

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

Date: 24 June 2015

Public Authority: Four Marks Parish Council
Address: Unit 32, Lymington Barn
Lymington Bottom Road
Medstead
Alton
Hampshire
GU34 5EW

Decision (including any steps ordered)

1. The complainant has requested a copy of the minutes of a closed session of Four Marks Parish Council. The Commissioner's decision is that Four Marks Parish Council has correctly applied the exception for internal communications at Regulation 12(4)(e) of the EIR to agenda item 14.162. He has also decided that agenda item 14.161 does not constitute environmental information as defined by regulation 2(1) of the EIR.
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Either provide the information at agenda item 14.161 to the complainant or issue a valid refusal notice under the FOIA.
3. 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.

Background

4. As way of background, the council has explained that the withheld minutes concern a piece of land which was unregistered for many years until the owner of an adjacent property obtained Possessory Title to the land. The withheld minutes concern the Parish Council's possible options with regard to the land over which the public has had unrestricted access for many years.
5. The Commissioner understands that the land in question is the same as that referred to in the decision notice for FER0571565¹, namely 'Storey's Sanctuary'.

Request and response

6. On 10 December 2014, the complainant wrote to Four Marks Parish Council ('the council') and requested information in the following terms:

"Please provide a copy of the minutes of the closed session of the Parish Council held on 26 November 2014."
7. Having received no response, the complainant sent a chaser email on 18 January 2015.
8. The council responded on 23 January 2015 and refused to provide the information citing the exceptions at Regulations 12(4)(e), 12(5)(b) and 12(5)(d) of the EIR.
9. The complainant expressed dissatisfaction with the response and requested an internal review on 23 January 2015. The council did not provided an internal review response.

Scope of the case

10. The complainant contacted the Commissioner on 23 March 2015 to complain about the way his request for information had been handled.
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¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1431763/fer_0571565.pdf

11. In correspondence to the Commissioner, the council confirmed that it is relying on the exceptions at Regulations 12(4)(e), 12(5)(b) and 12(5)(d) of the EIR in order to withhold a copy of the minutes of the closed session of the council held on 26 November 2014.
12. The Commissioner has first considered whether the exception for internal communications at Regulation 12(4)(e) has been correctly applied.
13. As the Commissioner has decided that the exception at Regulation 12(4)(e) has been correctly applied in this case, he has not deemed it necessary to consider the exceptions at Regulations 12(5)(b) and 12(5)(d).

Reasons for decision

Agenda item 14.162

Regulation 12(4)(e)

14. Regulation 12(4)(e) states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.
15. The Commissioner has published guidance² on regulation 12(4)(e), which includes a description of the types of information that may be classified as 'internal communications.'
16. The first factor that must be considered is whether the information in question can reasonably be described as a 'communication'.
17. The complainant has said that it does not appear apt to include the official record of the deliberations and decisions of an elected body within the term 'internal communications', although he has acknowledged that the term has a wide meaning.
18. In his guidance on the exception, the Commissioner acknowledges that the concept of a 'communication' is broad and will encompass any information someone intends to communicate to others, or places on file

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_internal_communications.ashx

so that others may read it. He is aware that it is standard practice for minutes of meetings to be circulated to attendees, either by manual or electronic means.

19. The Commissioner is therefore satisfied that the withheld minutes properly constitute a 'communication' for the purpose of the exception. He has therefore next considered whether the withheld information constitutes 'internal' communications.
20. There is no definition contained in the EIR of what is meant by 'internal'. Consequently, in the absence of one, a judgment on what is an internal communication must be made by considering the relationship between the sender and recipient, the particular circumstances of the case and the nature of the information in question. Typically, however, an internal communication is one that stays within one public authority.
21. The council has said that the information includes details of communications between the council and an external solicitor. The Commissioner considers that communications can still be internal even if they record discussions with third parties or contain information received from third parties. In this case, the Commissioner considers that a note of legal advice received from a third party, circulated within a public authority for its own use, is an internal communication. For the purpose of this exemption, it is the form of the communication that is important, rather than the content.
22. The complainant has said that the minutes are a document which the council is under a statutory obligation to prepare and to make available for inspection to any local government elector for its area (sections 99 and 228 of and paragraph 41 of Schedule 12 to the Local Government Act 1972). He has referred to paragraph 18 of the Commissioner's guidance on internal communications which makes clear that a communication which is made available to someone outside the public authority cannot be an internal communication.
23. The Commissioner has considered this point. However, in this case, he is aware that the council has not actually made the requested information from the minutes available to anyone outside the public authority.
24. The Commissioner is satisfied that the minutes of the closed session are internal. He therefore considers that the withheld information constitutes an internal communication and the exception is engaged.
25. As the Commissioner considers that the exception is engaged, he has gone on to consider the relevant public interest arguments in this case.

The public interest test

26. Where the exception in Regulation 12(4)(e) is engaged it is subject to a public interest test required by Regulation 12(1).
27. The test is whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
28. When carrying out the test the Commissioner must take into account a presumption towards the disclosure of the information which is required by Regulation 12(2).

Public interest in favour of disclosing the requested information

29. The complainant has said that any consideration of this exception in relation to the requested minutes should take into account the strong public interest in democratic accountability which requires that the discussions and decisions of elected representatives are open to public scrutiny.
30. The Commissioner considers that the factors in favour of disclosure relate to the benefits of open and transparent decision making which include enabling the public to understand why decisions are made and to promote local participation in local issues and governance.

Public interest in favour of maintaining the exception

31. In essence the public interest considerations relating to Regulation 12(4)(e) relate to the protection of thinking space and the ability to have full and frank discussions without fear that the information will be disclosed.
32. As stated in his aforementioned guidance on the subject, there is no automatic or inherent public interest in withholding an internal communication. Arguments should relate to the particular circumstances of the case and the content and sensitivity of the specific information in question.
33. The council said that a public authority needs a safe space to develop ideas, debate live issues and reach decisions away from external interference and distraction and that the need for a safe space will be strongest when the issue is still live. It said that, in this case, the issue is still live because the council is considering what action to take, if any, in respect of challenging the Possessory Title to the land and/or trying to gain adverse possession of the land. It explained that there have been instances of vandalism of fencing on the land and it therefore feels there may be public interest in its involvement in the use of the land. The

council considers that the safe space argument carries great weight in this instance.

34. The council also said that disclosure of the withheld information would inhibit free and frank discussions in the future and that the loss of frankness and candour would damage the quality of advice and lead to poorer decision making.
35. The council pointed out that the withheld minutes contain legal advice and that disclosure of this would harm internal deliberation and decision-making processes. It said that it is important to maintain the confidentiality of legal advice in order to ensure that the council is not discouraged from obtaining proper legal advice in appropriate cases and that the chilling effect argument is therefore considered to justify withholding the minutes on the basis that it contains legal advice.

Balance of the public interest

36. The Commissioner accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction.
37. However, he considers that, in general, once a decision has been taken the private thinking space which is required is diminished and the sensitivity of the information is reduced. The timing of the request will therefore be an important factor.
38. The complainant has said that he is aware of one matter which has been under continuing discussion, namely the legality of the council's removal of fences, which has been the subject of correspondence between himself and the council, but that the council has stated that it considers such correspondence to be closed.
39. The Commissioner has considered this but is of the opinion that correspondence with an individual on a particular matter can be closed without the issue itself being concluded. In its submission to the Commissioner, the council has confirmed that the issue which is the subject of the minutes is still live.
40. The Commissioner does not consider that chilling effect arguments will automatically carry much weight in principle. The weight will depend on the circumstances of each case, including the timing of the request, whether the issue is still live, and the content and sensitivity of the information in question. If the issue in question is still live, arguments about a chilling effect on those ongoing internal discussions are likely to carry significant weight.

41. The council has cited the chilling effect argument in relation to the legal advice referred to in the withheld information. The Commissioner considers that the following paragraph from the section on legal advice in his guidance on Regulation 12(4)(e) is relevant here:

“Chilling effect arguments may also carry some weight. It may be important to maintain the confidentiality of legal advice in order to ensure that the public authority is not discouraged from obtaining proper legal advice in appropriate cases. There is likely to be a greater expectation that legal advice will be kept confidential compared to other types of advice or discussions, and the resulting chilling effect if legal advice was disclosed may therefore be more pronounced. Although lawyers are subject to professional regulation and should be expected to continue giving full and proper advice, the quality of internal discussions may deteriorate if a public authority was deterred from even seeking the advice for fear it would later be disclosed.”

42. As stated above, the Commissioner does not consider that safe space and chilling effect arguments automatically carry much weight in principle. However, the issue in hand was still live at the time of this request and disclosure of the withheld information could reduce the council's thinking space and the ability to have full and frank discussions without fear that the information will be disclosed. This could detrimentally affect the decision making process and potentially lead to less full and frank advice being provided to the council in the future.
43. The Commissioner acknowledges the presumption in favour of disclosure inherent in regulation 12(2) of the EIR. He also accepts that there is an inherent public interest in the openness and transparency of public authorities and their decision making processes. However, due to the specific circumstances of this case, the Commissioner has placed significant weight on the safe space argument and gives the chilling effect argument some credit. He finds that the public interest in maintaining the exception is not outweighed by the public interest in favour of disclosure.

Agenda item 14.161

44. The complainant has said that no satisfactory reason has been given for the considering that the information within agenda item 14.162 headed 'Freedom of Information Act' falls within the scope of the EIR.
45. Having reviewed the information at agenda item 14.161, the Commissioner does not consider it to be environmental information as defined by regulation 2(1) of the EIR.

46. The council has not submitted any arguments as to why such information is environmental or why it should be withheld under the FOIA. This was despite the council being informed by the Commissioner that it must justify its position and being provided with the Commissioner's guidance on how he deals with complaints³ which clearly states that it is the public authorities' responsibility to satisfy the Commissioner that information should not be disclosed and that it has complied with the law.
47. Therefore, the Commissioner considers that the council should either provide the information at agenda item 14.161 to the complainant or issue a valid refusal notice under the FOIA.

³ https://ico.org.uk/media/for-organisations/documents/1215/complaints_guide_for_public_authorities.pdf

Right of appeal

48. 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

49. 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.
50. 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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