

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

Decision notice

Date: 29 March 2021

Public Authority: Steyning Parish Council
Address: The Steyning Centre
Fletcher's Croft
Steyning
BN44 3XZ

Decision (including any steps ordered)

1. The complainant requested copies of correspondence sent by a particular parish councillor. Steyning Parish Council ("the Parish Council") initially refused the request as manifestly unreasonable before stating that it had disclosed the information voluntarily.
2. The Commissioner's decision is that the Parish Council did not in fact hold any relevant information for the purposes of the EIR. However, the Parish Council failed to issue a refusal notice stating that it did not hold the information within 20 working days and therefore breached Regulation 14(2) of the EIR. The Parish Council also failed to carry out a reconsideration (internal review) of its response and therefore breached Regulation 11 of the EIR.
3. The Commissioner does not require further steps.

Request and response

4. On 14 October 2019, the complainant wrote to the Parish Council and requested information in the following terms:

"I am issuing a Freedom of Information request for copies of any correspondence between Cllr Campbell ["the Parish Councillor"] and any Steyning based organisation or local protest/special-interest

group that includes reference to the current Public Consultation of the draft Neighbourhood Plan (or Community Plan) and/or reference to proposed Local Green Space designations.

"This FoI covers any email correspondence from all email accounts authored and/or sent by Cllr Paul Campbell or Mr Paul Campbell as an individual or acting on behalf of a group, as well as any similar written correspondence that may have been posted or hand-delivered."

5. The Parish Council's refusal notice was dated 25 February 2020, but does not appear to have been communicated to the complainant until 6 March 2020. It relied on Regulation 12(4)(b) to refuse the request. The Parish Council stated that it did not hold relevant information and that responding to the request would cause an unjustified burden. However, it also noted that the Parish Councillor would voluntarily publish his correspondence.
6. The complainant requested a review on 24 April 2020, The Parish Council wrote to the complainant on 15 June 2020 stating that it was declining to carry out a review.

Scope of the case

7. The complainant first contacted the Commissioner on 17 December 2019 to complain about the lack of response from the Parish Council. The Commissioner was required to issue decision notice FS50898379 ordering the Parish Council to respond.¹
8. The complainant then contacted the Commissioner on 21 July 2020 to complain about the response he had finally received. Given the Parish Council's response of 15 June, the Commissioner considered that requiring the Parish Council to complete an internal review would serve no useful purpose and accepted the case for further review.
9. The Commissioner commenced her formal investigation on 23 December 2020 with a letter to the Parish Council. She noted that the Parish Council was simultaneously claiming that it held no information, that it had already published the information (that it apparently did not hold) and that it would be manifestly unreasonable to be expected to provide

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2020/2617234/fs50898379.pdf>

the information – information which it either did not hold or had already published. The Commissioner pointed out that these stances were self-evidently contradictory and asked the Parish Council to revisit the request and, if it still wished to rely on Regulation 12(4)(b), explain why responding would be burdensome.

10. After several exchanges of correspondence, the Parish Council explained that the Parish Councillor had already published (on a voluntary basis) his correspondence relating to the Neighbourhood Plan – which amounted to a single email that had been sent in his capacity as a ward councillor. The Parish Council therefore considered that it was unlikely that it held any relevant correspondence for the purposes of the EIR and, in the event that it did, the information would already be available to the complainant. It withdrew its reliance on Regulation 12(4)(b) of the EIR and issued a fresh response to the complainant on 9 March 2021.
11. The Commissioner therefore considers that the scope of this notice is to determine whether the Parish Council held any information within the scope of the request. She also has some concerns about the procedural handling of the request that will be dealt with below and in the “Other Matters” section.

Reasons for decision

12. 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);*
13. The Commissioner notes that the request seeks correspondence relating to the Neighbourhood Plan. The Plan sets development priorities for the local area and is therefore a "measure" affecting the elements of the environment. As the correspondence would be information on that measure, the Commissioner considers that, if the Parish Council did hold any further information it would be environmental. For procedural reasons, she has therefore assessed this case under the EIR – although this makes it neither more nor less likely that relevant information is held.

Regulation 5(1)/12(4)(a) (Held/Not Held)

14. Regulation 5(1) states that: "*a public authority that holds environmental information shall make it available on request.*"
15. Regulation 12 of the EIR states that:
- (1) *Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—*
 - (a) *an exception to disclosure applies under paragraphs (4) or (5); and*
 - (b) *in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*
 - (2) *A public authority shall apply a presumption in favour of disclosure.*
 - (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;*
16. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request,

the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, she will consider any reason why it is inherently likely or unlikely that information is not held.

17. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
18. The Commissioner's guidance on the information likely to be caught by the EIR states that, in the case of councils, the information held by elected members will not usually be held by the council itself for the purpose of the legislation.² If the elected member holds an official position within the council (such as Chair or member of the executive leadership), their correspondence might be held by the council, but if it relates to councillors personal life or ward responsibilities, it will not be "held" for the purposes of the legislation – even if it is retained on council systems.
19. The Commissioner notes that the request is directed at the Parish Councillor and covers a period of time before he was elected. The Commissioner does not consider that any correspondence the Parish Councillor sent prior to being elected would be held by the Parish Council.
20. Having viewed the email provided by the Parish Councillor, the Commissioner notes that it was clearly sent in his capacity as a ward councillor. The wording of the email made clear that it represented his personal view and not the view of the Parish Council. The Commissioner therefore considers that the email was not held by the Parish Council.
21. The clerk of the Parish Council confirmed that he had searched to see whether any relevant information was held. He noted that any correspondence that the Parish Councillor had sent on behalf of the Parish Council (as opposed to on his own behalf) should have been sent via (or copied to) the clerk. The Parish Councillor himself confirmed in correspondence that any official correspondence would have required

² <https://ico.org.uk/media/for-organisations/documents/2614663/information-held-by-a-public-authority-for-purposes-of-eir.pdf>

authorisation from a meeting of the Parish Council and gone via the clerk.

22. The Commissioner therefore considers it extremely unlikely that the Parish Council holds any information within the scope of the request. Even if the Parish Councillor did engage in any further correspondence within the time period covered by the request (and he has stated explicitly that he did not) it would not be held, by the Parish Council, for the purposes of the legislation.
23. The Commissioner is therefore satisfied that the Parish Council was entitled to refuse the request because it held no relevant information.
24. Strictly speaking, Regulation 12(4)(a) is subject to a public interest test and a presumption in favour of disclosure. However, the Commissioner does not consider that there are public interest factors which could cause a public authority to provide information it does not hold.

Procedural Matters

Refusal Notice

25. Regulation 14 of the EIR states that:
 - (1) *If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.*
 - (2) *The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.*
 - (3) *The refusal shall specify the reasons not to disclose the information requested, including—*
 - (a) *any exception relied on under regulations 12(4), 12(5) or 13; and*
 - (b) *the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).*
 - (4) *If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.*
 - (5) *The refusal shall inform the applicant—*

- (a) *that he may make representations to the public authority under regulation 11; and*
 - (b) *of the enforcement and appeal provisions of the Act applied by regulation 18.*
- 26. Whilst there is no explicit duty under the EIR to confirm or deny holding information within the scope of a request, where a public authority does not hold relevant information, it should issue a refusal notice citing Regulation 12(4)(a) of the EIR.
- 27. The Parish Council did not provide any refusal notice whatsoever until five months after the request was received. The Commissioner therefore considers that the Parish Council breached Regulation 14(2) of the EIR.

Reconsideration/Internal Review

- 28. Regulation 11 of the EIR states that:
 - (1) *Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.*
 - (2) *Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.*
 - (3) *The public authority shall on receipt of the representations and free of charge—*
 - (a) *consider them and any supporting evidence produced by the applicant; and*
 - (b) *decide if it has complied with the requirement.*
 - (4) *A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations.*
 - (5) *Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of—*
 - (a) *the failure to comply;*
 - (b) *the action the authority has decided to take to comply with the requirement; and*

(c) *the period within which that action is to be taken.*

29. The Parish Council's initial response to the request was dated 25 February 2020, but the metadata from the covering email indicates that it was not sent until 6 March 2020. The complainant wrote to the Parish Council on 24 April 2020 pointing out the contradiction in its response and asking for a review. Whilst this was 41 working days after the date on the Parish Council's response, it was only 32 working days after date the response appears to have been sent.
30. On the evidence available to the Commissioner, the request for an internal review was sent within 40 working days of the complainant receiving his initial response – it was therefore a valid request for reconsideration and the Parish Council was obliged to respond.
31. On 15 June 2020, the Parish Council finally provided a formal response to the complainant's correspondence of 24 April 2020. It stated that:

"Further to your review request of 24 April 2020. The Council's FoI Panel convened on 14 May 2020 and declined to review the Council's decision.

"The Panel had in mind that under its adopted policy:-

- Any review request should be made within a five working day limit*
- The Council is under no obligation to undertake a review, particularly where the refusal is on the ground that the request was vexatious or manifestly unreasonable*
- The information you requested has been disclosed to you voluntarily. There is nothing more to disclose.*

"The conclusive reason for declining to review is the final point. Neither SPC nor the ICO is required to consider academic issues."

32. The Commissioner considers that this response is deficient in a number of ways. Firstly, as the wording of Regulation 11 makes clear, a requestor may seek an internal review at any point within a 40 working day window of the date a public authority provides its response. Secondly, it is not for the public authority to make its own judgment on whether it does or does not wish to carry out an internal review. Once a review has been requested in writing, the EIR obliges a public authority to carry out an internal review – regardless of the reason the request was originally refused and regardless of whether the public authority believes it has provided all the relevant information it holds.

33. From the evidence presented to the Commissioner in this case it is clear that the Parish Council received a valid request for an internal review of the way the request was handled. It was therefore under an obligation to carry out a review within 40 working days. As it failed to do so, the Parish Council breached Regulation 11 of the EIR.

Other Matters

34. Regulation 16 of the EIR requires the Commissioner to promote good practice among public authorities in responding to requests for environmental information. During the course of this investigation the Commissioner has been made aware of several examples of poor request-handling practice which she is obligated to highlight.

Inappropriate use of exceptions

35. Given that the Parish Councillor was only able to identify a single piece of correspondence relevant to the request, the Commissioner considers that it was inappropriate for the Parish Council to have attempted to rely on Regulation 12(4)(b) to refuse the request.
36. If the Parish Council held no information, then it is difficult to see how it would be burdensome to comply with the request. Had it held a considerable amount of correspondence, but had already published it, it would again be difficult to see why the request would be burdensome. The Parish Council appeared to suggest that the Parish Councillor had engaged in considerable correspondence which would need to be reviewed to see what would or would not be held for the purposes of the legislation – but this subsequently turned out not to be the case.
37. It is not clear whether this arose because the Parish Council failed to ask sufficient questions of the Parish Councillor or because the Parish Councillor failed to provide accurate information about the amount of potentially relevant information. However, either way, where a public authority wishes to claim that a request would be burdensome, it should be able to make at least some quantification of the amount of information that would potentially fall within scope.

The "FOI Panel"

38. The responses from the Parish Council stated that both the request and the request for an internal review had been considered by the Parish Council's "FOI Panel" which appears to be comprised of several elected parish councillors. At the point the request was responded to, the clerk does not appear to have had any formal role on this panel.

39. It is for the Parish Council to determine the process by which it responds to information requests – so long as the process complies with the relevant legislation. However, the Commissioner considers that a public authority should ensure that those charged with dealing with requests should have the appropriate training and experience to do so.
40. In this particular case it was noticeable that the Parish Council swiftly (and rightly) dropped its reliance on Regulation 12(4)(b) once the Commissioner intervened. It is unfortunate that it took 18 months to get to the correct outcome.
41. It also appears that the Parish Councillor himself may have been part of the “FOI Panel” that adjudicated on either the request or the request for a review. Whilst his input was always going to be necessary, allowing him to partly determine the response may well have set the Parish Council off in the wrong direction.
42. Finally, the Parish Council must ensure that it is responding to information requests in manner that is both applicant-blind and motive-blind. It should also be careful, either when disclosing information under the FOIA or EIR (especially if it is published on a disclosure log) that it takes adequate care to respect the data protection rights of any third parties referred to in the correspondence.
43. The Parish Council has assured the Commissioner that processes have been improved since this request was responded to and that it strives to comply with both the letter and spirit of the legislation. The Commissioner is happy to accept these assurances.

Co-operation with the Commissioner

44. Whilst the Parish Council made efforts to co-operate with the Commissioner, it is apparent from the correspondence that this complaint could have been resolved more quickly if the Parish Councillor had been more co-operative. It is the responsibility of all members of a public authority to ensure that the organisation complies with its legal obligations – those obligations include an obligation to co-operate with the Commissioner’s investigations.

Right of appeal

45. 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

46. 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.
47. 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

Pamela Clements
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