

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 23 November 2021

Public Authority: Birstall Parish Council
Address: Council Office, Village Hall
Birstall Road,
Birstall,
Leicestershire LE4 4DH

Decision (including any steps ordered)

1. The complainant requested information from Birstall Parish Council, Leicestershire ("the Parish Council") about trees. The Parish Council provided some information, but stated that it did not hold any information about actions taken or work done. It also withheld information relating to a lease, under regulation 12(5)(b) of the EIR – adversely affect the course of justice – and/or regulation 12(4)(d) of the EIR – material in the course of completion.
2. The Commissioner's decision is that the Parish Council does not hold the information about actions taken and work done, and correctly withheld the information relating to a lease under regulation 12(5)(b). However, by failing to provide a response under the EIR within 20 working days, it breached regulation 5(2).
3. The Commissioner does not require the Parish Council to take any steps.

Request and response

4. On 24 June 2020, the complainant wrote to the Parish Council and requested information in the following terms (numbering added for ease of reference):

"WORCESTER AVENUE TREES

1. *Copies of all correspondence relating to the trees behind Worcester Avenue for the last four years including:*

- a) *details of the action taken as a result of the concerns raised at the September 2018 Council meeting;*
- b) *details of work carried out by Parish Council staff on the trees;*
- c) *copies of any correspondence including reports on the condition of the trees and the terms of the lease between Birstall Parish Council and Charnwood Borough Council;*
- d) *a copy of the Parish Councils latest lease with Charnwood Borough Council regarding the parcel of land to the North of Meadow Lane which includes the senior football ground, the recreation ground, the allotments and the junior football pitch.*

2. **TREE POLICY**

Copies of the records maintained regarding tree inspections as required by Section 4 of that policy for the last four years to 31 May 2020."

- 5. The Parish Council responded on 22 July 2020 and refused the request under section 14(1) of the FOIA (vexatious requests) and under section 14(2) of the FOIA (repeated requests).
- 6. Following an internal review, on 14 August 2020, the Parish Council withdrew its reliance on section 14 of the FOIA. It stated that most of the requested information had been provided already in a councillor agenda pack. It also stated that the lease was being withheld, since it was legally privileged, citing section 42(1) of the FOIA.

Scope of the case

- 7. The complainant contacted the Commissioner on 27 September 2020 to complain about the way his request for information had been handled.
- 8. The Commissioner accepted the case for investigation and subsequently wrote to the Parish Council. She advised the Council that the information that had been requested would be likely to be "environmental" within the definition set out in the EIR. Specifically, since it would relate to tree management, it would fall within the definition at regulation 2(1)(c) of the EIR: "*information on measures and activities affecting, or likely to affect, the environment*".

9. The Commissioner explained, therefore, that she required the Parish Council to issue a response to the complainant, under the EIR.
10. The Parish Council issued a fresh response to the complainant on 19 August 2021. It clarified that its position, as regards the request, was as follows:
 - Request 1a) and 1b): information not held;
 - Request 1c) and 1d): the Parish Council withheld this information under the exception at regulation 12(4)(d) of the EIR: material in the course of completion;
 - Request 2: this information was provided.
11. The complainant advised the Commissioner that he remained dissatisfied with the response. The Parish Council reconsidered the request, as required by regulation 11 of the EIR, but maintained its position.
12. Subsequently, the Parish Council reconsidered the request again, and advised the Commissioner that it considered regulation 12(5)(b) of the EIR (adversely affect the course of justice, etc) also applied to the withheld information.
13. This notice covers whether the Parish Council holds the information requested at 1a) and 1b) of the request. It also covers whether the information requested at 1c) and 1d) is exempt from disclosure under regulation 12(5)(b) and/or regulation 12(4)(d) of the EIR.

Reasons for decision

Regulation 12(4)(a) – information not held

14. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
15. The complaint under consideration in this part of the notice relates to the Council's assertion that no information is held, in respect of the following parts of the request:
 - 1.a) details of the action taken as a result of the concerns raised at the September 2018 Council meeting;*
 - 1.b) details of work carried out by Parish Council staff on the trees.*

16. In cases where there is a dispute over whether information is held, the Commissioner applies the civil test of the balance of probabilities in making her determination. This test is in line with the approach taken by the Information Rights Tribunal when it has considered whether information is held, in cases which it has considered in the past.
17. The Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the public authority to check whether the information is held, and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is held.

The complainant's view

18. The complainant explained that he expected the Parish Council to hold information about actions taken and work done, since the concerns about the trees had been raised publicly in a meeting. He also considered that, if no information was held, the reason should be made clear: had no actions/work been carried out, or had the relevant information not been retained?

The Council's view

19. The Council has explained that the concerns raised at the meeting in question, whilst they were minuted, had not been a formal agenda item, and the Parish Council had not formally resolved to take action.
20. However, the Parish Council has confirmed that verbal discussions subsequently took place between the clerk and the Estates Team Manager following the meeting, and afterwards, with the principal local authority, Charnwood Borough Council ("the Borough Council").
21. The Parish Council has explained that it did not carry out any work, but that work was apparently done by the Borough Council, following the verbal discussions.
22. The Parish Council's position is that there is no record of the actions it took following the concerns being reported, because these comprised verbal discussions only. Neither does it hold any report on work carried out, since it was not carried out by the Parish Council.

The Commissioner's decision

23. The Commissioner's remit is to establish whether, on the balance of probabilities, information falling within the scope of the request is held.

24. She is satisfied by the Parish Council's explanations as to why no information is held, and her decision is that, on the balance of probabilities, it was correct to state that it did not hold the information.
25. She does not require the Parish Council to take any steps in respect of this.

Regulation 12(5)(b) – adverse effect on the course of justice

26. Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information to the extent that 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.
27. In this case, the information withheld under this exception relates to an issue which arose after a tree fell and damaged a property. It became apparent that there was uncertainty as to whether the tree was the responsibility of the Parish Council or the Borough Council. The uncertainty had arisen because of the terms of a lease; in particular, in relation to the precise boundary of the land being leased by the Parish Council from the Borough Council.
28. The withheld information comprises correspondence between the Parish Council and its legal advisers, correspondence between the Parish Council and the Borough Council, some internal Parish Council communications, and the lease itself.
29. For the exception to be engaged, as the Information Tribunal emphasised in the decision of *Archer v Information Commissioner and Salisbury District Council (EA/2006/0037)*, there must be an "adverse effect" resulting from disclosure of the information, as indicated by the wording of the exception.
30. The Commissioner's guidance also notes that, in accordance with the Tribunal decision in *Hogan and Oxford City Council v Information Commissioner (EA/2005/0026 and EA/2005/030)*, the interpretation of the word "would" (in "would adversely affect") is "*more probable than not*".
31. In this case, the Parish Council asserted that its efforts to resolve this matter would be adversely affected if the information were disclosed. At the date of the request, attempts to resolve the issues relating to the existing lease were ongoing. There was also a need for the Parish Council to ensure that the matter was clarified, going forward, requiring further correspondence and, potentially, renegotiation. These matters are covered in the withheld correspondence.

32. Due to the need for a "safe space" in which to deliberate, the Parish Council considered that disclosing the information publicly would harm its position in terms of being able to obtain frank legal advice, and being able to discuss any discrepancies or ambiguities over the lease terms, freely, with the Council. It also considered that its position would be harmed in terms of any subsequent negotiations going forward, should this prove necessary.
33. The Commissioner is satisfied that an adverse effect to the course of justice; that is, the Parish Council's ability to obtain legal advice, and to discuss and/or negotiate terms freely and from a position of strength, would occur from the disclosure of the withheld correspondence in this case.
34. In addition, whilst the Commissioner is unaware whether any actual litigation was contemplated by any party, she understands that the Parish Council was seeking to obtain absolute clarity over its position regarding the trees. It envisaged that publicly disclosing the correspondence would adversely affect its position, in the event that matters escalated. The Commissioner is satisfied that an adverse effect to the course of justice would occur in these circumstances.
35. The Commissioner is also satisfied that disclosing the existing lease would adversely affect the course of justice. Whilst it comprises a completed legal transaction, signed off some years ago, she is not aware that it has been made public in its entirety. Due to the ongoing "live" issues surrounding clarifying and/or re-negotiating the lease, the Commissioner considers that disclosure under the EIR, in response to the request, would adversely affect the course of justice.
36. She is satisfied that the exception is engaged in respect of all of the withheld information. She has therefore considered whether the balance of the public interests favour the exception being maintained.

The public interest test

Public interest in disclosing the information

37. In his correspondence with the Commissioner, the complainant commented on the level of interest in this matter, asserting that there was "*a great deal of public interest*".
38. He considers that information about any actions taken by the Parish Council, following on from the meeting at which concerns were expressed about the trees, and subsequently following on from a tree having fallen, should be in the public domain.

39. The Commissioner is also aware of the inherent public interest in being able to scrutinise how a public authority conducts its business, particularly in respect of environmental information.

Public interest in withholding the information

40. In considering the balance of the public interests in the disclosure of information which has been withheld under an "adverse effect" exception, the Commissioner is mindful of those matters which the exception is designed to protect: in this case, allowing the course of justice to run smoothly.
41. The Parish Council's position is that it wishes to be able to obtain free and frank legal advice, and engage in free and frank deliberations and negotiation, away from the public gaze.
42. It also asserts that matters relating to the lease have been reported in meetings, and that it is keeping the councillors and the parish informed as to progress. The Parish Council considers that this is sufficient to meet the public interest in the relevant matters.

The balance of the public interests

43. The Commissioner has considered the factors on both sides, in light of the circumstances of the case and the contents of the withheld information.
44. It would not, generally, be in the public interest to allow the smooth running of the course of justice to be adversely affected. However, whether this outweighs the public interest in the disclosure of information depends on the severity and frequency of the envisaged harm, as covered below, and the weight of the public interest in favour of disclosure. The envisaged harm must be considered alongside the facts of the case, and the contents of the withheld information, to determine whether the public interest in disclosure outweighs the public interest in maintaining the exception.
45. Regarding the severity and frequency of the envisaged adverse effect, the Commissioner is satisfied in this case that disclosure would cause tangible harm to the Parish Council's ability to carry out its legal functions. She considers that disclosing the information would materially damage its ability to undertake its duties effectively, and would potentially compromise its legal position.
46. Whilst there is clearly local interest in matters relating to the management of the relevant trees, and the terms of the lease, the Commissioner does not consider the contents of the withheld information are of significant public interest to the world at large; they

do not add greatly to the public understanding of the relevant matters. Neither does she consider that the Parish Council's position regarding its discussions over the lease and the management of the relevant trees, has been misrepresented.

47. The Commissioner has determined that the balance of the public interest is weighted in favour of maintaining the exception; that is, in the information being withheld, in this case.
48. It is noted that 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... 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).
49. In this case, however, as covered above, 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.
50. Since all of the withheld information was withheld correctly under regulation 12(5)(b), it has not been necessary for the Commissioner to consider whether any or all of the information is covered by regulation 12(4)(d): material in the course of completion.

Regulation 5(2) – duty to make environmental information available

51. Regulation 5(2) of the EIR states that information shall be made available as soon as possible and no later than 20 working days after the date of receipt of the request.
52. In this case, the Parish Council failed to consider the request (which was made on 20 June 2020) under the EIR. It issued an appropriate response, and provided some information, on 19 August 2021.
53. The Parish Council was therefore in breach of regulation 5(2). Because a response has now been issued, the Commissioner does not require the Parish Council to take any steps in respect of this.

Right of appeal

54. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

55. 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.
56. 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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