

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

Date: 19 May 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 the withheld information. He does not require it to take any steps to ensure compliance with the legislation.

Background

2. As way of background, the council has explained that the withheld minutes concern a piece of land referred to by members of the parish as 'Storey's Sanctuary' (after a former Parish Councillor who was instrumental in having this piece of open space land being made available to the public). The land has been unoccupied for many years and an owner of a dwelling adjacent to part of the land has obtained Possessory Title to the land. Fencing has also been erected on the land by adjoining landowners. 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.

Request and response

3. On 24 October 2014, the complainant wrote to Four Marks Parish Council ('the council') and requested information in the following terms:
 - 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 s 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."
4. The council responded on 27 November 2014. It 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.
5. The complainant first expressed dissatisfaction with the response on 27 November 2014. Further correspondence passed between the complainant and the council and then on 12 December 2014 the council said that the request for a copy of the minutes comes under the EIR and applied the exceptions at Regulations 12(4)(e), 12(5)(b) and 12(5)(d).
6. The complainant expressed dissatisfaction with the EIR response on 14 and 16 December 2014. On 15 and 16 December 2014, the council informed the complainant that there is nothing further to add and suggested he contact the ICO.

Scope of the case

7. The complainant contacted the Commissioner on 16 February 2015 to complain about the way his request for information had been handled.
8. 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 17 September 2014.

9. The Commissioner has first considered whether the exception for internal communications at Regulation 12(4)(e) has been correctly applied.
10. 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

Regulation 12(4)(e)

11. 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.
12. The Commissioner has published guidance¹ on regulation 12(4)(e), which includes a description of the types of information that may be classified as 'internal communications.'
13. The first factor that must be considered is whether the information in question can reasonably be described as a 'communication'.
14. 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.
15. 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 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.

¹ https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf

16. 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.
17. 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.
18. 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.
19. 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.
20. 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

21. Where the exception in Regulation 12(4)(e) is engaged it is subject to a public interest test required by Regulation 12(1).
22. 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.
23. 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

24. No specific arguments in relation to the public interest in disclosing the information were submitted.

25. However, 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

26. 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.
27. 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.
28. 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 the ongoing encroachment by neighbouring landowners. 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.
29. 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.
30. 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

31. 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.

32. 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.
33. 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.
34. 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.
35. 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.
36. 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."
37. 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.

38. 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 outweighed by the public interest in favour of disclosure.

Right of appeal

39. 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

40. 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.
41. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
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SK9 5AF