

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

Decision notice

Date: 25 October 2021

Public Authority: Tunbridge Wells Borough Council
Address: Town Hall
Royal Tunbridge Wells
Kent
TN1 1RS

Decision (including any steps ordered)

1. The complainants have requested information about a Tree Preservation Order ("TPO"), from Tunbridge Wells Borough Council (the "Council"). The Council disclosed information it held within the scope of the request, but withheld some citing the exceptions at sections 13 (Personal data) and 12(5)(b) (Course of justice) of the EIR. The Council later revised its position and no longer relied on either of these exceptions instead saying that it had incorrectly interpreted the request and that no information was held.
2. The Commissioner's decision is that the Council's response did not comply with EIR regulation 5(2) as it was not provided to the complainants within 20 working days of their request. She also finds that, on the civil standard of the balance of probabilities, the Council does not hold any information so it complied with EIR regulation 5(1). No steps are required.

Request and response

3. On 26 July 2020, the complainants made the following clarified request for information:

"Please provide all documents, memoranda, and notes of any meetings discussions and telephone calls (both internal and

external) concerning:

(a) the TPO on the Yew Tree in the garden of 14 Albany Hill "which was part of a wider TPO made in 1983 in the Albany Hill area (see letter 24 July 2018 from [name redacted] Tree Officer).

(b) the notification to the residents of 13 Albany Hill that the Yew Tree in the garden of 14 Albany Hill was to be included in the 'wider TPO made in 1983'.

(c) the policy of TWBC regarding the scope of the power in section 23(3) of the Local Government (Miscellaneous Provisions) Act 1976.

As respects item (c) the exclusion of legal professional privilege is acknowledge (but citation of legal authority for any policy position taken by TWBC will assist resolution of the issues. I have previously asked for the legal authority for its inclusion of the word 'imminent' between "cause" and "damage" in section 23(3)(b)".

4. The Council responded, late, on 4 September 2020 and advised that no information was held in respect of parts (b) and (c) of the request. It provided some information within the scope of part (a) of the request but refused to provide the remainder. It cited the following exceptions as its basis for doing so: regulations 13(1) and 12(5)(b) of the EIR.
5. Following an internal review the Council wrote to the complainants on 16 October 2020 and maintained its position.
6. During the course of the Commissioner's investigation, at a very late stage, the Council revised its position. It explained that, on reconsideration, the information which it had applied the exceptions at regulations 13(1) and 12(5)(b) to fell outside the scope of the request. Its position was, therefore, that no information is held.
7. The complainants were not made aware of the Council's revised stance regarding the interpretation of their request. However, as she considers she is able to make a determination without their further input, the Commissioner has used her discretion to proceed directly to a decision notice to avoid any further delays.

Scope of the case

8. The complainants wrote to the Commissioner on 19 December 2020 to complain about the way their request for information had been handled. They advised that their: "*... substantive issues have been referred to the Local Authority Ombudsman ... following completion of Stages 1 and 2 of the Council's complaints procedure*", however, they were concerned that

it seemed information from a third party had been received by the Council so they wanted to see what additional information was held.

9. In subsequent correspondence, the complainants added that they also wanted the Commissioner to consider whether the Council holds any documents prepared by officers who would have visited the site before recommending the Tree Preservation Order in 1983.
10. No reference was made to the citing of regulation 12(5)(b) of the EIR. Therefore, as she noted that the Council no wished to rely on this exception (see paragraph 6), the Commissioner has not further considered it.
11. In respect of part (c) of the request, the complainants were advised by the Council that it: "... does not have a policy regarding s.23 of the Local Government (Miscellaneous Provisions) Act 1976 ... the powers under s. 23 are discretionary and the Council is under no legal obligation to exercise these powers or have a policy with regard to them". The response to this part of the request was not challenged by the complainants when requesting an internal review, or in their correspondence with the Commissioner, so she has not considered it.
12. In respect of the citing of regulation 13(1) of the EIR, the Council decided, during the Commissioner's investigation, that the information which it had previously identified falls outside the scope of the request. The Council explained that this is because:

"The information provided in the response dated 4 September 2020 was information relating to subsequent applications for tree works (Works to trees subject to a Tree Preservation Order (TPO) for the property 14 Albany Hill, Tunbridge Wells). The Council recognises that this was outside the scope of the request, however, was an attempt to provide additional information which the Council considered may have been helpful. The information redacted was personal data (namely signature and contact details) of the applicant in line with the Council's redaction guidelines for planning information. The name of the applicant was redacted in error and the Council apologises for this. This information is publically [sic] available via the Council's website on the planning portal".

13. The Commissioner has viewed the information which was originally under consideration. Only a very small amount of this has been withheld, namely the name of a resident, a private phone number, some staff names and some signatures. She notes that none of this information relates directly to the original TPO – which should be evident to the complainants from what has been disclosed and the dates of the documents, where available. Based on the wording of the request, which seeks information about the original TPO only, the Commissioner is

satisfied that the information to which redactions have been applied falls outside the scope of the 26 July 2020 information request. This is because none of it relates to the original TPO.

14. The Commissioner will consider whether the Council holds any information about the original TPO in respect of parts (a) and (b) of the request. (They have confirmed that they have a copy of the TPO itself).

Reasons for decision

Regulation 5: duty to make environmental information available

15. Under regulation 5(1) of the EIR, a public authority that holds environmental information must make it available on request if it is not excepted from disclosure or, under regulation 5(3), the applicant's own personal data.
16. Under regulation 5(2) a public authority must make information available as soon as possible and no later than 20 working days after the date of receipt of the request.
17. The Council did not comply with regulation 5(2) as it did not provide the complainants with an appropriate response within 20 working days of receiving their request.
18. The Commissioner understands that the complainants are involved in a personal dispute with the Council in respect of the tree referred to in the request. However the Commissioner cannot comment on this wider matter; her decision can only relate to the request for information and the requirements of the EIR. Where there is a dispute about the extent to which information is held by a public authority, the Commissioner uses the civil standard of proof, ie the balance of probabilities.
19. As is customary when investigating such matters, the Commissioner asked the Council a series of questions about its reasons for believing that it did not hold any information about the original TPO, other than the actual order itself.
20. In respect of part (a) of the request, the Council explained it:

"... does not hold the information requested in respect of the above Tree Preservation Order dating back to 1983. The Council holds the Tree Preservation Order document but does not hold any additional documentation specifically with regard to the Yew Tree for 14 Albany Hill in relation to memorandum, notes of any meetings, discussions and telephone calls as set out in the request".

21. In respect of part (b) of the request, the Council explained the following regarding the consultation process that was in place at the time the TPO was made:

" ... prior to August 1999 local planning authorities were only required to send copies of tree preservation orders to the owners and occupiers of the land affected by a new or varied order. The 1999 Regulations added a further requirement to send copies to the owners and occupiers of any adjoining land, even where they had no rights over the trees protected. The Council is satisfied that the correct consultation process was carried out at the time the TPO was made and confirmed".

22. It further explained:

"The Council provided the information in December 2020 as part of the response to a Stage 2 complaint submitted by [name redacted] under the Council's Corporate Complaints Procedure:

As the reasons for making a particular Tree Preservation Order (TPO) are not stated within an Order itself, and the officers involved with making this Order are no longer at the Council, we are unable to conclude with certainty the reason this tree was included in the Order.

In response to your comments regarding the consultation process in place at the time the TPO was made, prior to August 1999 local planning authorities were only required to send copies of tree preservation orders to the owners and occupiers of the land affected by a new or varied order. The 1999 Regulations added a further requirement to send copies to the owners and occupiers of any adjoining land, even where they had no rights over the trees protected. The Council is satisfied that the correct consultation process was carried out at the time the TPO was made and confirmed.

The Council reiterates its position that there is no information held in respect of the above request for information".

23. The Commissioner asked the Council to explain what searches it had carried out to ascertain that no information within the scope of the request was held and why would these searches have been likely to retrieve any relevant information. It advised:

"Searches were carried out by the Council's Tree Officer. The Council's Planning system (Uniform), network drives and folders held in shared systems were all checked.

The Tree Officer also reviewed hard copies documents [sic] of TPO's retained and no additional information relating to the original TPO made in 1983 was found to be held. I attach a copy of the original TPO for information.

This search was carried out to ascertain whether there were any additional documents held due to the date of the documents requested. Current applications are scanned on to the electronic system, TPO's and associated documents from the period requested were kept manually and subsequently digitised. The search did not identify any further information from that which was previously available".

24. The Council said that searches were undertaken using details of the addresses, both of the tree owner and complainant, by TPO reference, and by the complainant's name.

25. Regarding records of this age the Council explained:

"The Council's current record management policy for Tree Preservation Orders is that the information is retained permanently. The information requested dates back to 1983 – we do not hold a copy or details of the record retention which was in place at the time. The TPO made in 1983 which includes the Yew Tree at 14 Albany Hill is retained and attached for information. The requirement to retain copies of TPO's is in line with the requirements under the Town and Country Planning Act. There is no additional information held in respect of the TPO made in 1983. As outlined above, prior to August 1999 local planning authorities were only required to send copies of tree preservation orders to the owners and occupiers of the land affected by a new or varied order. The 1999 Regulations added a further requirement to send copies to the owners and occupiers of any adjoining land, even where they had no rights over the trees protected. The Council is satisfied that the correct consultation process was carried out at the time the TPO was made and confirmed. The Council confirms that there is no additional information held in respect of the TPO made in 1983".

26. The Council also explained that it had provided the complainant with information relating to subsequent applications for tree works in respect of this TPO, adding that this later information was also publicly available via the Council's website on its planning portal. This is the information which it subsequently advised fell outside the scope of the wording of the request, which the Commissioner has accepted above.

The Commissioner's conclusion

27. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a

complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out in the paragraphs, above, the Commissioner is required to make a finding on the balance of probabilities.

28. The Commissioner is satisfied that the Council approached the appropriate personnel, where possible, to ascertain whether or not any information was held in respect of part (a) of the request. She is also satisfied that it conducted searches in the business areas where such information would be held, if it were held, using appropriate search terms.
29. Regarding part (b) of the request, because of the age of the TPO the Council has explained that in 1983 it was only necessary to send copies of TPOs to the owners and occupiers of the land affected by a new or varied order at that time. Therefore, the information at part (b) could not be held as it was not something which was undertaken.
30. Based on the explanations provided to her the Commissioner is satisfied that, on the civil standard of the balance of probabilities, it is more likely than not that the information requested at parts (a) and (b) of the request is not held. The Commissioner decided that the Council has therefore complied with regulation 5(2) of the EIR.

Other matters

31. It is unfortunate that the Council did not properly assess the request when it was received as this may have meant that the complainants accepted its position. As it instead identified information about the TPO which was created at later dates, this has led to confusion and the complainants' belief that further information is held and other parties were involved.
32. Whilst it falls outside the scope of her investigation, by way of assistance the Commissioner can confirm that very little information has been redacted from within the documents that were mistakenly identified and disclosed, all of which is personal data. In her initial view, this information would be properly caught within the exception at regulation 13(1) (Personal data) of the EIR and it is likely that it would be properly withheld from public disclosure under the EIR. A brief description of these redactions is included at paragraph 12.
33. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal

in her draft Openness by Design strategy¹ 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 her Regulatory Action Policy².

¹ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

² <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

34. 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

35. 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.
36. 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

Carolyn Howes
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