

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

Decision notice

Date: 24 June 2013

Public Authority: Wickhambreaux Parish Council

Address: 4 Chequers Cottages
Stone Street
Petham
Canterbury
CT4 5PW

Decision (including any steps ordered)

1. The complainant requested information regarding the sale of Ickham Grazing Marshes by the Church Commissioners, information relating to the Council's application to register Seaton Meadow as a Village Green and information about Seaton Meadow in general. The Council initially considered the whole request under the FOIA but later accepted that some information should have been considered under the EIR. It provided some information to the complainant but refused other information by virtue of sections 21, 22 and 42 of the FOIA. It also relied on section 1(1)(a) for information it discounted on the basis that it was produced by or received by Councillors and not therefore held for the purposes of FOIA.
2. The Commissioner's decision is that Wickhambreaux Parish Council (WPC) has not considered this request in compliance with the EIR. The Commissioner believes it is likely that all of it would be environmental information as defined by regulation 2(1)(a) to (f) of the EIR. The Commissioner also considers that the information withheld by virtue of section 42 of the FOIA, provided to him during the course of this investigation, falls within the definition of environmental information and should have been withheld under regulation 12(5)(b) of the EIR.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

- With the exception of the information subject to the Commissioner's ruling in relation to regulation 12(5)(b) of the EIR, WPC will need to provide a fresh response to the request that is compliant with the requirements of regulation 14 of the EIR.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 15 May 2012, the complainant wrote to WPC and requested the following information in respect of the sale of Ickham Grazing Marshes and Seaton Meadow:

" any further information held by the Parish Council, which includes external correspondences from parish councillors, paper records, letters, emails, information stored on computer, maps, photographs, handwritten notes or any other form of recorded information which covers the time frame from August 2009 to date."

6. WPC responded on 11 June 2012. It informed the complainant that his request was insufficiently specific and requested further details in order to identify and locate the information. It also cited section 21 in respect of WPC's request to register Seaton Meadow as a Village Green and its response to the objectors providing a link regarding village greens on Kent County Council's website. It relied on section 42 in respect of any legal advice regarding its application and section 22 in respect of any material being collated for the forthcoming Inquiry.
7. On 27 June 2012, the complainant requested an internal review of WPC's application of the exemptions cited pointing out that to the extent that any of the information was environmental information, section 21 would not apply. He also refined his request as follows:

"Information held by WPC or by others on its behalf which comprises all communications, including, but not limited to, emails sent and received between 1 August 2009 and to date that relate to the sale of the Ickham Grazing Marshes by the Church Commissioners and or the application to register Seaton Meadow as a Village Green and Seaton Meadow in general. For the avoidance of doubt this request includes any communications, including, but not limited to, emails of [named Councillor A],[named Councillor B], [named Councillor C], [named

Councillor D] and [named Councillor E] that fall within this time frame and relate to the category of information specified."

8. Following an internal review, WPC wrote to the complainant on 23 July 2012. It upheld its reliance on the exemptions cited in its refusal notice and in respect of his request for informed to and from named Councillors, stated:

"Correspondence between councillors is not generally covered by FOIA, even when it relates to council business...Such correspondence will only be subject to the FOIA where it relates to the management and administration of the council...Therefore should they exist, any emails between Councillors are not covered by either the FOIA or EIR."

Scope of the case

9. The complainant's representative contacted the Commissioner on 3 September 2012 to complain about the way her client's request for information had been handled. She considered that WPC's application of the exemptions cited was incorrect and expressed concern that some of the information may fall within the definition of environmental information and, where relevant, her client's request should have been considered under the EIR. She was further concerned that WPC had failed to consider the consequences of this, particularly in relation to sections 21 and 22 of the FOIA.
10. The complainant was also unconvinced by WPC's application of the public interest test and stated that it had failed to fully comply with its statutory duty to advise and assist under section 16 of the FOIA (and where relevant), regulation 9 of the EIR.
11. The complainant's representative also rejected WPC's response that correspondence between Councillors is not usually covered by the FOIA or the EIR even where it relates to council business and expressed concern that WPC had breached its duty under section 1(1) of the FOIA to confirm or deny whether any emails between councillors existed and its general failure to review information it holds falling within the scope of her client's request.
12. Some background information was also provided regarding WPC's application to register Seaton Meadow as a Village Green. She confirmed that her client, (amongst others), was challenging WPC's application to register the land as a Village Green and informed the Commissioner that a public inquiry had been listed for 12 November 2012.

13. The Commissioner also notes that in his letter to WPC dated 27 June 2012, the complainant confirmed he did not wish to see material that WPC was collating for the public inquiry and which it intended to make available to him on 22 October 2012. However, in its letter to the complainant dated 23 July 2012, WPC cited section 22 in relation to this information. The complainant has however confirmed that he is satisfied with this element being scoped out of the investigation so long as WPC has only withheld material being collated for the public inquiry on this basis. As WPC has confirmed this, information withheld on the basis of section 22 does not therefore form part of the Commissioner's investigation discussed in this notice.

Reasons for decision

The appropriate legislation

14. The Commissioner notes that WPC responded to this request under the FOIA. However, the Commissioner considers that all of the information requested is likely to fall within the definitions of regulation 2(1)(a) and 2(1)(c) of the EIR. Regulation 2(1)(a) and (c) concerns information regarding:
- 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."*
15. The Commissioner raised this point with WPC in his letter of 22 February 2013. In its response dated 19 March 2013 , WPC informed the Commissioner that whilst it considered that information regarding the sale of Ickham Grazing Marshes and Seaton Meadow in general, may fall within the definition referred to above, it did not consider its application to register an area of land as a village green fell within the above definition. It argued that applications to register an area of land as a village green are about the continued use of the land for sports and pastimes as opposed to any environmental factor affecting the land. It further argued that it does not constitute a 'measure' as defined under regulation 2(c) of the EIR.

16. The Commissioner does not support this view and notes that a request to register a village green is ultimately considered by the Commons Registration Authority and if successful, the area of land will be preserved as a village green for sports and pastimes. He therefore considers that an application to register an area of land as a village green would constitute an '*administrative measure*' as defined by regulation 2(1)(c) of the EIR.
17. He would also point out that each case will need to be considered on its merits and from what he has seen so far, the information falling within this category of information would fall within the definition of environmental information outlined in regulation 2(1)(c).

Sections 1 and 17 and Regulation 14

18. Section 1(1)(a) of FOIA states that a public authority should confirm or deny whether it holds information falling within the scope of a request. Section 17 provides that where a public authority does not intend to disclose any relevant information it holds, it must respond to the complainant within 20 working days of the date of the receipt of the request stating under which provision of the FOIA it is refusing the request. Regulation 14 of the EIR provides the equivalent requirement to section 17 of the FOIA.
19. The Commissioner considers that the request can be divided into the following three categories:
 - Sale of Ickham Grazing Marshes
 - Application to register Seaton Meadow as a Village Green
 - Information regarding Seaton Meadow in general.
20. The Commissioner considers that WPC's response to the complainant, outlined in paragraphs 6 to 8 of this notice, indicates a lack of understanding of the requirements of both the FOIA and the EIR. He therefore contacted WPC on 22 February 2013 outlining the main areas where this was most apparent and requesting clarification of a number of issues.
21. WPC responded on 19 March 2013, however the Commissioner considers that its response continues to indicate a failure to understand the requirements of both the FOIA and EIR to the extent that he is unable to fulfil his duties under section 50 of the FOIA. This includes, but is not limited to its failure to provide him with a copy of all relevant withheld information.
22. Ordinarily, the Commissioner would raise this matter directly with the public authority concerned. However, the Commissioner notes that in its

response to him dated 19 March 2013, WPC asked for confirmation that his letter of 22 February 2013 was not an information notice, but a request for more information to be provided on a voluntary basis. WPC further confirmed that should the letter constitute an information notice, it would wish to exercise its right of appeal against such a notice. Given the council's lack of engagement with a straightforward request for the withheld information and the confusion that exists regarding the appropriate regime, the Commissioner is left with no choice but to base the majority of the decision on two key points; the appropriate regime and the basic obligations that these entail.

The sale of Ickham Grazing Marshes and information regarding Seaton Meadow in general.

23. The Commissioner considers that WPC's response to these two categories of information not only fails to address his queries, but contains some confusing and contradictory comments.
24. For example, in response to his queries regarding if, and to what extent WPC holds information falling within the scope of the sale of Ickham Grazing marshes and Seaton Meadow in general, WPC has stated:

"As the Parish Council does not have any responsibilities in relation to the sale of the land by the Church Commissioners or Seaton Meadow generally, the Council does not maintain any file or filing system in relation to this category of information."

25. However, WPC subsequently states the following:

"We believe we have disclosed all the communications between the Parish Council and third parties in relation to the sale of Ickham Grazing Marshes by the Church Commissioners and in relation to Seaton Meadow generally."

26. The Commissioner finds these statements both confusing and contradictory and considers that they prevent him from fulfilling his obligations under section 50 of the FOIA to complete a thorough investigation of this complaint.
27. The Commissioner also notes that in its letter dated 19 March 2013, WPC has stated that:

"The request would involve the disclosure of written internal communications that exist."

although it has not provided any arguments in support of this and has not actually cited regulation 12(4)(e). WPC has however used some arguments relevant to the public interest test but then goes on to state:

"We have not been able to identify any written internal communications."

28. The Commissioner is not therefore satisfied that WPC has fulfilled its obligations under section 1(1) of the FOIA in relation to this part of the complainant's request and considers that this is a further example of WPC's failure to provide a response to the Commissioner to enable him to fulfill his duties under section 50 of the FOIA.

The application to register Seaton Meadow as a Village Green

29. WPC has withheld some information falling within the scope of its application to register Seaton Meadow as a village green on the basis of section 21, of the FOIA.
30. Whilst the Commissioner acknowledges that WPC does not consider any of this information to fall within the definition of environmental information, as pointed out in paragraph 16 of this notice, the Commissioner does not share this view. Therefore, to the extent that any of this information constitutes environmental information as defined by regulation 2(1)(a) to (f) of the EIR, the Commissioner is mindful that there is no equivalent exception to section 21 under the EIR.
31. The Commissioner would also point out that even if the information did not fall within the definition of environmental information as outlined in paragraph 14 of this notice, that the arguments WPC has thus far provided have failed to convince the Commissioner that section 21 would be engaged.
32. The Commissioner is also concerned that WPC appears to have taken a very narrow interpretation of the complainant's request in relation to its application to register Seaton Meadow as a village green. In its letter to the Commissioner dated 19 March 2013 WPC states:

"In replying to [name of complainant's] request for information ...we did not consider that [name of complainant] was asking us to disclose all the communications that might fall within the scope of his request in relation to the application for a green. Instead our reply dealt with the specific kinds of communications relating to the application to register the green to which he referred in his letter."

33. Later in the same letter, WPC stated:
34. *"We invite you to clarify with [name of complainant] whether his complaint now concerns non-disclosure of communications which concern the village green application generally*

35. The Commissioner would point out that a public authority cannot alter the scope of any request for information made under either the FOIA or the EIR. It is up to the public authority to determine its scope and where there is any ambiguity in the request, it is the public authority's responsibility to clarify the scope.
36. The Commissioner also considers that the scope of the complainant's request as reproduced verbatim in paragraph 7 of this notice clearly encompasses the full spectrum of communications.
37. The Commissioner is not therefore satisfied that WPC has fulfilled its obligations under section 1(1) of the FOIA in relation to this part of the complainant's request.

Information held by Councillors

38. The Commissioner considers that WPC's response to the complainant regarding information held by Councillors outlined in paragraph 8 of this notice indicates a mis-understanding of his general stance on this issue. Consequently, in his letter of 22 February 2013, the Commissioner pointed out that whilst information held by Councillors in their role as Councillors will not be covered by either the FOIA or the EIR, information produced or received by a Councillor acting as a representative of the Council is covered.
39. The Commissioner therefore informed WPC that it would need to revisit this part of the request to determine what information is held relevant to the request. In doing this, it would need to consider the purpose of information produced or received by all Councillors and the capacity in which it is being held to establish whether it is covered by the FOIA or the EIR.
40. The Commissioner also pointed out to WPC that this will cover a broader range of information than the emails considered in its response to the complainant as it failed to consider any other type of communications which may exist. For the avoidance of doubt, the Commissioner also highlighted to WPC that the FOIA and EIR applies to official information held in private email accounts (and other media formats) when held on behalf of a public authority.
41. In its response to the Commissioner, WPC informed him that:

"Enquiries made of Councillors at the time of [name of complainant's] request about their communications did not reveal any other communications as council business did not elicit councillor communications in relation to the application for the village green."

42. The Commissioner considers that WPC's response to the complainant on 23 July 2012 and referred to in paragraph 8 of this notice, indicate that WPC had not in fact attempted to identify this information and he believes this is further supported by comments in its letter of 19 March 2013 which state:

"Although we have not been able to ascertain the extent of any written communications held by Parish Councillors with local people relating to their concerns about the sale of land or [name individual's] actions with regard to it, any that exist are not held by the public authority but by the individual councillor."

43. The Commissioner is not therefore satisfied that WPC has fulfilled its obligations under section 1(1) of the FOIA in relation to this part of the complainant's request.

Late reliance on section 12 and/or regulation 12(4)(b)

44. The Commissioner notes that in its response to him dated 19 March 2013, WPC indicated that it may consider refusing the request by virtue of either or both of section 12 of the FOIA and/or regulation 12(4)(b) on the basis that the costs involved in responding to the request exceed the appropriate cost limit. This has been confirmed in WPC's letter to the Commissioner dated 20 May 2013.
45. However, the Commissioner has discretion whether to accept a late claim of section 12 by a public authority following the binding decision of the Upper Tribunal in the case of the All Party Parliamentary Group on Extraordinary Rendition v IC and the Ministry of Defence (GIA/150-152/2011). This does not however apply to the EIR as the Court of Appeal has determined that it should be treated as an exception.
46. The Commissioner notes that much of the information appears to have only been identified as a result of the Commissioner pointing out WPC's failure to understand the requirements of both the FOIA and EIR and has not therefore been collated. However, the Commissioner does not consider that WPC has provided a reasonable estimate of costs to date and would need to seek further information from it in relation to this. Additionally, the Commissioner is concerned that WPC has failed to understand what actions can be taken into consideration when calculating the cost limit as its letter of 20 May 2013 states:

"I would then need to check each of the documents to see whether it attracts privilege or contains personal data..."

47. In this case therefore, the Commissioner believes that the best of course of action is for the council to provide a fresh response to the

complainant, compliant with regulation 14 of the EIR, once armed with both a clearer understanding of the appropriate regime and some knowledge of what is actually held.

Section 42 of the FOIA - Regulation 12(5)(b) of the EIR

48. The Commissioner notes that WPC has withheld the information from the Open Spaces Society, the National Association of Local Councils, Mr Cain Ormondroyd (Barrister) and the Kent Law Clinic under section 42 of the FOIA. As WPC has not provided copies of information it is withholding from the Kent Law Clinic on the basis of LPP, this analysis does not apply to this information: This information would have to be considered within the fresh response required by the steps of this notice.
49. However, having considered the information provided from the Open Spaces Society, the National Association of Local Councils and Cain Ormondroyd (Barrister), the Commissioner has determined that it falls within the definition of environmental information and should therefore be considered under the EIR.
50. Regulation 12(5)(b) of the EIR states that information is exempt if 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 or a criminal or disciplinary nature. Regulation 12(5)(b) is a broad exception with the course of justice including but not restricted to information attracting Legal Professional Privilege (LPP). The purpose of the exception is to ensure that there should be no disruption to the administration of justice.
51. The Tribunal in *Woodford v IC* (EA/2009/0098) confirmed that the test for adverse affect in relation to LPP would be met by the general harm which would be caused to the principle of LPP, without needing to demonstrate that specific harm would be caused in relation to the matter covered by the information.

"There can be no doubt that disclosure of information otherwise subject to legal professional privilege would have an adverse effect on the course of justice."
52. Consideration of the specific circumstances is however required when addressing the public interest test.
53. Regulation 12(5)(b) will be engaged if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
54. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential

communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both these cases, the communications must be confidential, made between a client and professional legal advisor acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.

55. WPC has confirmed that it is relying on advice privilege in respect of the information referred to in paragraph 48 of this notice.
56. As with section 42 of the FOIA, for public authorities establishing who the legal advisor is will be key to them identifying when a communication is legally privileged. The Commissioner generally considers that the term 'lawyer' means a legal advisor acting in a professional capacity and includes legal executives.
57. In *Calland v IC the Financial Services Authority* (EA/2007/0136) the former Information Tribunal confirmed that legal advice and communications between in-house lawyers and external solicitors or barristers also attract LPP.
58. WPC has informed the Commissioner that the individual providing the advice from the Open Spaces Society (OSS) is a non-practicing solicitor working for the organisation as a casework officer. The Commissioner also notes that the individual providing the advice from the National Association of Local Councils (NALC) via the Kent Association of Local Councils is a professional legal advisor, as is Cain Ormondroyd (Barrister). The Commissioner is therefore satisfied that all information under consideration does represent advice between a client and qualified legal advisors acting in their professional capacities.
59. The complainant's representative has however expressed concerns regarding who has been identified as the client, and also considers that the confidentiality of at least some of this information may have been lost, thereby making WPC's claim to LPP null and void.
60. The Commissioner has therefore raised these concerns with WPC which has confirmed that as well as certain members of WPC, the client is Seaton Meadow Advisory Sub-Committee which was established on 16 March 2010 to seek legal opinion where necessary in respect of WPC's application to register Seaton Meadow as a Village Green. WPC has further explained that the Sub-Committee acted under delegated authority of WPC in relation to the day-to-day business of preparing the case and considers that they were as much the client as the members of WPC taking strategic or funding decisions about the case.

61. WPC has confirmed that the members of the Sub-Committee consisted of five Councillors and three co-opted members, two from Seaton Community Action and one from the local Conservation Society. The complainant's representative considers that by having two members of Seaton Community Action (a group campaigning in favour of WPC's application), co-opted to the Sub-Committee represents a conflict of interest and puts WPC's claim to confidentiality of the disputed information in doubt.
62. The complainant's representative also drew the Commissioner's attention to Seaton Community Action's website where some legal advice (not the disputed information subject to this notice), was displayed on the basis that it was advice from its barrister, arguing that this raised serious questions regarding precisely who the client is in respect of the disputed information.
63. Having asked questions around these concerns, WPC has informed the Commissioner that although the members of the Sub-Committee did not sign a formal confidentiality agreement, all members were clearly informed that all matters dealt with by the committee were strictly confidential and agreed not to disseminate information. WPC has further confirmed that this was stressed at each meeting where any legal advice was to be considered. As far as WPC is concerned, there were no breaches of confidentiality.
64. WPC has also informed the Commissioner that a decision was taken at a Parish Meeting on 7 November 2012 to make some legal advice available to both the complainant and the wider public. However, WPC had not at this time established its own website and asked whether Seaton Community Action would publish this information for it on its website. The Chariman of WPC has further confirmed that it would be her description of it '*as legal advice from our barrister*' which was repeated on the website.
65. The Commissioner has viewed the disputed information and is satisfied that it does constitute advice between a client (WPC and the Sub-Committee and its legal advisors acting in their professional capacities for the sole purpose of obtaining legal advice. Having considered the concerns expressed by the complainant's representative, the Commissioner is also satisfied that confidence attached to the information has not been lost. He has therefore gone on to consider the public interest test.

Public interest arguments in favour of disclosing the information

66. The EIR clearly state under regulation 12(2) that when considering exceptions to the duty to disclose environmental information, a public

authority must apply a presumption in favour of disclosure and only where there is an overriding public interest in maintaining the exception should information not be released in response to a request.

67. Although not acknowledged by WPC, the Commissioner accepts that there is also a general public interest in favour of transparency and accountability in allowing scrutiny of how decisions are made and how public money is spent.
68. The Commissioner also accepts there is a public interest in the disclosure of information regarding WPC's request to register Seaton Meadow as a village green

Public interest arguments in favour of maintaining the exception

69. The Commissioner considers that the general public interest in maintaining the exception will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between a client and lawyer to ensure full and frank legal advice, which in turn is fundamental to the administration of justice.
70. This is consistent with the former Information Tribunal's ruling in the case of *Bellamy v the IC* (EA/2005/0023) that there is a strong element of public interest inbuilt into the privilege itself. Indeed, it is worth noting that the Tribunal considers that there should be at least equally strong countervailing considerations to override that inbuilt interest.
71. This was further reinforced in the case of *DCLG v Information Commissioner & WR* [2012] UKUT (AAC) (28 March 2012) which concluded that the risk of the disclosure of legally privileged information leading to a weakening of confidence in the general principle of legal professional privilege is a public interest factor of very considerable weight in favour of maintaining the exception and there would have to be special or unusual factors in a particular case to justify not giving it this weight.
72. The timing of the advice is also a significant factor and the Commissioner notes that the advice is recent and at the time of the request, concerned a live matter.

The balance of public interest test

73. The Commissioner notes the explicit presumption in favour of disclosure of the information provided for under regulation 12(2) of the EIR. He also appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible in relation to their decisions.

74. However, given the particularly strong public interest in safeguarding openness in all communications between a client and lawyer to ensure full and frank legal advice, combined with the fact that the advice was both recent and live at the time of the request, he considers there would need to be particularly strong public interest factors in favour of disclosure of the information. This would usually include factors where substantial amounts of money are involved, where a decision will affect a large amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following his inspection of the information, he could see no obvious signs that these factors were present in this case to tip the balance in favour of disclosure.
75. The Commissioner has therefore concluded that the balance of public interest is weighted in favour of maintaining the exception and consequently, that WPC was justified in its reliance on regulation 12(5)(b) of the EIR in relation to the information referred to in paragraph 48 of this notice.

Right of appeal

76. 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

77. 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.
78. 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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