

Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004

Decision Notice

06 September 2010

Public Authority: Kirkby Malzeard, Laverton and Dallowgill Parish
Council
Address: West Leas Farm
Galphay
Ripon
North Yorkshire
HG4 3PB

Summary

The complainant requested a copy of the minutes of the Council's meeting dated 30 November 2009 and a copy of an email referred to by the Chairman during this meeting from 'unnamed person' or their solicitor. The Council provided the complainant with a copy of the minutes but refused to disclose the email requested, as it considered this was subject to legal professional privilege and deemed the request itself to be vexatious. During the Commissioner's investigation the Council changed its view and issued a further refusal notice to the complainant advising her that the requested email is not held for the purposes of the Act by virtue of section 3(2)(a). The Commissioner has investigated and he has determined that the requested information is environmental information and therefore the request should have been dealt with under the EIR. The Commissioner has also decided from the evidence available that the requested information is held by the Chairman of the Council on behalf of the Council for its own purposes in accordance with regulation 3(2)(b) of the EIR. He has therefore ordered the Council to either disclose the requested email to the complainant or issue a further refusal notice advising why the requested email cannot be disclosed under the EIR within 35 days of this Notice.

The Commissioner's Role

1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation

18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

2. The complainant contacted the Council by email on 2 December 2009 to request a copy of the following information:

"Can you please email to me copies of the following:

- 1) A copy of your notes for the Minutes of last Monday's meeting, which will be presented at the next meeting;
- 2) The email which [the Chairman] said at the meeting he received on Monday from [named redacted] (or his solicitor)."

The meeting to which the complainant refers is the parish council meeting held on 30 November 2009.

3. The Clerk of the Council responded on 2 December 2009. She advised the complainant that the minutes had not to date been finalised and that she was unable to supply a copy of the email, as this was only sent to the Chairman.
4. The complainant directed the second element of her request (for a copy of an email) to the Chairman on 3 December 2009.
5. The Chairman of the Council replied on 4 December 2009 advising the complainant that the Council has 20 working days to respond to her request. In relation to the second element of the complainant's request, the Chairman confirmed that he was discussing the possibility of disclosing this information with the 'unnamed person's' solicitor. The Chairman also advised that he was considering whether the request could be deemed vexatious and whether the information is subject to legal professional privilege.
6. As the complainant received no further contact from the Council, she sent a further email on 6 January 2010 to the Clerk and Chairman chasing this matter up.
7. Later that day (6 January 2010) the Chairman of the Council responded. He stated that he sent an additional separate email on 4

December 2009 to that mentioned in paragraph 5 above which refused the information request on two grounds:

- the information is subject to legal professional privilege; and
 - the request was considered to be vexatious.
8. The complainant responded on 6 January 2010 advising the Chairman of the Council that she received the first email on 4 December 2009 (detailed in paragraph 5) but not the second email of that day, which provided the details of the Council's refusal.
 9. Later that day (6 January 2010) the Chairman of the Council replied. He confirmed again that an additional separate email was sent on 4 December 2009 with the details of the Council's refusal. He stated that the members of the Council considered her request to be vexatious.
 10. A further email was sent by the complainant to the Chairman on 6 January 2010. She confirmed that she did not receive the second email of 4 December 2009 and requested the Chairman to send a copy.
 11. The Chairman responded the same day advising the complainant that he deleted the second email of 4 December 2009 and was therefore unable to send a copy.

The Investigation

Scope of the case

12. On 2 February 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant stated that she had not to date received an adequate Refusal Notice from the Council. The complainant explained that she had received several responses from the Chairman of the Council. However, these were sent after the date for compliance had expired and did not explain in any detail why she is unable to have access to the requested information.
13. During the course of the Commissioner's investigation the Council disclosed a copy of the minutes of the meeting that took place on 30 November 2009. The remainder of this Notice will therefore focus on the second element of the complainant's request only, which is her request for:

- a copy of the email the Chairman referred to during the meeting of 30 November 2009 which he stated he received from the 'unnamed person' or their solicitor.
14. During the Commissioner's investigation the Council changed its stance. It withdrew its previous reliance on legal professional privilege and the request being vexatious and stated that it was now of the view that the requested information is not held for Council business and was in fact a private and personal communication to the Chairman. The remainder of this Notice will therefore focus on whether the Commissioner agrees with the Council that the information is not held for Council purposes.

Chronology

15. The Commissioner wrote to the Council on 11 February 2010 explaining his role and to advise the Council of its obligations under the Act and the EIR. He advised the Council that it had not to date issued an appropriate Refusal Notice to the complainant and requested that it either release the information or issue a further Refusal Notice within 10 working days.
16. The Clerk of the Council issued a further response to the complainant on 22 February 2010, a copy of which was forwarded to the Commissioner. This response attached a copy of the minutes the complainant requested (item 1 of paragraph 2 above) and advised the complainant that a copy of the email (item 2) could not be supplied, as it was received by the Chairman.
17. The complainant contacted the Commissioner on 22 February 2010 to complain again about the way her information request had been handled by the Council and its latest response.
18. The Commissioner wrote to the Council on 4 March 2010 to inform it that the complainant's complaint would be given further consideration.
19. Further correspondence was received from the complainant on 13 March 2010. She confirmed that she received a further response from the Council on 12 March 2010, which attached a copy of an email between the Chairman and the 'unnamed person's' solicitor. However, this was not the email she originally requested and it in fact post dates her information request.
20. The Commissioner received a further email from the complainant on 30 March 2010. She stated that she attended the parish council meeting the previous evening and had now been informed by the Chairman that

the requested email was a “private” email sent to him “personally”. In her email to the Commissioner, the complainant raised various reasons why this latest statement seemed contradictory to previous responses she had received and the purpose for which the email was first mentioned at the council meeting on 30 November 2009.

21. A further email was received from the complainant on 16 April 2010, which attached a further exchange of email between her and the Council. The complainant questioned why the email she received on 12 March 2010 was sent to her, as it was not the one she requested and asked again that the correct email be released. The Clerk to the Council replied that she would not be disclosing the email originally requested as the “Councillors have no wish to see it or read it or have it released into the public domain”.
22. The Commissioner wrote to the Council on 5 May 2010 to outline again its obligations under the Act and the EIR. Specifically, the Commissioner advised the Council that the complainant’s request for information was made to the Council as a whole; not to one particular member and the appropriate consideration is whether the Council’s holds the requested information. It reminded the Council that if the Chairman held this email for Council purposes, it is held by the Council for the purposes of the Act or the EIR if these applied. The Commissioner confirmed that the Clerk’s previous response in which she stated that she was unable to provide a copy of the email as it was held by the Chairman is not appropriate grounds for refusal. He again requested that the Council either disclose the information or issue an adequate Refusal Notice to the complainant.
23. The Clerk of the Council issued a further Refusal Notice to the complainant on 13 May 2010. This now advised the complainant that the requested information is not held by the Council.
24. The Commissioner contacted the Clerk by telephone on 28 May 2010 to discuss the latest response in further detail. In particular, the Commissioner queried the Council’s latest statement that the requested information is not held for Council purposes and why previous responses confirmed that it was. The Clerk of the Council explained that the requested information was held by the Chairman in a personal capacity and not in his role as Councillor. The Commissioner advised the Clerk that he would need to see a copy of the email in question and obtain further more detailed arguments to support this view. The Clerk responded that the Chairman had refused to provide her with a copy of the email and all other Councillors had confirmed that they were not interested in seeing it. The Commissioner again reminded the Clerk of the Council’s obligations under the Act and the

- EIR. The Clerk advised the Commissioner to contact the Chairman directly for any further information.
25. The Commissioner contacted the Chairman of the Council by email on 28 May 2010. He requested a copy of the email in question and a further more detailed explanation to support the latest statement that it is held by him in a personal capacity. The Commissioner requested that information be provided no later than 11 June 2010.
 26. As no response was received by the timeframe specified, the Commissioner emailed the Chairman of the Council again on 21 June 2010. He requested that the outstanding information be provided no later than 25 June 2010 and advised the Chairman that if it was not, he would proceed to a Decision Notice recommending that the information be disclosed.
 27. The additional information requested was not provided by the Council. The Commissioner did receive a further letter from the Clerk of the Council dated 7 June 2010. However, this was in response to the Commissioner's telephone call of 28 May 2010 and did not make any reference to the Commissioner's request for further information dated 11 and 21 June 2010.

Analysis

Substantive Procedural Matters

28. The Commissioner has found from the evidence provided by the complainant that the requested information is environmental information and therefore that the complainant's request should have been dealt with under the EIR. Briefly, subparagraph 2(1)(a) of the EIR defines environmental information as material on the state of the elements of the environment including the land and landscape. Subparagraph 2(1)(c) extends this definition to include information on measures such as policies, legislation, plans and activities affecting or likely to affect the elements described in paragraph 2(1)(a) as well as measures and activities designed to protect those elements. The Commissioner notes that the requested information relates to an appeal lodged by the 'unnamed person' with the Planning Inspectorate against an enforcement notice they received relating to a hard track they had created and a mobile home they had erected on agricultural land without planning permission. The Commissioner is satisfied that the creation of a hard track and the erection of a mobile home is an activity as defined in subparagraph 2(1)(c) of the EIR which has

effected the land and landscape of that area, as described in subparagraph 2(1)(a).

29. As the Commissioner has established that the requested information is environmental information he will now go on to consider whether this information is held for the purposes of the EIR.

Is the requested information held by the Council for the purposes of the EIR?

30. Section 3(2) of the EIR provides that:

"For the purposes of these Regulations, environmental information is held by a public authority if the information –

- (a) is in the authority's possession and has been produced or received by the authority; or*
- (b) is held by another person on behalf of the authority.*

31. It is the Commissioner's view that if information is held by another person on behalf of the Council for Council business, it holds that information for the purposes of the EIR.
32. The only circumstance in which information would not be held by a public authority by virtue of regulation 3(2) would be where information is only held on behalf of another person, and is not held at all for that public authority's own purposes.
33. The Commissioner decision in this case as to whether the requested information is held for the purposes of the EIR is based on the evidence and copies of correspondence supplied by the complainant. As explained in the 'Chronology' section of this Notice, the Council has failed to supply a copy of the withheld information and provide more detailed arguments to support its view despite the Commissioner's assistance, various reminders and the opportunities to do so.
34. It is apparent from the first responses the Council issued to the complainant that it was initially of the view that the requested information is held by the Council for the purposes of the EIR. The Council's emails of 6 January 2010 confirmed that the requested information was being withheld because it was covered by legal professional privilege and because the request itself had been deemed vexatious by the Council. Further correspondence between the complainant and the Council also confirms that the issue of disclosure was discussed between the Councillors suggesting that a collective

decision was reached and that the email in question is recorded information held by the Council for its own business purposes.

35. The Commissioner notes that the wording of the complainant's request itself confirms that the email in question was referred to by the Chairman during the Council's meeting on 30 November 2009 suggesting that it was therefore relevant to Council business and the issue being discussed during the meeting at that time. Additional correspondence supplied by the complainant strongly suggests that the requested information relates to an appeal lodged by the 'unnamed person' with the Planning Inspectorate against an enforcement notice they had received regarding a hard track they had created and a mobile home they had erected on their land without planning permission. As the purpose of these meetings is to discuss Council business the Commissioner does not accept from the evidence available that the requested email is a private and personal communication belonging to the Chairman.
36. The complainant has provided a copy of an email dated 23 November 2009 sent by the Chairman to the 'unnamed person's' solicitor, which strongly suggests that the requested information is the 'unnamed person's' solicitor's response to this email. The email requested the 'unnamed person' or their solicitor to provide their comments and representations relating to the appeal, which would be read out at the council meeting on 30 November 2009. It is quite clear that the email dated 23 November 2009 was sent by the Chairman to the 'unnamed person's' solicitor on behalf of the Council in his capacity as Chairman. It is reasonable to assume in the absence of the requested information itself and any further supporting evidence from the Council, that the requested information is further correspondence resulting from the email of 23 November 2009 relating to the appeal, which the Chairman received in his capacity as Chairman of the Council.
37. For the reasons explained above, the Commissioner has concluded that the requested information is held for Council purposes and is therefore held for the purposes of the EIR.

Procedural Requirements

38. The Council should have issued a Refusal Notice to the complainant under the EIR instead of the Act. This should have been issued to the complainant within 20 working days of her request and it should have stated that the Council is of the view that the requested information is not held for the purposes of the EIR by virtue of section 3(2)(b).

The Decision

39. The Commissioner's decision is that the Council did not deal with the request for information in accordance with the EIR. The Council:
- failed to identify that the requested information is environmental information. It therefore applied the Act when it should have applied the EIR.
 - incorrectly informed the complainant that the requested information is not held for Council purposes. The Commissioner has found that the requested information is held by the Chairman on behalf of the Council in accordance with regulation 3(2)(b) of the EIR.

Steps Required

40. The Commissioner requires the Council to take the following steps to ensure compliance with the EIR:
- The Council should either disclose the requested information to the complainant in accordance with regulation 5(1) of the EIR or issue a further Refusal Notice in accordance with regulation 14(1) advising her why the information cannot be disclosed citing the relevant exception(s) under the EIR.
41. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

42. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

43. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

44. The Commissioner notes that the Council alleged to have deleted its Refusal Notice dated 4 December 2009 to the complainant. He would remind the Council of its obligations as a public authority under the Section 46 Records Management Code of Practice, in particular section 5 of this Code which states that:

“Public authorities should have a properly recognised and effectively resourced RM function. It should cover all records (including electronic records) from creation to disposal. The person responsible for RM should also be responsible for or have an organisational link to FOI, DP and other information management functions.”

45. It is considered good practice for the Clerk to hold Council correspondence. The Commissioner wishes to refer the Council to the *Governance Toolkit for Parish and Town Councils* produced by the Association of Council Secretaries and Solicitors (ACSeS), in particular Part 3(3)A headed Parish Council Correspondence, which states:

- “(i) The point of contact for the parish council is the Clerk, and it is to the Clerk that all correspondence for the parish council should be addressed.
- (ii) The Clerk should deal with all correspondence following a meeting.
- (iii) No individual Councillor or Officer should be the sole custodian of any correspondence or information in the name of the parish council, a committee, sub-committee or working party. In particular, Councillors and Officers do not have a right to obtain confidential information/documentation unless they can demonstrate a ‘need to know’.
- (iv) All official correspondence should be sent by the Clerk in the name of the council using council letter headed paper.
- (v) Where correspondence from the Clerk to a Councillor is copied to another person, the addressee should be made aware that a copy is being forwarded to that other person (e.g. copy to XX).”

Right of Appeal

46. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 06th day of September 2010

Signed

**Lisa Adshead
Group Manager Complaints Resolution**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Freedom of Information Act 2000

Section 1(1)

Provides that –

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 3(2)

Provides that –

“For the purposes of this Act, information is held by a public authority if –

(a) it is held by the authority, otherwise than on behalf of another person, or

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

Section 14(1)

Provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious”

Section 42(1)

Provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

Environmental Information Regulation 2004

Regulation 2(1)

In these Regulations –

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form 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) and (b) 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 elements of the environment referred to in (b) and (c);

Regulation 3(2)

For the purposes of these Regulations, environmental information is held by a public authority if the information –

- (a) is in the authority's possession and has been produced or received by the authority; or
- (b) is held by another person on behalf of the authority.

Regulation 14 - Refusal to disclose information

Regulation 14(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.

Regulation 14(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.

Regulation 14(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).

Regulation 14(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.

Regulation 14(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.