



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case Nos. EA/2015/0132 + 0153

ON APPEAL FROM:

The Information Commissioner's
Decision Notices No: FER0571565 + FER0576056
Dated: 19 May 2015 + 24 June 2015

Appellant: DR STEPHEN WHITEHEAD

Respondent: INFORMATION COMMISSIONER

On the papers at: FOX COURT, LONDON

Date of hearing: 15 DECEMBER 2015

Date of decision: 5 JANUARY 2016

Date of promulgation: 7 JANUARY 2016

Before

ROBIN CALLENDER SMITH
Judge

and

DAVE SILVERS and MALCOLM CLARKE
Tribunal Members

Representations:

For the Appellant: Dr Stephen Whitehead
For the Respondent: Mr Eric Metcalfe, of Counsel, and Ms Sonia Taylor, Solicitor on behalf of the Information Commissioner.

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

Subject matter: EIR 2004

Exceptions, Regs 12 (4) and (5)

- Internal communications 4 (e)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notices dated 19 May and 24 June 2015 and dismisses the appeals.

REASONS FOR DECISION

Background

1. Four Marks is a small village with its own Parish Council in Hampshire.
2. A piece of land in the parish known as “Storey’s Sanctuary” – after a former Parish Councillor who was instrumental in having that open space land made available to the public – had been unoccupied for many years.
3. An owner of property adjacent to part of the land had obtained Possessory Title to the land.¹ Fencing had been erected on other parts by adjoining landowners.

The requests for information

¹ Possessory Title depends on adverse possession and can be upgraded to Absolute Title after being in possession as proprietor for 12 years: Land Registration Act 2002 (s.62 (1), (4)).

4. Dr Stephen Whitehead (the Appellant) made two separate information requests to Four Marks Parish Council which are the subject of these two appeals.

5. **In the first**, dated 24 October 2014, he asked:
 1. Please provide a copy of the minutes of the closed session of the Parish Council held on 17 September 2014. This was requested in my email of 7 October.
 2. Please state whether the Parish Council has in fact adopted a publication scheme in accordance with section 19 (1) of the Freedom of Information Act 2000. If so, please provide a copy as requested in my email of 13 October and state on what date it was adopted and on what date it was approved by the Information Commissioner. Please also state whether and if so in what manner it has been published in accordance with section 19 (4).
 3. Please provide a full copy of the standing orders applying to meetings of the Parish Council. This was requested in my email of 13 October.

6. The Parish Council, in its response of 27 November 2014, refused to provide the information requested at point 1, provided narrative information in relation to point 2 and provided a copy of the information requested at point 3.

7. In subsequent correspondence the Parish Council relied, on 12 December 2014, on its conclusion that the request for the copy of the minutes came under the Environmental Information Regulations 2004. It applied the exceptions at Regulations 12 (4) (e), 12 (5) (b) and 12 (5) (d).

8. In respect of this the Information Commissioner decided that Regulation 12 (4) (e) had been correctly applied on the basis that the exception allowed public authority to refuse to disclose information in relation to internal communications.

9. **In the second**, dated 10 December 2014, he asked the Parish Council:

Please provide a copy of the minutes of the closed session of the Parish Council held on 26 November 2014.

10. The Parish Council eventually responded on 23 January 2015. It refused to provide the information citing the same EIR exceptions.

11. The Information Commissioner decided, on 24 June 2015, that Regulation 12 (4) (e) had been correctly applied for the same reason as the first information request.

The appeals to the Tribunal

12. The Appellant's arguments in relation to these appeals are set out in his separate Grounds of Appeal.

13. He has amalgamated and expanded on both of these in his 13-page, 96-paragraph reply to the Information Commissioner's Responses to each appeal. In summary he states:

1. EIR exception Regulation 12 (4) (e) was not engaged because neither document were internal communications.
2. The Information Commissioner's findings about the balance of the public interest did not support the decisions that the exception was correctly applied.
3. The Information Commissioner had failed to consider fully all the relevant factors favouring the public interest in disclosure.
4. The Information Commissioner had given excessive weight to the "safe space" and "chilling effect" arguments in favour of applying the exception.
5. The public interest in maintaining the exception was, in fact, outweighed by the public interest in disclosure.

14. He sets out (at Paragraphs 15 – 21) what he contended was the background history about the land to which the documents he was seeking refer. In summary:

1. The withheld documents contained minutes of discussions relating to the whole or part of what was at one time a single irregularly-shaped plot of land in the village of Four Marks. The plot had no specific name and the identity of the legal owner was unknown. It was bounded on all sides by residential plots except for a short part of the southern boundary with a passageway between two gardens at the eastern end leading to the road. It was formerly in use as pasture but had been unused for many years and had become

overgrown with trees and scrub. It had never been in use as public open space.

2. Part of the land at the western end had been enclosed many years ago by neighbouring residents who subsequently registered possessory title and obtained outline planning permission for housing development that had not, as yet, been carried out. Another area of land towards the centre of the original plot was enclosed by another resident in approximately 1998 with the stated intention of preventing any attempt at development.
3. The name "Storey's Sanctuary" was not in general use but was understood to be used by the Parish Council to refer to the part of the original plot excluding the enclosed portion at the western end.
4. From 2005 until 2014 there had been sporadic annexations of portions of the land with the Parish Council then removing fences.
5. The minutes of the Parish Council and its committees showed that it had also considered the possibility of mounting some form of legal challenge to the 2011 registration of possessory title.

15. The Appellant also contended that the Parish Council was under a legal obligation to make the information available for inspection by virtue of section 228 (1) of the Local Government Act 1972.

The questions for the Tribunal

16. In both appeals the Tribunal must decide whether the relevant exception is properly engaged and, if so, where the balance of the public interest falls in terms of maintaining or disclosing the information requested.
17. The withheld information in both appeals was disclosed to the Tribunal as closed, confidential material.

Evidence

18. The Tribunal reminded itself of the guidance for the approach to be taken by courts and tribunals in respect of any closed material procedure.

19. In *Bank Mellat v HMT (no. 1)* [2013] UKSC 38, which was not a case about FOIA, Lord Neuberger said at paragraphs 68-74 that:

- i) If closed material is necessary, the parties should try to minimise the extent of any closed hearing.
- ii) If there is a closed hearing, the lawyers representing the party relying on the closed material should give the excluded party as much information as possible about the closed documents relied on.
- iii) Where open and closed judgments are given, it is highly desirable that in the open judgment the judge/Tribunal (i) identifies every conclusion in the open judgment reached in whole or in part in the light of points made or evidence referred to in the closed judgment and (ii) says that this is what they have done.
- iv) A judge/Tribunal who has relied on closed material in a closed judgment should say in the open judgment as much as can properly be said about the closed material relied on. Any party excluded from the closed hearing should know as much as possible about the court's reasoning, and the evidence and the arguments it has received.

20. In *Browning v Information Commissioner and Department for Business, Innovation and Skills* [2013] UKUT 0236 (AAC) the Upper Tribunal issued similar guidance about the use of closed material and hearings in FOIA cases, noting that such practices are likely to be unavoidable in resolving disputes in this context:

- i) FOIA appeals are unlike criminal or other civil proceedings. The Tribunal's function is investigative, i.e. it is not concerned with the resolution of an adversarial civil case based on competing interests.
- ii) Closed procedures may therefore be necessary, for consideration not only of the disputed material itself, but also of supporting evidence which itself attracts similar sensitivities.
- iii) Parliament did not intend disproportionate satellite litigation to arise from the use of closed procedures in FOIA cases.
- iv) Tribunals should take into account the Practice Note on Closed Material in Information Rights Cases (issued in May 2012). They should follow it or explain why they have decided not to do so.
- v) Throughout the proceedings, the Tribunal must keep under review whether information about closed material should be provided to an excluded party.

21. The closed bundles in this appeal contained the disputed information.

22. It was necessary for the Tribunal to see this withheld information – and to consider the totality of both – in relation to the exemptions claimed.
23. The Tribunal has considered carefully and rigorously the Appellant's points and concerns already expressed in the notices of appeal and in his other representations and submissions.
24. As a result of its conclusions and reasons, the Tribunal's decision is an open one and there is no closed, confidential annex.

Conclusion and remedy

25. The reasons which follow are common to both information requests.
26. The Tribunal is satisfied that the correct EIR exemption, Regulation 12 (4) (e), is engaged in each situation.
27. The concept of a "communication" under that Regulation clearly includes any information someone "intends to communicate to others, or places on file so that others may read it".
28. On that basis the minutes in respect of the first request clearly constitute a "communication".
29. The minutes in question included details of communications between the public authority and an external solicitor. It was circulated within the public authority for its own use.
30. The Information Commissioner correctly observed that it was "the form of the communication that is important, rather than the content" [Paragraph 18 DN].
31. The minutes of the closed session were correctly characterised as an "internal communication".

32. The same reasoning obtains for the second request (in relation to Minute 14.162).
33. In terms of the public interest balancing test the Tribunal observes that neither of the Decision Notices reflect fully the importance these kind of contentious local issues can have on the members of the community affected by them.
34. In a sense, the smaller the community the greater interest will be – particularly on matters relating to common land and its ownership – in knowing exactly what is being discussed and how the outcome may affect the community.
35. By the same token that increases the countervailing factors that require considerable weight to be given to the public interest in maintaining the exemptions particularly when the issue at the heart of both information requests was still live.
36. The public authority in the circumstances had a greater need for a safe space to reach decisions away from external interference and without revealing its options or intentions to other parties in a situation where legal processes could be underway because it had yet to determine “what action to take, if any, in respect of the ongoing encroachment by neighbouring landowners”.
37. The Tribunal agrees that disclosure would have inhibited free and frank discussion and potentially could have led to poorer decision-making. The Timing of the two requests were of key importance in these appeals. The requests were both made within a short time of the meetings to which they related and when the issues were still very much live and under active consideration by the Council. Had they been made after the issues had been resolved the public interest in refusing the requests is likely to have been much weaker.

38. The Parish Council needed the safe space, in addition, to maintain the confidentiality of legal advice and to ensure that it was not discouraged from obtaining proper legal advice in appropriate cases.
39. Disclosure of the requested information could “detrimentally affect the decision-making process” and potentially “lead to less full and frank advice being provided to the council in future”.
40. The Tribunal concludes that the “safe space” considerations clearly outweigh the important public interest in allowing the requested information to become public.
41. In so far as the “chilling effect” arguments exist they are only minor considerations in the public interest balancing exercises considered in each appeal by the Tribunal.
42. With respect to the Appellant’s arguments about the provisions of the Local Government Act 1972 and the legal requirement for minutes to be open for inspection under section 228 these are misplaced and erroneous.
43. Both Schedule 12 of the Local Government Act 1972 and Regulation 9 of the Openness of Local Government Bodies Regulations 2014 (SI 2014/2095) provide a legal framework governing the publication of minutes of local authorities and with extensive provision for information contained in such minutes to be withheld on the grounds of being confidential or exempt.
44. Particularly in the circumstances of these two appeals there is nothing to prevent closed minutes of the local authority being an “internal document” for the purposes of the Environmental Information Regulations.
45. For these reasons, both appeals must fail.

46. Our decisions are unanimous.

47. There is no order as to costs.

Robin Callender Smith
Judge
5 January 2016