

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

Decision notice

Date: 11 February 2016

Public Authority: Hertfordshire County Council
Address: County Hall
Pegs Lane
Hertford
Hertfordshire
SG13 8DE

Decision (including any steps ordered)

1. The complainant has requested information relating to a village green application which was made to the council by a local resident. The council provided some information however it withheld other information on the basis that Regulation 12(5)(b) (course of justice) applied, and also Regulation 13 (personal data).
2. The Commissioner's decision is that the council was not correct to apply 12(5)(b) to the information as the public interest rests in its disclosure. He has however decided that it was correct to apply Regulation 13.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the information which the council considered exempt under Regulation 12(5)(b).
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 19 May 2015 the complainant wrote to the council and requested information in the following terms:

"I request all copies of correspondence between Hertfordshire County Council and the legal team acting on behalf of Stevenage Borough Council."

6. The council responded on 17 July 2015. It disclosed some information however it redacted other information on the grounds that Regulation 12(4)(d) (unfinished documents), and Regulation 13 (personal data) applied.
7. Following an internal review the council wrote to the complainant on 8 September 2015. It upheld its original position however it did disclose further information which had previously been redacted under Regulation 13.

Scope of the case

8. The complainant contacted the Commissioner 18 September 2015 to complain about the way his request for information had been handled. His complaint was that the level of redaction was too high under Regulation 13, and that the council had not taken into account requirements for information which is required by law to be presented to applicants in an application of this nature. He therefore considered that Regulation 12(4)(d) had been applied incorrectly.
9. During the course of the Commissioner's investigation the council reconsidered its position and provided further information to the complainant under Regulation 13. It still withheld the names of 2 individuals under that exception however. The council also withdrew its reliance upon Regulation 12(4)(d) however it applied Regulation 12(5)(b) (course of justice) to two small sections of information which it said were subject to legal professional privilege. The complainant subsequently confirmed that he still considers that the exceptions have been applied incorrectly however.
10. The Commissioner therefore considers that the complaint is that Regulation 13 and Regulation 12(5)(b) were applied incorrectly by the council.

Reasons for decision

11. The complainant is a Member of Parliament. He is acting on behalf of a constituent who made an application for a piece of land to be officially designated as a town or village green. The land is owned by Stevenage Borough Council who objected to the application. At the time of the request the application was due to be decided by the county council, Hertfordshire County Council, as the regulatory authority responsible for making the designation.
12. The complainant requested details of legal discussions between the borough council and the county council in order to prepare arguments for the application to be approved. As part of his complaint to the Commissioner he outlined his view that the requested information should have been provided to the applicant on the basis of the procedural requirements of The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007) No 457 ('the Commons Regulations') . This provides that:

"Consideration of objections

6.—(1) Where an application is made under section 15(1) of the 2006 Act to register land as a town or village green, as soon as possible after the date by which statements in objection to an application have been required to be submitted, the registration authority must proceed to the further consideration of the application, and the consideration of statements (if any) in objection to that application, in accordance with the following provisions of this regulation.

(2) The registration authority—

(a) must consider every written statement in objection to an application which it receives before the date on which it proceeds to the further consideration of the application under paragraph (1); and

(b) may consider any such statement which it receives on or after that date and before the authority finally disposes of the application.

(3) The registration authority must send the applicant a copy of every statement which it is required under paragraph (2) to consider, and of every statement which it is permitted to consider and intends to consider.

(4) The registration authority must not reject the application without giving the applicant a reasonable opportunity of dealing with—

(a) the matters contained in any statement of which copies are sent to him under paragraph (3); and

(b) any other matter in relation to the application which appears to the authority to afford possible grounds for rejecting the application."

13. In essence therefore the complainant argues that the council was already under a legal duty to provide the information he has asked for to the applicant prior to it making a decision on the application. His request follows the county council's refusal to provide all of the information which he considers should have been provided to his constituent as part of his application.

Regulation 12(5)(b)

14. Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

"the course of justice, 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."

15. The successful application of the exception is dependent on a public authority being able to demonstrate that the following three conditions are met; (i) the withheld information relates to one or more of the factors described in the exception, (ii) disclosure would have an adverse effect on one or more of the factors cited, and (iii) the public interest in maintaining the exception outweighs the public interest in disclosure.
16. There are only 2 small sections of information which have been withheld by the council under Regulation 12(5)(b). These are held in correspondence dated 19 February 2015 and correspondence dated 20 June 2013. The council claims that the redacted information from both pieces of correspondence is subject to legal professional privilege.
17. Regulation 12(5)(b) of the EIR, specifically the reference to the 'course of justice', and section 42 of FOIA share common ground in that both may cover information that attracts legal professional privilege. However, in contrast to section 42 of FOIA, a public authority seeking to apply regulation 12(5)(b) of the EIR is required to take the additional step of demonstrating that disclosure would adversely affect the course of justice.
18. The Commissioner has firstly considered whether the council's assertion that the information is subject to legal professional privilege is correct. The correspondence is between a professional lawyer at the borough

council and the Definitive Maps Officer at the county council discussing details surrounding the borough council's objection to the application. The dominant purpose of the information is to discuss the legal options open for Stevenage Borough Council in preparing and presenting its case, and options open to resolve the issue.

19. The case would be resolved by the cabinet at the county council, following a 30 minute presentation by each side outlining their case. Prior to this, council officers look at the merits of each case and make a recommendation to the cabinet to either accept or decline the application.
20. The council has claimed that the withheld information is subject to advice privilege. Legal advice privilege is generally considered where no litigation is in progress or is contemplated. Legal advice privilege may only be claimed in respect of certain limited communications that meet the following requirements:
 - the communications must be made between a professional legal adviser and client;
 - the communications must be made for the sole or dominant purpose of obtaining legal advice; and
 - the information must be communicated in a legal adviser's professional capacity. Consequently not all communications from a professional legal adviser will attract advice privilege.
21. Having considered the communications between the lawyer and the officer at the county council the Commissioner considers that they are not communications between a client and advisor. There is no client/advisor relationship between the parties. The correspondence relates primarily to the county council officer clarifying the reasons behind the objection (letter dated 20 June 2013), and some pre hearing administrative questions regarding the intentions of the borough council regarding its attendance at the hearing (letter dated 19 February 2015). In neither of these pieces of correspondence is one party requesting legal advice from the lawyer at the borough council.
22. The Commissioner therefore considers that the information cannot be subject to advice privilege.
23. Further to this the Commissioner has considered whether the information can be subject to litigation privilege. His decision is that this is not applicable as there was no specific litigation contemplated (or argued by the council) in this case at the time of the request.

Would disclosure cause an adverse effect?

24. It is not essential for the information to be subject to legal professional privilege in order for the exception to apply. A disclosure of information may have an adverse effect upon the course of justice even where the information is not subject to legal professional privilege. The Commissioner has therefore considered this further.
25. The council has based the majority of its arguments on the basis that the information is subject to legal professional privilege, which the Commissioner has decided was not applicable in this case. The Commissioner is not able to speculate on further arguments which the council might have considered relevant and must rely upon those which it provided.

The letter dated 19/02/15

26. In the case of the redacted information within this letter, the Commissioner notes that the intentions of the borough council would have become clear to those at the hearing and the withheld section would at that time have become redundant. The request was made in May 2015, and the correspondence relates to the hearing which occurred on 25 February 2015. The Commissioner must consider the application of the exception at the time that the request was received and at that time the information was therefore no longer relevant and live.
27. Having considered the content of the redacted sections of information however the Commissioner considers that a disclosure of this information at that time would not have had an effect on the course of justice. Effectively the information does not discuss legal interpretation or strategy in the hearing to any degree which could have affected the outcome of final hearing in July. It discusses attendance at the council meeting on 25 February 2015, and this had already occurred by the time of the request. The issues discussed in the email would have become clear at that point.
28. The Commissioner is therefore satisfied that the council was not correct to apply Regulation 12(5)(b) to the sections of redacted information from this letter.

Letter dated 20/6/13

29. As regards the letter dated 20/6/13, the Commissioner notes that the redacted information provides a detailed analysis and discussion on the legal interpretation of case law surrounding the village green application, based upon the grounds of objection raised by the borough council.

Therefore the information provides a legal analysis of the situation as defined by the objection received from the borough council.

30. Its disclosure could undermine the confidence of the borough council (and others) that it could fully clarify its points to the county council prior to the presentation in order to allow it to prepare its recommendation for the cabinet. It would also undermine the county council's confidence that it could ask for clarification of points, seek further information on the intentions of the parties in order to prepare a recommendation and to prepare for the oral presentation by the parties without that information subsequently being disclosed. The council argues that a disclosure of this information prior to the final hearing would undermine the level playing field which the adversarial process relies upon and therefore adversely affect the course of justice. As stated this argument was formulated on the basis that the information was subject to legal professional privilege, which the Commissioner has decided is not the case.
31. The council's arguments are further weakened in this instance given the nature of the proceedings in questions; as noted from the complainant's arguments, under the Commons Regulations, statements of objection and "*any other matter in relation to the application which appears to the authority to afford possible grounds for rejecting the application*" should be provided to the applicant in order for them to address these before making their appearance before cabinet. Clearly if the council felt that it needed to clarify the arguments being put forward by the borough council there is a strong argument that this is a factor which it was intending to rely upon to draft its recommendation (and should therefore have been disclosed prior to the meeting).
32. The Commissioner however recognises that there must be space for the county council to be able to consider and clarify the arguments of the borough council in order to draft a recommendation and this is the information which the council has redacted from this piece of correspondence.
33. However the recommendation itself had been completed by the council and the basis of the arguments was available to the complainant from the minutes of the meeting of 25 February 2015. The final decision was taken in 22 July 2015 after a delay as the applicant wished to make further arguments based upon the grounds of objection. The recommendations made to council in the February cabinet and that in July are not identical but do rely upon the same arguments and were mostly identical with small additions to various sections.
34. Having considered the above arguments the Commissioner is satisfied that the council was however correct to apply Regulation 12(5)(b). He

has therefore gone on to consider the public interest test required by Regulation 12(1). 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.

The public interest

The public interest in maintaining the exception

35. As regards the redactions in the letter of 20 June 2013, the public interest in maintaining the exception relates to the timing of the request in May 2015. At that point the final hearing before cabinet had not taken place and further arguments were still being prepared ready for the July 2015 meeting (and decision). Effectively the disclosure would provide details of the arguments it was considering employing against the application prior to the cabinet decision being made.
36. The Commissioner cannot place a great degree of weight on this as it is for the objector to specifically clarify his grounds of objection, and questions seeking to clarify grounds which are not clear would simply help inform the decision to be made, even where known by both parties. The onus is on the objector to demonstrate why his arguments should be agreed over the applicants, and the applicant has a right to question and respond to these prior to the cabinet meeting. Additionally the argument's which the council was relying upon had already been released for the hearing in February, and minutes of the meeting together with background papers would have been available from the council website after that meeting.
37. The Commissioner notes that the council argues that it may need to rely upon the information if its decision is subject to appeal. He is not convinced by this argument given the nature of the withheld information. Effectively the correspondence seeks clarification of the borough councils' arguments. It questions the borough council's arguments for objecting to the application. It does not particularly demonstrate the legal position of the county council on the issue.
38. Additionally the grounds which are discussed are reiterated in part in the background papers to the cabinet meeting where the decision was eventually made. This information has been published, and may have been made available to the public via the council website prior to the request being made.

The public interest in the disclosure of the information

39. The complainant argues that the Commons Regulations require that the statement of objection and other factors which the council considers relevant to the decision should be presented to the applicant prior to the hearing in order that he has a reasonable opportunity to of dealing with the objection arguments. This is not however the same as a disclosure under the EIR, which relates to disclosures to the whole world.
40. Whilst any failure to adhere to the Commons Regulations may be a strong basis for an appeal it is not within the Commissioner's remit to make a determination on the application of legislation which he has no powers to regulate. The decision he must take relates to the application of the EIR to the request. This is a different decision to considering whether the information should be released to a specific applicant only under The Commons Regulations. The Commissioner is not therefore able to comment upon, or base his judgement on whether the information should have been provided under those regulations.
41. Although this is the case, the Commissioner can take into account the general public interest in transparency on an issue which might, ultimately affect the local community. The decision to refuse the application effectively takes away a degree of protection from the land, which may ultimately end up with its sale and potentially development occurring on it in the future. There is therefore a strong public interest in information being disclosed which would highlight the actions and the arguments which the council considered when reaching its recommended decision. The Commissioner must also take into account the presumption towards disclosure as stated in Regulation 12(2).
42. The Commissioner notes that the decision had not been taken at the time of the request, however a recommendation had been made to cabinet on 25 February 2015 and is recorded in the paperwork for the meeting of the Cabinet for that date on the councils website. Therefore, at the time of the request council officers had reached the point where they were satisfied with the argument to produce a recommended decision, albeit that further arguments which the complainant wished to submit might have ultimately resulted in a change to that recommendation.
43. The Commissioner considers that the majority of the arguments submitted by the council in respect of withholding this information surround its argument that the information is subject to legal professional privilege. As he considers that that status was not applicable to this information he considers that the public interest arguments for withholding the information are significantly weakened.

44. In reducing the significance of these arguments the Commissioner considers that the council has failed to make its case that the public interest in the maintenance of the exception outweighs the public interest in the information being disclosed for this information. He has therefore decided that the council was not correct to apply Regulation 12(5)(b) to this information.

Regulation 13

Regulation 13(1) – Third party personal data

45. This exception provides that third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act 1998 (“the DPA”).

Is the information personal data?

46. The complainant has requested the names of individual(s) which have been redacted from the correspondence provided to him. By definition the name and contact address of an individual will be personal data relating to that person; it identifies the individual, informs the recipient of their contact address and their place of work.
47. The Commissioner is therefore satisfied that the information is personal data as defined in The Data Protection Act 1998 (the DPA).

Would disclosure breach the Data Protection Principles?

48. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner’s considerations below have focused on the issue of fairness. In considering fairness, the Commissioner has taken into account the nature of the information, the reasonable expectations of the data subject, and the potential consequences of disclosure and balanced the rights and freedoms of the data subject with the legitimate public interest in disclosing the information.
49. The withheld personal information relates to 2 individuals. One was a temporary employee working for the council on the project. The other individual does not work for either authority directly but is a legal professional who the county council suggested the borough council may wish to refer to. The county council says that it has no knowledge of whether the individual subsequently had dealings with the borough council following this.

The temporary employee

50. The temporary employee is not a senior employee and was not employed in a public facing role. The council also said that he would not have been a decision maker over the issue and that he would have had no direct interaction with the public in his role. Further to this the council says that it has not been able to find any indication that his name has been associated with contending the application previously to the outside world.
51. Although it is possible that the complainant might recognise who the individual is through his dealings with the council regarding the application, both FOIA and the Regulations consider information which is disclosed to be to the any member of the public rather than simply to the applicant. Any disclosure would therefore be considered to be significantly wider than to the complainant alone.
52. The council therefore considers that the individual would have no expectation that his name and contact details might be disclosed as a result of the request.
53. Whilst the Commissioner accepts this argument he has found evidence that the individual has been associated with the work of the council on other projects, and that his name and details have been publicised as a point of contact over a small number of issues relating to council functions previously. Clearly his role does require a 'public face' on occasions, and this can be taken into account when balancing his expectations against the legitimate interests of the public.
54. Looking at the legitimate interests of the public in his name and contact details being disclosed, the council argues that the only reason why a member of the public might require this information would be to make a complaint or to contact the individual concerned to correspond with him. As stated however, the council argues that he was not responsible for any policy decisions, and in relation to this case, accountability for the decision rests with the county council, not a temporary employee within the borough council. The council therefore argues that the public has little, if any legitimate interest in the information being disclosed. The council also argues that the relevant department and its contact details are already known and so this would not be a disclosure which is necessary.
55. Having considered the above there are counter arguments, relating accountability of individuals in carrying out public roles, and in creating greater transparency of individuals within their public roles. The only information redacted is the name of the individual, together with his

contact details at the council. A disclosure would not therefore encroach on his private life to any great degree.

56. On balance the Commissioner is satisfied that it is not necessary for that information to be disclosed given that the departments contact details are available. Again, it would be the department, and ultimately the council as a whole which is accountable for the actions taken, particularly by temporary members of staff. The employee himself would be accountable to the department and the council as a whole, not the public directly.
57. The Commissioner's decision is therefore that the council was correct to apply Regulation 13 to this person's information.

The adviser

58. As stated, in the withheld information the name of the individual is mentioned as a potential person to refer to over the issue. The council argued that the release of this individual's name into the public domain in relation to this subject without them being involved would align them to this decision making process, which it believes to be unfair given that it has no further information as to whether the borough council subsequently contacted the individual.
59. As regards this therefore the Commissioner considers that the individual may be unaware that his details were mentioned within the documentation, and would not expect to have his name associated with the issue other than if he were subsequently hired to advise the borough council. There is however no evidence that that was the case.
60. Whilst the Commissioner is satisfied that the name is associated with a positive recommendation by the council, the association with a relatively controversial objection by the borough council which he potentially played no part in (or even knew anything about) would be detrimental to his personal privacy.
61. The Commissioner further considers that given the context of his position within the information, the redaction of his name does not in any way undermine the usefulness of the disclosed information. A disclosure of his identity is not necessary for the purposes of the legitimate interests of the public.
62. The Commissioner is therefore satisfied that the council was correct to apply Regulation 13 to the identity of the individual.

Right of appeal

63. 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

64. 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.
65. 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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