

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

Date: 15 October 2021

Public Authority: Shrewsbury Town Council
Address: Riggs Hall
Castle Gates
Shrewsbury
SY1 2AS

Decision (including any steps ordered)

1. The complainant requested copies of correspondence and documents exchanged between Shrewsbury Town Council's solicitors, Hatchers, and the CSE Limited's solicitors, Martin Kaye, in relation to the sale of land adjacent to Greenfields Recreation Ground. Shrewsbury Town Council initially refused to disclose the requested information citing Sections 42 and 43 of the FOIA. However, following the Commissioner's investigation it stated that it did not hold the requested information under the FOIA.
2. The Commissioner's decision is that the requested information is environmental and is held on behalf of Shrewsbury Town Council by its solicitors. Furthermore, Shrewsbury Town Council has failed to engage regulation 12(5)(b) and regulation 12(5)(e).
3. The Commissioner also finds that Shrewsbury Town Council breached regulation 5(2) of the EIR.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information
5. 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

6. On 25 May 2020 the complainant wrote to Shrewsbury Town Council (the Council) and requested information in the following terms:

"In addition to my FOI request to see and have copies of correspondence and documents exchanged between Town Council and their solicitors Hatchers in Sale of Greenfields Recreation Ground¹. Can I also request the same for CSE² Solicitors Martin Kaye, Telford".
7. The Council responded on 25 June 2020. It stated that it was unable to provide the requested information in accordance with Section 42 (Legal Professional Privilege) and Section 43 of the FOIA (Commercial Interests).
8. Following a review of a number of related requests submitted by the complainant, the Council wrote to him on 28 September 2020 and stated the requested information was refused under Sections 42 and 43 of the FOIA as it was 'commercial in nature' and subject to 'legal professional privilege between solicitors and their clients' respectively.

Scope of the case

9. The complainant contacted the Commissioner on various occasions in 2020 and 2021 to complain about the way his request for information had been handled. In particular, he was unhappy with the Council's decision to apply a blanket refusal under Sections 42 and 43 of the FOIA.
10. The Commissioner contacted the Council on a number of occasions in relation to the complaint and on 10 June 2021 requested a schedule and copies of the withheld information. Although the Commissioner had not seen the information she suggested it might be environmental as defined by the EIR and invited the Council to consider this point when responding.

¹ This request has been dealt with by the Commissioner in Decision Notice reference: IC-110276-B7Q4

² CSE Developments (Shropshire) Limited is the name of the developer that purchased Greenfield Recreation Ground

11. The Council responded on 17 August 2021 and stated that it did not hold the requested information under the FOIA as all correspondence had been between its solicitors, Hatchers, and CSE's solicitors, Martin Kaye.
12. The scope of the Commissioner's investigation will be to determine whether the requested information is held by the Council, and if so, whether information is environmental as defined by the EIR. If it is, the Commissioner will go on to consider whether the original arguments advanced by the Council to withhold it have been engaged.

Reasons for decision

13. In its initial responses to the complainant and the Commissioner, the Council indicated the information requested was covered by the FOIA by citing the exemptions under Sections 42 and 43. The Commissioner will therefore start by considering the appropriate legislative regime applicable to the request.

Is the requested information environmental as defined by the EIR?

14. 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);

15. The Commissioner considers that, as the information requested in this case relates to the sale of public land to a private developer for domestic housing, it is a measure affecting or likely to affect the elements and factors of the environment, such as land and landscape, as defined by Regulation 2(1)(a). She is therefore satisfied that the information falls within the definition of environmental information under Regulation 2(1)(c) of the EIR.

Section 3(2)(b) of the FOIA/Regulation 3(2)(b) of the EIR

16. The next question for the Commissioner to consider is whether the requested information is held by Hatchers on behalf of the Council. The Council originally applied Sections 42 and 43 to withhold the requested information in its entirety implying that it was in fact held for the purposes of the FOIA. However, it subsequently altered its position when the Commissioner requested the withheld information stating it did not hold the information under the FOIA.

17. Section 3(2)(b) of the FOIA, which is worded the same as Regulation 3(2)(b) of the EIR, states;

'For the purposes of this Act, information is held by a public authority if-

(b) it is held by another person on behalf of the authority'.

18. The Commissioner's interpretation of Section 3(2)(b) is that information is held by a public authority under the terms of the FOIA or the EIR if it is held by another person (which means a legal person, and could be an individual or an organisation), for the public authority's own purposes³.

³ https://ico.org.uk/media/for-organisations/documents/1148/information_held_by_a_public_authority_for_purposes_of_foia.pdf

19. In relation to information held by solicitors instructed to act on behalf of a public authority client, the Commissioner's guidance⁴ makes the point that this will generally be held on behalf of the public authority. However, this distinction is not always clear cut as the guidance goes on to point out that 'solicitors may hold information for their own purposes' and not on behalf of a public authority.
20. What the Commissioner has to decide is whether the requested information is owned by the Council as the client or by the solicitors, Hatchers, for their own purposes.
21. Paragraph 3.1 of the Code of Conduct for Solicitors⁵ published by the Solicitors Regulation Authority states a solicitor can;

'.....only act for clients on instructions from the client, or from someone properly authorised to provide instructions on their behalf'.
22. Paragraph 6.3 of the Code of Conduct states a solicitor must;

'.... keep the affairs of current and former clients confidential unless disclosure is required or permitted by law or the client consents'.
23. These paragraphs describe the nature of the solicitor/client relationship and how the solicitor acts on instruction from the client and on their behalf, and must keep their information confidential.
24. Generally speaking, documents sent or received by a firm of solicitors instructed by a public authority are owned by the public authority as the solicitors under agency principals.
25. In this case the solicitors, Hatchers, have been instructed by the Council to deal with the sale of land owned by the Council, Greenfields Recreation Ground. The Commissioner therefore finds that documents sent by Hatchers to and received from the developer's solicitors, Martin Kaye, are held on behalf of the Council under Regulation 3(2)(b) of the EIR.

⁴ https://ico.org.uk/media/for-organisations/documents/1148/information_held_by_a_public_authority_for_purposes_of_foia.pdf

⁵ <https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/>

Regulation 5 of the EIR – Duty to make available environmental information on request

26. Regulation 5(1) of the EIR states that *"a public authority that holds environmental information shall make it available on request."* This is subject to any exceptions that may apply.

Regulation 5(2) of the EIR – Time to respond

27. As explained above, Regulation 5(1) requires a public authority to disclose requested information. Regulation 5(2) of the EIR requires this information to be provided to the requester within 20 working days following receipt of the request.

28. The complainant submitted his request on 25 May 2020 and the Council responded on 25 June 2020 by stating it did not hold the requested information. This is provided for under Regulation 12(4)(a) of the EIR which states;

'12(4) For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that –

(a) It does not hold that information when an applicant's request is received'

29. As the Council incorrectly applied Regulation 12(4)(a) and failed to respond to the complainant within 20 working days, Commissioner finds that it breached Regulations 5(1) and 5(2) of the EIR.

The FOIA Exemptions applied by the Council

30. In its initial response to complainant, the Council refused to disclose the requested information under Sections 42 and 43 of the FOIA. However, it did not elaborate as to why it believed these exemptions were applicable nor did it carry out a public interest balancing test. The Commissioner will now deal with each of these exemptions or the EIR equivalent exceptions in turn.

Section 42 of the FOIA – Legal Professional Privilege/Regulation 12(5)(b) of the EIR – adverse affect on the course of justice

31. As the Commissioner has decided the information requested is 'environmental', she will consider the applicability of the EIR exceptions closest in nature to the FOIA exemptions cited by the Council.
32. The closest equivalent to Section 42 under the EIR is Regulation 12(5)(b) which states;

'.....a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(b) the course 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

33. 'Adversely affect' means that there must be an identifiable harm to or negative impact on the interests identified in the exception. Furthermore, the threshold for establishing an adverse effect is a high one, since it is necessary to establish that disclosure would have an adverse effect. 'Would' means that it is more probable than not, ie a more than 50% chance that the adverse effect would occur if the information were disclosed. If there is a less than 50% chance of the adverse effect occurring, then the exception is not engaged.
34. The Council cited Section 42 of the FOIA and gave the reason that the information was subject to 'legal professional privilege between solicitors and their clients'.
35. The Commissioner has therefore assumed, based on the correspondence she has seen between the complainant and the Council, that the Council applied section 42 because it believed some or all of the requested information was covered legal professional privilege. The Commissioner accepts that the exception under Regulation 12(5)(b) of the EIR is designed to encompass information that would be covered by Legal Professional Privilege (LPP).
36. 'There are two types of privilege - litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. Legal advice privilege is attached to confidential communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation.
37. Despite requesting the information from the Council, it has not provided it to her. However, based on the wording of the request and the subsequent correspondence between the Council and the complainant, she is satisfied that it consists of correspondence between two firms of solicitors, Messrs Hatchers and Martin Kaye, relating to the sale of Council owned land, namely, land adjacent to Greenfields Recreation Ground. On that basis and in the absence of any detailed submissions from the Council, it is difficult to see why it would be

covered by legal professional privilege which only covers lawyer to client correspondence (and litigation correspondence) rather than lawyer to lawyer correspondence between separate parties.

38. The Commissioner therefore finds that the Council has not advanced sufficient arguments to support its initial position that the requested information is covered by legal professional privilege necessary to engage either Section 42 of the FOIA or Regulation 12(5)(b) of the EIR.
39. The other FOIA exemption cited by the Council to withhold the requested information was Section 43 – commercial interests.

Section 43 of the FOIA – Commercial Interests/Regulation 12(5)(e) of the EIR – adverse affect to the confidentiality of commercial or industrial information

40. Section 43(2) of the FOIA states that:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

41. The exemption can be engaged on the basis that disclosing the information either "would" prejudice commercial interests, or the lower threshold that disclosure only "would be likely" to prejudice those interests. For the Commissioner to be convinced that prejudice "would" occur, she must be satisfied that there is a greater chance of the prejudice occurring than not occurring. To meet the threshold of "would be likely to" occur, a public authority does not need to demonstrate that the chance of prejudice occurring is greater than 50%, but it must be more than a remote or hypothetical possibility.
42. In the Commissioner's view it is not sufficient for a public authority to merely assert that prejudice would be likely to occur to another party's commercial interests to engage the exemption. Nor is it sufficient for any third party to assert that such prejudice would be likely to occur. The public authority must draw a causal link between disclosure of the information and the claimed prejudice. It must specify how and why the prejudice would occur.
43. As the requested information is environmental, the Commissioner has considered this request under the EIR. The comparable provision to Section 43 of the FOIA under the EIR is Regulation 12(5)(e).
44. Regulation 12(5)(e) states a public authority may refuse to disclose information to the extent that its disclosure would adversely affect;

'(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest'

45. In this case, in spite of the Commissioner requesting detailed submissions from the Council, it has not advanced any arguments as to why disclosure of the requested information would prejudice commercial interests or adversely affect the confidentiality of commercial or industrial information. All it has stated in its responses is; 'Section 43 – Commercial Interests'. The Commissioner is not persuaded that any or sufficient evidence has been advanced by the Council to engage either Section 43 of the FOIA or Regulation 12(5)(e) of the EIR.

Other matters

46. The Commissioner would like to remind the Council of the importance of engaging with her when responding to requests for detailed arguments under the FOIA and EIR, including those relating to the public interest, in support of any information redacted or withheld. The Commissioner would also like to draw the Council's attention to her detailed guidance on the FOIA⁶ and the EIR⁷ on the ICO's website.
47. The Commissioner uses intelligence gathered from individual cases to inform our insight and compliance function. This aligns with the goal in our draft "Openness by design"⁸ strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our "Regulatory Action Policy"⁹.

⁶ <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/>

⁷ <https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/>

⁸ https://ico.org.uk/media/about-the-ico/documents/2615190/openness_by_-_design_strategy_201906.pdf

⁹ <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/>

Right of appeal

48. 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

49. 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.
50. 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

**Laura Tomkinson
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**