one of the Parish Councillors for the purpose of briefing a member of the Isle of Wight Council and members of the Parish Council. The email concerns the complainant’s intention to enclose and occupy part of the village green which he considers belongs to him.
19. The Council has informed the Commissioner that a dispute over part of the Village Green began on 6 July 2016, when the complainant sent the

Council an email informing it of his intention to enclose an area of land at Castlehaven and thereby preventing public access. The complainant stated that he is considering a stone wall and gate on his boundary which he considers is 10 feet east of his current wall.

20. The Council has informed the Commissioner that the disputed area of land does not correspond to the Council's understanding of the land adjacent to the Village Green. This area had previously been occupied by a concession hut, which the Council describes, on the basis of witness statements, as being barely able to accommodate a double mattress.
21. Given that the withheld email concerns the complainant's clear and unambiguous intention in regards to a disputed piece of land, the Council considers that litigation is both anticipated and likely. On the basis of the complainant's correspondence with the Council, it is apparent that the land he claims is likely to exceed the area which he currently intends to enclose and therefore the Council began seeking legal advice and in early September 2016, with a solicitor being appointed through its legal insurance.
22. It is the Council's position that the withheld email is one of several privileged communications made in connection with the anticipated litigation relating to this land dispute. These communications have passed between the Parish Council's solicitor and Clerk; the Clerk and members of the Parish Council; and between the Clerk and third parties involved in the dispute – including the Isle of Wight Council Legal Services Department (as the Village Green Register Authority); the Isle of Wight Council Village Green Officer; the Isle of Wight Council Rights of Way Manager. The dominant purpose of these communications is to assist in the preparation of the Parish Council's case.
23. The Council believe that litigation is extremely probable because it received an email from the complainant on 5 June 2017 which states, "As you know we have defined the extent of the land with pegs in the ground which are still in place. We have been very patient in waiting for superior evidence but now need to conclude this process. If no superior evidence is identified within the next 14 days we will enclose and occupy this area of land".
24. Whilst the complainant has not yet carried out his stated intention, the Council has advised the Commissioner that it would seek immediate legal assistance in respect of, what it considers, would constitute trespass on the Village Green.
25. The Council disputes several of the complainant's claims, including his account of his meeting with the Isle of Wight Village Green Officer. The Parish Council has obtained this officer's comments in respect of the

complainant's account of the meeting which took place on the village green. In the Council's words, this, "...differed significantly from the views [he] presented".

26. The Council has informed the Commissioner that it is satisfied that the litigation privilege attached to the withheld information has not been lost. To support this position, the Council has referred the Commissioner to statements made by the complainant in his recent correspondence.

27. The first statement is contained in the complainant's email of 19 June 2017 in which he made his first request for information. That email stated:

"I was shown an email from [a named councillor] which included the last paragraph of the above email but presented out of context such that the recipients understood it to mean that I intended to fence along the edge of the land owned by the PC. I am entitled in law to an unredacted copy of [a named councillor's] email and trust that this will be provided without delay."

28. The second statement is contained in the complainant's email of 21 June 2017 where he made his second request for information. He stated:

"In the light of the prima facie evidence of misrepresentation of my statements by a Parish Councillor and my previous complaints on the Parish Council's treatment of my family I request under the Freedom of Information Act copies of all internal communications regarding my wife and I. Should there be any communication which you consider should not be provided to me I require it to be clearly identified together with full details of why you consider its content justifies it being withheld."

29. The Council argues that the complainant's first statement is false, as the withheld information faithfully reproduces the complainant's email to the Council of 5 June 2017. By extension, it is argued, the complainant's statement that the withheld email constitutes prima facie evidence of misrepresentation of the statements made by the complainant demonstrate that he did not have the opportunity to read the full contents of the withheld email is therefore wrong.

30. In the Council's opinion, this position is reinforced by the complainant's admission, contained in his response to the Parish Council, that he was only permitted a brief inspection of the email.

31. Additionally, following a "Cease and Desist" letter before action, sent to the complainant by the Council's solicitor, the complainant made an allegation against the Parish Council of Misconduct in Public Office to the

Isle of Wight Constabulary. The complainant cited the named councillor's email as prima facie evidence of criminal activity.

32. The e-mail was supplied to the Police Officer who investigated the complainant's allegation and the allegation was subsequently recorded as a "no crime" report.
33. In view of the above, the Commissioner is satisfied that it is more probable than not that disclosure of the requested information would adversely affect the course of justice and she is therefore satisfied that regulation 12(5)(b) is engaged in respect of the information the council has withheld. Notwithstanding this decision, the Commissioner must now consider whether disclosure of the withheld email is in the public interest.

The public interest test

Arguments in favour of disclosing the requested information

34. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding the basis and how public authorities make their decisions. This in turn fosters trust in public authorities and may allow greater public participation in the decision making process.
35. In this case, disclosure of the requested information would help the public to understand some of the issues considered by the Council in respect of the complainant's intention to enclose part of the Village Green.

Arguments in favour of maintaining the exception

36. In her previous decisions the Commissioner has expressed the view that disclosure of information relating to legal advice would have an adverse effect on the course of justice through a weakening of the general principle behind the concept of legal professional privilege. This view has also been supported by the Information Tribunal.
37. In the Council's opinion, the overriding public interest in this case is to preserve the public amenity of the Village Green and it considers that there are no grounds on which to conclude that there are any public interest factors which favour disclosing the withheld information since loss of litigation privilege would significantly weaken the Parish Council's case.
38. The Parish Council is the custodian of the Village Green under the terms of the Commons Registration Act 1965. As such, it has a statutory duty

to protect its amenity for the public. The Council believes that this duty is best discharged by opposing the purely private interest being pursued by the complainant with the attendant loss of litigation privilege.

39. The Commissioner's published guidance on legal professional privilege states the following:

"Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice."

40. Where a public authority is faced with a legal challenge, or a potential legal challenge (as in this case), it is important that the authority can defend its position properly and fairly. The Commissioner considers that there will always be a strong argument in favour of maintaining legal professional privilege as it is a long-standing, well established and important common law principle. The Information Tribunal affirmed this in the *Bellamy* case when it stated:

"...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."

41. This does not mean that the counter arguments favour public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect.
42. The Commissioner considers that the Council should be able to defend its position against any claim made against it, without having to reveal its position in advance, particularly as challenges may be made by persons who themselves are not required to disclose their positions. That situation would be unfair.

Balance of the public interest

43. The Commissioner appreciates that there is a general public interest in public authorities being as accountable as possible for the decisions they make.
44. However the Commissioner has decided that the public interest arguments which favour withholding the requested information are greater than those which its favour disclosure.

45. In this case, there is clearly a strong personal interest in having access to the withheld information. However, this does not mean that there is a wider public interest.
46. The public interest in disclosure is limited in terms of the value of the withheld information to the general public.
47. Here, the Commissioner is satisfied that the public interest is best served by maintaining the Council's position to withhold the email requested by the complainant. She takes this position on the grounds that the public interest in maintaining legal professional privilege is a particularly strong one. To outweigh the inherent strength of legal professional privilege would normally require circumstances where there are substantial amounts of public money are at stake; where the decision would significantly affect large numbers of people; or where there is evidence of misrepresentation, unlawful activity or a significant lack of appropriate authority.
48. In the circumstances of this case, the Commissioner does not consider that there are any factors that would equal or would outweigh the particularly strong public interest inherent in this exception.
49. The Commissioner has decided that the Council is entitled to rely on Regulation 12(5)(b) to withhold the email requested by the complainant.

The complainant's second request

50. The Council advised the Commissioner that, "The information held by the Parish Council which falls within the scope of [the complainant's] second request is not relevant to the provisions of the FOIA as it constitutes personal information".
51. Guidance issued by the Information Commissioner's Office states: 'The Freedom of Information Act does not give people access to their own personal data (information about themselves) such as their health records or credit reference file. If a member of the public wants to see information that a public authority holds about them, they should make a subject access request under the Data Protection Act 1998.'
52. In this case both of the complainant's requests have been considered as subject access requests under the provisions of the Data Protection Act. It follows that the Council is entitled to refuse to disclose to the complainant information which is the complainant's personal data. The Commissioner has decided that the Council is entitled to withhold the complainant's personal data in reliance on section 40(1) of the FOIA – where the information is non-environmental information, or on Regulation 5(3) of the EIR – where the information is environmental information.

Other matters

53. The Commissioner asked the Council to comment on the statement made in response to the complainant's second request that:

"...correspondence between councillors is not covered by the Freedom of Information Act, even where it relates to Parish Council business, including the discussion of issues which affect the Council".

54. The Council has acknowledged that the information which the complainant seeks in his first request is held on behalf of the Parish Council.

Right of appeal

55. 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

56. 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.
57. 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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