

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

Date: 30 September 2019

Public Authority: Beccles Town Council
Address: Town Hall
The Walk
Beccles
NR34 9AJ

Decision (including any steps ordered)

1. The complainant has requested information relating to the usage of Beccles Common. Beccles Town Council disclosed some information and withheld other information under the FOIA exemption for legal professional privilege (section 42). During the Commissioner's investigation it reconsidered the request under the EIR and applied the exceptions for material in the course of completion (regulation 12(4)(d)), the course of justice (regulation 12(5)(b)) and protection of the environment (regulation 12(5)(g)) to withhold the information.
 2. The Commissioner's decision is that Beccles Town Council wrongly handled the request under the FOIA and breached regulation 5(1) and regulation 14(1) but that it has correctly applied regulation 12(5)(b) to withhold the information.
 3. The Commissioner does not require the public authority to take any steps.
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Background

4. Beccles Town Council acts as the Sole Trustee for Beccles Fenland Charity Trust. The charity was established in March 2011 to manage lands granted to the town by Queen Elizabeth I in her Charter dated 1584¹.
5. Beccles Fenland Charity Trust is the owner of Beccles Common. The council has explained that driving is prohibited on the Common unless express permission has been granted. The council confirmed that it has been in dispute with the occupants of Woodview Farm, a property situated just off Beccles Common, which only has vehicular access to it across Beccles Common.
6. The council has confirmed that an easement was granted to the occupants of Woodview Farm in 2012 which allows them to drive across the Common to access their property for their residential use. Over the past few years Woodview Farm has have opened two businesses and customers of both have been driving across the Common and then parking on the Common in order to use the businesses.
7. The council confirmed that the Trust has sought legal advice regarding the rights of Woodview Farm's business customers to drive across and park on the Common, and also the rights of the occupants to park on Beccles Common. The complainant's request relates to the council's decision-making in these regards.

Request and response

8. On 26 March 2019, the complainant wrote to Beccles Town Council (the "council") and requested information in the following terms:

"Having walked on Beccles Common this afternoon I was astounded to see a large black metal post has been erected on registered common land, close to [names redacted] property. Please forward me a copy of the minuets (sic) of the meeting at which this was agreed by the Trustees of Beccles Fenland Charity Trust. I have been made aware that The Trustees are involved in discussions with [names redacted] relating

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

to the driving across the common and parking on common land close to their property. As Common Rights Holder and under the Freedom of Information Act I request all relevant information relating this concerning matter Inc all legal advice documents are forward to me as soon as possible. Has Waveney District Council or the Secretary of State for Works been notified? Please forward me an up to date Health and Safety report for Beccles Common."

9. The council responded on 9 April 2019. It disclosed some information and withheld other information under the exemption for Legal Professional Privilege (LPP) – section 42 of the FOIA.
10. Following an internal review the council wrote to the complainant on 7 May 2019. It stated that it was maintaining its position.

Scope of the case

11. On 17 May 2019 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
12. Due to the nature of the request it occurred to the Commissioner that the information was likely to constitute environmental information as defined in regulation 2(1) of the EIR; she, therefore, invited the council to reconsider the request under the EIR.
13. The council reconsidered the request under the EIR and confirmed that it was applying the exceptions for material in the course of completion (regulation 12(4)(d)), the course of justice (regulation 12(5)(b)) and protection of the environment (regulation 12(5)(g)) to withhold the information previously withheld under section 42 of the FOIA.
14. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the information.

Reasons for decision

Is it Environmental Information?

15. During the course of her investigation the Commissioner advised the council that she considered the requested information fell to be considered under the EIR. The Commissioner has set down below her reasoning in this matter.
16. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant part of the definition are found in 2(1)(a) to (c) which state that it is as any information in any material form on:
 - '(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements...'*
17. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.
18. In this case the withheld information relates to measures which will have an impact on the use of land. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information Tribunal in the case of *Kirkaldie v IC and Thanet District Council (EA/2006/001)* ("Kirkaldie").

19. In view of this, the Commissioner has concluded that the council wrongly (initially) handled the request under the FOIA and breached regulation 5(1) of the EIR. As the council subsequently corrected this the Commissioner does not require the council to take any steps in this regard.

Regulation 14 – refusal to disclose information

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

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

23. The council withheld the information specified in the following part of the request under regulation 12(5)(b):

"..I request all relevant information relating this concerning matter Inc all legal advice documents.."
24. Regulation 12(5)(b) of the EIR requires that a public authority can refuse to disclose information if its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature.
25. The course of justice at regulation 12(5)(b) is a broad exception which encompasses any adverse effect on the course of justice and the Commissioner considers that it is not limited to only information that is subject to LPP. This allows for information that is not subject to LPP to still be covered by the exception, as long as disclosure would adversely affect the course of justice 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. The Tribunal affirmed this view in the

case of Surrey Heath Borough Council v Kevin McCullen and the ICO (EA/2010/0034) when they acknowledged that the regulation covered more than just LPP.

26. As such, the Commissioner accepts that 'an inquiry of a criminal or disciplinary nature' is likely to include information about investigations into potential breaches of legislation, for example, planning law or environmental law.
27. Having considered the council's arguments, and reviewed the withheld information, the Commissioner recognises that the information consists of legal advice and associated commentary on that advice which relates to the live and ongoing question of the use of the Common. It is clear that the public disclosure of such information would not only inhibit the council's ability to effectively conduct its legal obligations, but would damage public confidence in such inquiries being undertaken appropriately and with due regard to the rights and expectations of involved parties.
28. In view of the above, the Commissioner is satisfied that it is more probable than not that disclosure of the information would adversely affect the course of justice, and that the exception provided by regulation 12(5)(b) is therefore engaged.

The public interest test

29. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(b) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out her assessment of the public interest test, the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

The public interest in disclosure

30. The council has acknowledged that there is a general public interest in promoting transparency, accountability, public understanding and involvement in the democratic process, and publishing the legal advice would aid this.
31. The complainant has highlighted that the Common is "...common land owned by the people of Beccles..." and they have consider that the council via the Beccles Fenland Charity Trust have failed to protect the

integrity of the Common. The complainant has also directed the Commissioner to a decision by the First-Tier Information Rights Tribunal which overturned an application of section 42 of the FOIA in relation to another request to the council for similar information².

The public interest in maintaining the exception

32. The council has stated that release of the legal advice received by the trust into the public domain would be detrimental to the Trust's success in any court proceedings in respect. Disclosing the information would make it available to the occupants of Woodview Farm, who could use the advice to undermine the Trust's legal position. The council has confirmed that the legal advice in question has not lost the quality of confidence and that there is a possibility that litigation could take place in the future over this live issue.
33. The council has argued that the Trust has a duty to ensure that it protects the special environmental nature of the Common and if the Trust's confidential legal advice was released into the public domain the occupants of Woodview Farm could instigate legal proceedings on the basis that the Trust's solicitor has advised that the Trust that the case may be lost if it went to court.
34. The council has also argued that disclosing the information would undermine its ability to and duty to protect the Common for the use of all residents.

Balance of the public interest

35. The public interest inherent in this exception will always be strong due to the fundamental importance of the general principle of upholding the administration of justice, and in particular, the importance of not prejudicing inquiries
36. The Commissioner has referred to the decision of the First-Tier (Information Rights) Tribunal cited by the complainant. She notes that it relates to a request made in 2014 for legal advice relating to the Common and that the Tribunal overturned the Commissioner's upholding

² EA/2015/0077, 23 February 2015

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

of the council's use of section 42 to withhold the advice and ordered disclosure of the information.

37. The Commissioner is mindful of the similarities between the cases, however, she is not bound by decisions made by the Tribunal and, furthermore, she also considers that there are significant material differences between the cases. Firstly, in the case considered by the Tribunal, it is apparent that the privilege attached to the legal advice in question had been lost. The advice and associated correspondence in the current case has not otherwise been placed in the public domain.
38. Secondly, the Commissioner notes that information in the current case explicitly relates to a live, ongoing legal process. The Commissioner considers that these two factors provide strong reasons for not disrupting the integrity of the legal process and impacting on the course of justice.
39. The Commissioner acknowledges that the complainant has genuine concerns about the Trust and the council's custodianship of the Common and there is a broad interest in the local community in relation to these matters. However, it is clear to the Commissioner that disclosing the information would undermine the Trust's legal position and impede its ability to oversee the Common in the interests of the local public. In other words, disclosing the information would harm the interests the complainant is seeking to promote.
40. The Commissioner also recognises that the complainant's arguments for disclosure are based on concerns that the Trust might not be protecting the Common in the best interests of the public. However, it is not the Commissioner's role to adjudicate in such matters. Moreover, she considers that the fact that the matter is ongoing bears out the council's public interest concerns regarding the timing of disclosure and the risks of exposing the council's legal position. The Commissioner does not consider it to be the role of the EIR to circumvent or potentially undermine existing legal processes or remedies.
41. Having considered the above factors, the Commissioner is satisfied that the public interest test supports the maintenance of the exception.
42. On the basis that all the withheld information has been correctly withheld under regulation 12(5)(b), the Commissioner does not need to consider the additional application of regulation 12(4)(d) and regulation 12(5)(g) to withhold the information.

Right of appeal

43. 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@justice.gov.uk

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

44. 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.
45. 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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