

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 2 March 2023

Public Authority: Boughton Malherbe Parish Council
Address: Rill House
The Street
Ulcombe
Maidstone
ME17 1DR

Decision (including any steps ordered)

1. The complainant has requested information from Boughton Malherbe Parish Council (the Council) about a village green. The Council refused to disclose the requested information due to it being commercially sensitive.
2. The Commissioner's decision is that the Council was entitled to withhold the information under regulation 12(5)(e) of the EIR. However, the Council breached regulation 14(3) of the EIR as it incorrectly issued its refusal under FOIA and not the EIR.
3. The Commissioner does not require the Council to take any further steps.

Request and response

4. On 24 August 2022, the complainant wrote to the Council and requested information in the following terms:

"Please send me all correspondence and records of discussions that Boughton Malherbe PC holds which refer to its desire to acquire the plot of land known as the village green written, produced, edited or circulated since February this year."

5. The Council responded on 20 September 2022. It stated that it does hold the requested information, but that it was withholding it by virtue of section 43(2) of FOIA.
6. Following an internal review the Council wrote to the complainant on 11 November 2022. It maintained its original position of withholding the requested information by virtue of section 43(2).

Reasons for decision

Is the requested information environmental?

7. Regulation 2(1) of the EIR defines environmental information as being information 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)...as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be

affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

8. The Commissioner is satisfied that the requested information falls under the definition of 'measures' given at regulation 2(1)(c), as it relates to the Council's wish to acquire the land known as the 'village green', in order to protect its future as an asset for the local community. For procedural reasons, he has therefore assessed this case under the EIR.
9. As regulation 12(5)(e) of the EIR is the rough equivalent of section 43 of FOIA, in the interests of expediency, the Commissioner has proceeded on the basis that this is the exception the Council would have relied upon to withhold the same information, had it dealt with the request under EIR.

Regulation 12(5)(e) – commercial confidentiality

10. Regulation 12(5)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
11. The Commissioner's guidance¹ on regulation 12(5)(e) sets out that the exception should be broken down into a four-stage test, and that all four elements of the test are required in order for the exception to be engaged.
12. Firstly, the Commissioner has considered whether the requested information is commercial in nature. For information to be commercial in nature it needs to relate to a commercial activity. A commercial activity generally involves the sale or purchase of goods or services, usually for profit. In this case the withheld information relates to the Council's wish to purchase the piece of land referred to as the village green. The Commissioner therefore accepts that the information is commercial in nature as it will relate to a commercial transaction.
13. Secondly, the Commissioner has considered whether the requested information is subject to confidentiality provided by law. The Commissioner considers that confidentiality provided by law includes

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/commercial-or-industrial-information-regulation-12-5-e/>

confidentiality imposed on any person by the common law duty of confidence, by a contractual obligation, or by statute. It covers information obtained from a third party, information jointly created or agreed with a third party, and it also covers information which a public authority creates itself. The Commissioner is satisfied in this case that the Council can rely on the common law duty of confidence in its application of regulation 12(5)(e). The very nature of the withheld information, and the discussions contained therein, carry an implied obligation of confidence.

14. Thirdly, the Commissioner has considered whether the confidentiality is protecting a legitimate economic interest. It is not enough to say that disclosure of information **might** cause some harm to an economic interest. A public authority must demonstrate that disclosure **would** cause harm. Having viewed the withheld information, and having had regard to the wider circumstances relating to it, the Commissioner is satisfied that the confidentiality is protecting a legitimate economic interest of the Council itself, as well as that of an identified third party. The Commissioner is unable to identify the third party within this decision notice, nor the specific nature of the envisaged harm which disclosure would likely cause, in order that he himself does not inadvertently cause harm to those economic interests.
15. Finally, the Commissioner is satisfied that the confidentiality would inevitably be affected if the Council disclosed this information.
16. Since the four tests have been satisfied, the Commissioner finds that regulation 12(5)(e) of the EIR is engaged as disclosing the requested information would adversely affect the Council's and the third party's commercial interests. He has therefore gone on to consider the associated public interest test.

Public interest test

17. The Council recognises that there is a general public interest in promoting transparency, accountability, as well as public understanding and involvement in the democratic process. However, it considers that this general public interest has already been satisfied through published minutes which make the public aware of the Council's policy to pursue acquisition of the village green.
18. The complainant argues that disclosure would not result in any loss to any party, and that it is in the public interest to know what activity the Council is undertaking on the matter whilst reserving substantial funds, for a purpose which the complainant considers that the Council is unlikely to achieve.

19. The Council considers that the village green is important to the local community, and firmly believes that its successful registration as an Asset of Community Value gives further weight to the argument that securing its public ownership is in the public interest. The Council argues that it wishes to avoid the harm envisaged if it were to disclose the requested information, and the public interest therefore lies with maintaining the exception.
20. The Commissioner has considered both the complainant's and the Council's arguments, along with the withheld information. Whilst there is always a public interest in public authorities being open and transparent regarding funds and spending of public money, in this case the Commissioner is not persuaded that the specific content of the information which has been withheld by the Council would aid public interest or understanding – beyond the information already in the public domain. Further, he finds that there is a wider public interest in the Council, along with the identified third party, being able to maintain their commercial positions without risk of harm caused by disclosure of related information.
21. On balance, the Commissioner finds that the public interest favours maintaining the exception at regulation 12(5)(e) of the EIR in this case, and he does not require the Council to take any further steps.

Procedural matters

22. As the Council issued its refusal under FOIA rather than the EIR it breached regulation 14(3) of the EIR, which concerns a public authority's obligation to specify the EIR exception relied upon to withhold the requested environmental information.

Right of appeal

23. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

24. 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.
25. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF