

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

Date: 3 April 2020

Public Authority: Beccles Town Council

Address: Town Hall
The Walk
Beccles
NR34 9AJ

Decision (including any steps ordered)

1. The complainant requested from Beccles Town Council (the Council) information regarding the legal advice relating to parking on Beccles Common. The Council refused the request under section 42(1) (legal professional privilege) of the FOIA. During the Commissioner's investigation the Council reconsidered the request under the EIR and applied the exceptions for material in the course of completion (regulation 12(4)(d)), the course of justice (regulation 12(5)(b)) and protection of the environment (regulation 12(5)(g)) to withhold the information.
2. The Commissioner finds that the Council initially handled the request incorrectly under the FOIA and in so doing breached regulation 5(1) and regulation 14(1) of the EIR.
3. The Commissioner's decision is that the Council correctly applied regulation 12(5)(b) (course of justice) to the withheld information. Therefore, the Commissioner does not require the Council to take any steps as a result of this decision.

Background

4. The Commissioner understands from viewing the correspondence, and from a telephone discussion with staff at the Council that Beccles Town Council acts as the Sole Trustee for Beccles Fenland Charity Trust.
5. The Council explained that Beccles Fenland Charity Trust is wholly owned by the Council and that all its FOI requests are treated as council business. Therefore, the Commissioner has taken the approach that the request is considered to have been made to the Council and the decision notice is to be served on the Council.
6. The Council's website states that the charity was established in March 2011 to manage lands granted to the town by Queen Elizabeth I in her Charter dated 1584¹.
7. Beccles Fenland Charity Trust is the owner of Beccles Common. The Council explained that driving is prohibited on the Common unless express permission has been granted. The Council confirmed that it has been in dispute about vehicular access to the Common with the occupants of Woodview Farm, a property situated just off Beccles Common.
8. The Council said that an easement was granted to the occupants of Woodview Farm in 2012 which allows them to drive across the Common to access their property for their residential use. Over the past few years Woodview Farm have opened two businesses and customers of both have been driving across the Common and then parking on the Common in order to use the businesses.
9. The Council reported that the Trust has sought legal advice regarding the rights of Woodview Farm's business customers to drive across and park on the Common, and also the rights of the occupants to park on Beccles Common. The complainant's request relates to these matters.

¹ <http://www.beccles.info/towncouncil/beccles-fenland-charity-trust-2/>

Request and response

10. On 25 March 2019 the complainant wrote to the Council and requested information in the following terms:

"...I would like copies of the legal advice from [name redacted] solicitor, and a copy of the legal advice from your solicitor. I also ask for this under the Freedom of Information Act."

11. On 9 April 2019 the Council responded and withheld the information requested under section 42(1) (legal professional privilege) of the FOIA.
12. On 12 April 2019 the complainant asked the Council for an internal review.
13. On 7 May 2019 the Council provided its internal review response and maintained its original position to withhold the information under section 42(1) of the FOIA.

Scope of the case

14. The complainant contacted the Commissioner on 23 May 2019 to complain about the way her request for information had been handled.
15. Due to the nature of the information requested, the Commissioner decided that it was likely to constitute environmental information as defined in regulation 2(1) of the EIR. Therefore, the Council was directed to reconsider the request under the EIR.
16. The Council reconsidered the request under the EIR and confirmed that it was applying the exceptions for material in the course of completion (regulation 12(4)(d)), the course of justice (regulation 12(5)(b)) and protection of the environment (regulation 12(5)(g)) to withhold the information previously withheld under section 42(1) of the FOIA.
17. The Commissioner confirmed with the complainant that her investigation would consider whether the Council had correctly withheld the information.
18. The following analysis focuses on whether the Council correctly withheld information under regulations 12(4)(d), 12(5)(b) and 12(5)(g).

Reasons for decision

Is it environmental information?

19. Regulation 2(1) of the EIR defines what "environmental information" consists of. The relevant parts of the definition are found in 2(1)(a) to (c) which state that it is information in any 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;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(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..."

20. The Commissioner considers that the phrase "any information...on" should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.
21. In this case the withheld information relates to measures which will have an impact on the use of land. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be on a measure affecting or likely to affect environmental elements and factors listed in regulations 2(1)(a) and (b). This is in accordance with the decision of the Information Tribunal in the case of *Kirkaldie v IC and Thanet District Council* (EA/2006/001)².

² <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i94/Kirkaldie.pdf>

22. In view of this, the Commissioner has concluded that the Council initially handled the request incorrectly under the FOIA and in so doing breached regulation 5(1) of the EIR. As the Council subsequently corrected its handling of the request, the Commissioner does not require the Council to take any steps regarding this.

Regulation 14 – refusal to disclose information

23. The Commissioner has found that although the Council originally considered the complainant's request under the FOIA, it is the EIR that actually apply to the requested information. Therefore where the procedural requirements of the two pieces of legislation differ it is inevitable that the Council will have failed to comply with the provisions of the EIR.
24. As such, the Commissioner believes that it is appropriate to find that the Council breached regulation 14(1) of the EIR which requires a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the Council issued (and indeed its internal review) failed to cite any exception contained within the EIR as the Council actually dealt with the request under the FOIA.
25. Since the Council has subsequently addressed this failing, the Commissioner does not require it to take any steps in this regard.

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

26. Regulation 12(5)(b) of the EIR requires that a public authority can refuse to disclose information if its 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. Consideration of this exception involves two stages. First the exception must be engaged. Secondly, the exception is subject to the public interest test, which means that unless the public interest in the maintenance of the exception outweighs the public interest in disclosure, the information must be disclosed.
27. Covering first whether the exception is engaged, the issue for the Commissioner here is whether disclosure of the requested information would adversely affect any of the matters referred to in regulation 12(5)(b). In order for the Commissioner to accept that an adverse effect would result, this outcome must be more likely than not.
28. The Commissioner accepts that "an inquiry of a criminal or disciplinary nature" is likely to include information about investigations into potential breaches of legislation, for example, planning law or environmental law.

29. Whilst, unlike section 42(1) of the FOIA, regulation 12(5)(b) is not limited only to information subject to legal professional privilege (LPP), information that is subject to LPP will be covered by this exception.
30. Having considered the Council's arguments, and reviewed the withheld information, the Commissioner recognises that the information consists of legal advice and associated correspondence which relates to the live and ongoing question of the use of the Common.
31. The advice was provided by a solicitor acting for the Council and includes information and correspondence it received from third parties. The information contains correspondence passed to, and legal advice from a professional legal adviser, acting in that capacity on behalf of the Council over a specific matter. The advice provided was for the dominant (main) purpose of providing legal advice.
32. The Commissioner accepts that the information has the necessary requirements to fall within the scope of legal advice privilege, which applies to confidential communications between a legal adviser and a client made for the main purpose of giving legal advice. This is because the legal adviser gave the Council advice in a legal context regarding the topic in question – parking on Beccles Common.
33. The Commissioner acknowledges that the public disclosure of the information would inhibit the Council's ability to effectively conduct and support its legal obligations.
34. In view of the above, the Commissioner is satisfied that it is more probable than not that disclosure of the withheld information would adversely affect the course of justice, and that the exception provided by regulation 12(5)(b) is therefore engaged.

The public interest test

35. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(b) is engaged, 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 is mindful of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

Public interest in favour of disclosing the information

36. The Council has acknowledged that there is a general public interest in promoting transparency, accountability, public understanding and involvement in the democratic process, and publishing the withheld information would aid this.
37. The complainant has highlighted that "*the very important issue of ownership which was not passed on to you by the trust/council is the fact that it is the inhabitants of Beccles who own this land, bequeathed to them in a charter of 1584 by Elizabeth I and ratified by James I in 1605.*" The complainant also directed the Commissioner to a First-tier Information Rights Tribunal case which overturned an application of section 42 of the FOIA. This was in relation to another request to the Council for similar information.³
38. With regards to the ongoing dispute, the complainant said that it has been ongoing for seven years. She informed the Commissioner that a Deed of Grant was issued in 2012 "*at great expense to the local ratepayers*" and that it was intended to settle the issue. The complainant also reported that the parking enforcement on the Common has been legally challenged, and she considers that this will result in additional involvement by solicitors at further cost. Therefore, the complainant believes that the public has a right to know, she said "*specifically as the Charity Commission has always advocated openness and transparency when dealing with charity issues*". The complainant questioned why after seven years, the public is no closer to a solution and she strongly believes that the public has a right to know.
39. As the First-tier Tribunal noted in the decision referred to by the complainant, the Common is "*land held in trust for the inhabitants of Beccles*". In line with this, the Commissioner recognises that the background explained by the complainant is a matter of legitimate public interest and her view is that this points a valid public interest in favour of disclosure of the requested information of some weight.

³[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1669/Hewlett,%20Rosemary%20EA.2015.0077%20\(12.11.15\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1669/Hewlett,%20Rosemary%20EA.2015.0077%20(12.11.15).pdf)

Public interest in favour of maintaining the exception

40. The First-tier Tribunal has noted previously that the public interest in maintaining confidentiality on information falling within the scope of LPP is strong. Factors in favour of LPP being maintained include:
- Public authorities need the ability to communicate freely with legal advisors in confidence and to receive advice in confidence.
 - If legal advice were routinely disclosed this would act as a disincentive to seek advice or to provide full and frank instructions
 - If legal advice were routinely disclosed caveats and qualifications might be given which would prevent free and frank correspondence.
 - Legal advice may include arguments for and against a course of action which can undermine public confidence in decision making. Without comprehensive advice the quality of decision making would be reduced as it would not be fully informed and balanced.
41. The Council explained that this is an ongoing dispute, which had not yet been resolved. The Council further explained that many local residents use Beccles Common for recreation, playing sport, walking dogs and it said that people should be allowed to roam freely across the Common in order to do this. The Council considers that any abuse of the Common, due to excessive driving across it, would be to the detriment of a significant number of people. It argued that it is not therefore in the public interest to potentially weaken its position by disclosing the legal advice it is relying upon to support its position to the world, particularly when the matter is ongoing.
42. The Commissioner has recognised above that matters relating to the Common are of legitimate public interest. In line with this, she also recognises that it is in the public interest to protect the ability of the Council to act as necessary in relation to the Common, including preserving its ability to receive confidential legal advice on matters relating to the Common. The Commissioner considers this a valid public interest factor in favour of maintenance of the exception.

Balance of the public interest arguments

43. The public interest inherent in this exception will always be strong due to the fundamental importance of the general principle of upholding the administration of justice, and in particular, the importance of not prejudicing inquiries and matters which might end before the courts.
44. The Commissioner has noted the decision of the First-tier Information Rights Tribunal cited by the complainant and referred to above at paragraph 37. She notes that it relates to a request made in 2014 for legal advice relating to the Common and that the Tribunal overturned the Commissioner's upholding of the Council's use of section 42 to withhold the advice and ordered disclosure of the information.
45. The Commissioner is mindful of the similarities between the cases, however, she is not bound by decisions made by the First-tier Tribunal and, furthermore, she also considers that there are significant material differences between the cases. Firstly, in the case considered by the Tribunal, it is apparent that the privilege attached to the legal advice in question had been lost. The advice and associated correspondence in the current case has not otherwise been placed in the public domain.
46. Secondly, the Commissioner notes that information in the current case explicitly relates to a live, ongoing issue. The Commissioner considers that these two factors provide strong reasons for not disrupting the integrity of the legal process and impacting on the course of justice.
47. The Commissioner acknowledges that the complainant has genuine concerns about the Trust and the Council's custodianship of the Common and there is a broad interest in the local community in relation to these matters. However, it is clear to the Commissioner that disclosing the information would undermine the Trust's legal position and impede its ability to oversee the Common in the interests of the local public. In other words, disclosing the information would potentially harm the interests the complainant is seeking to promote.
48. The Commissioner has seen no evidence to suggest that the Council has misrepresented its position, nor that there has been any lack of transparency over the issue. The issue is ongoing, and whilst this is the case, it is clear that a disclosure of the advice it is working to could detrimentally affect its ability to present and support its legal case before the courts should it need to do so.

49. The Commissioner also recognises that the complainant's arguments for disclosure are based on concerns that the Trust might not be protecting the Common in the best interests of the public. However, it is not the Commissioner's role to adjudicate in such matters. Moreover, she considers that the fact that the matter is ongoing highlights the Council's public interest concerns regarding the timing of disclosure. A disclosure at the current time, exposing the advice supporting the Council's legal position whilst this matter is ongoing, is a strong public interest factor in favour of the exception being maintained.

Conclusion

50. Having considered the above factors, the Commissioner is satisfied that the public interest test supports the maintenance of the exception.
51. 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).
52. 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(5)(b) was applied correctly.
53. On the basis that all the withheld information was correctly withheld under regulation 12(5)(b), it has not been necessary for the Commissioner to also consider regulations 12(4)(d) and 12(5)(g).

Right of appeal

53. 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: grc@justice.gov.uk.

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

54. 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.
55. 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

Ben Tomes
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