

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

Date: 12th September 2017

Public Authority: East Meon Parish Council
Address: Agriculture Place
East Meon
Petersfield
Hampshire
GU32 1PN

Decision (including any steps ordered)

1. The complainant has requested information relating to the Parish Council's decision to recommend a refusal of a planning application to the East Hants District Council. The council said that it does not hold any records of the meeting which it has not already published however the complainant believes that information is likely to be held within the private email accounts of three Parish Council Councillors. The council said that it does hold some emails relating to the timing of a site meeting but that no other information is held. It did not however provide a copy of the emails it admitted it holds to the complainant nor claim any exemption for withholding this information.
2. The Commissioner's decision is that the council has failed to consider information which it has admitted it holds for disclosure to the complainant. She has also decided that, barring these emails, on a

balance of probabilities the Parish Council was correct to state that no further information is held falling within the scope of the request.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To consider the meeting time emails for disclosure and respond again to the complainant as required by the Regulations.
4. 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

5. On 10 October 2016 the complainant made the following request for information under the FOIA for:

"Please could I have copies of the minutes of the meetings of the planning committee in the current session. I note that members of the committee report to the council on matters that they have considered but I should like to see the minutes themselves. If they are not available in electronic form I should be happy to come to the office at a time convenient to you to see them."

6. The council responded on 11 October 2017. It said that Parish Council planning committee meetings are not required to be minuted as they are not formal meeting settings and the outcomes are reflected in the written responses to planning applications and subsequently a matter of public record on the council's website.
7. The complainant wrote back to the council on 11 October 2016 and pointed out that the council's document 'Rules of Guidance for the Planning Committee' state that *"Meetings will be minuted by the Clerk to the Council, another member of staff or a member of the Committee"*. The council's response was to reiterate that the information which is held is available from its website, although it admitted that due to an error it had not been available when it first communicated this to the complainant.
8. On 17 October 2017, the complainant wrote to the council and said that it appeared that neither standing orders nor rules had been followed by the council in respect of the council's recommendation. He recognised

that the clerk had not been present at the meeting to decide the recommendation but noted the requirement for minutes to be taken by others in the event that that was the case. He therefore requested information in the following terms:

- 1) *A copy of the Agenda for the meeting, or if none was produced confirmation that none was produced.*
 - 2) *The minutes of the meeting, and the identity of the person who took them in accordance with Rule 3*
 - 3) *If no contemporaneous minutes were taken:*
 - 3.1) *Copies of an agenda, or any email exchanges before the start of the meeting.*
 - 3.2) *The date and venue for the meeting and the time at which it started and ended.*
 - 3.3) *The names of the attendees.*
 - 3.4) *A brief note of the discussion, such as would have been recorded in a minute.*
9. On 24 October he followed this with a further request, stating:
- "...I shall therefore make the request formal under the Freedom of Information Act.*
- My request is in relation to Planning Application [details redacted by the ICO] and requires the disclosure of any documents and emails from the Planning Committee of East Meon Parish Council and its members, [names of individuals redacted by the ICO], which relate to that application."* He then reiterated the specific details of his previous request.
10. The council responded on 25 October 2016 and confirmed that it had provided the complainant with *'all explanations and information that is publically available from this office'*.
 11. Following an internal review the council wrote to the complainant on 16 January 2017. It said that it had furnished him with all the public information that is held in respect of his request.
 12. Following further correspondence the council wrote to the complainant on 23 January 2017 and confirmed that:

"Regarding your request under the FOI Act, I confirm once again that the Council do not hold any of the information you request (other than what has already been provided and is on the Parish Council Website).

There were no such Planning Meetings to which you refer and therefore no minutes. I also confirm that there is no record of planning committee emails on parish records."

Scope of the case

13. The complainant contacted the Commissioner on 11 November 2017 to complain about the way his request for information had been handled. He believes that some information will be held regarding the meeting which took place to decide the recommendation on his application.
14. The Commissioner considers that the complaint is that further information should be held by the council.

Reasons for decision

Background to the Case

15. The Commissioner understands that the complainant submitted a planning application which was subsequently refused. The Parish Council is a statutory consultee for applications within its area and in this case it recommended a refusal of the application to the District Council.
16. The Commissioner therefore understands the background to the request is that the complainant wishes to know more about the meeting of the parish council planning committee which took place prior to the parish council issuing a recommendation to refuse the planning application to the district council. For its part the council appears to have admitted that no formal meeting took place, however a recommendation was made in respect of the application and the complainant is seeking information as to how that was reached and what records the council holds in respect of its decision.
17. For the avoidance of doubt, it is not the Commissioner's place to decide whether a council has followed the correct procedures and standing orders when deciding upon a recommendation. The Commissioner understands that this was the topic of a separate complaint made by the complainant to the District Council.

18. The complainant wrote to the Commissioner on 10 February 2017 to confirm that he accepts that no further information is held by the clerk in respect of the application, however he believes further information will be held by members of the Planning Committee. He said that in a formal hearing held by the District Council one of the members had confirmed that the members of the planning committee had exchanged emails using their private email addresses. She had also confirmed that no meetings had been held by the three members of the Planning Committee alone at which minutes had been taken, but that they had either spoken on the telephone or exchanged documents by email.

Regulation 5(1)

19. Regulation 5(1) of the EIR states that a public authority that holds environmental information shall make it available on request.
20. Regulation 12(4)(a) provides that a public authority may refuse to disclose information where it does not hold that information when a request is received.
21. 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. She will also consider any reason why it is inherently likely or unlikely that information is not held. 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.
22. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions must decide whether, on the civil standard of balance of probabilities, the public authority holds any information within the scope of the request (or was held at the time of the request).

The complainant's argument

23. The complainant believes that further information will be held, particularly in private emails between the members of the planning committee, prior to the meeting and the recommendation. He has provided the Commissioner with a timeline of events which he says was provided by the Parish Council to the District Council in which it

explained the events leading to the parish council providing the recommendation. This document lists the actions which the council said it took once the application had been made. This includes a reference to:

- Submission drafted by [redacted by ICO] and circulated first as a draft to [redacted by ICO] and approved by them as a fair reflection of their views.
 - All Councillors were sent a copy of the proposed consultee response to read whilst studying the Application.
24. He said that at a hearing relating to his formal complaint, one of the parish councillors had confirmed that she had received the draft by email and had responded. He argues that unless a [named] Councillor suggests that he printed copies of the draft and circulated it by hand to seven other people he considers that there must be emails which should have been disclosed.

The council's position

25. The Commissioner has therefore asked the council to explain the searches it has carried out to determine that it does not hold the requested information.
26. The council initially explained to the complainant that there are no minutes of a planning meeting which considered the application. In an effort to be wholly transparent it said that a full public parish council meeting was called to consider the appropriate response to the planning application. It clarified that the minutes of this meeting are on the East Meon Parish Website and were published soon after the meeting.
27. It further confirmed that parish planning committee meetings were not recorded at the time that the relevant meeting took place (although it said that it has now put into place measures to record site meetings).
28. It confirmed that planning committee rules are currently under review. This follows a complaint at a formal meeting that the council failed to abide by the guidance for the Planning Committee.
29. The council said that the issue was discussed with the planning committee members who confirmed that they arranged site visits by email but nothing else. The Chairman of the Planning Committee drafted a suitable response to the planning application which he read out at the full parish council meeting.

Private email accounts

30. The clerk said that she does not have the power to require councillors to give her access to personal emails of council members, and that she had taken legal advice which confirmed that she does not have the power or authority to search the private email boxes of councillors. She is therefore reliant upon the members answering her questions regarding whether any information is held by them falling within the scope of the request.
31. She therefore asked the councillors if any information was held by them falling within the scope of the request and to forward to her any information contained in personal emails relating to parish business. She said that the planning committee members confirmed that the only emails they hold are site visit timing requests. The council did not however provide copies of these emails to the Commissioner. The Commissioner notes however that these emails will fall within the scope of part 3.1 of the request and that the council should therefore have considered these for disclosure to the complainant. She has therefore included a step, above, requiring the council to reconsider its position as regards these emails and to respond to the complainant again.
32. Other than these emails the councillors had specifically confirmed to her that there is no relevant information to disclose falling within the scope of the request. Again, no written confirmation of this was provided by the council to the Commissioner.
33. The Commissioner specifically asked the clerk the following question:
- 'Please can you confirm that members of the planning committee were specifically asked if they hold relevant information in their own private email accounts relating to the planning recommendation. For the absence of doubt, it is likely that such information would be held by the individuals on behalf of the council and would therefore fall within the scope of the request. Any such information should therefore be considered for disclosure in response to the request.'*
34. The councils response was as follows:

"... yes I can confirm that the planning committee were specifically asked if they hold relevant information and they confirmed that there is no relevant information to disclose."

Conclusions

35. The issue of private emails being used by councillors to conduct council business is a difficult one. The usual searches for information which would be carried out by the clerk or the officer who deals with requests may not locate this information, and the council is reliant upon

councillors making a formal record of the correspondence within council files or identifying all relevant information from their own private accounts and forwarding these to the clerk for consideration.

36. In the case of parish councillors the issue is magnified by the fact that the councillors are generally volunteers who provide their time free of charge to aid the community. They will not necessarily have all of the training and understanding of wider legislation which can affect their role, and subsequently issues can arise when faced with an investigation of the sort carried out by the Commissioner.
37. Nevertheless councillors are under a duty to consider the information they create or receive when carrying out council business as that information is caught within the scope of the Act. It is council information, and as such is subject to the requirements and obligations provided in the FOI Act and the EIR.
38. There will be occasions which merit further investigation where councillors of any level are considered to hold further information in private email accounts which they have not provided to the council in order for requests to be properly responded to. This will generally be where there is specific evidence that information is deliberately being withheld, and the conclusion is that a section 77 offence may have been committed.
39. The Commissioner's guidance "*Official information held in private email accounts*", which is available at https://ico.org.uk/media/for-organisations/documents/1147/official_information_held_in_private_email_accounts.pdf, states on page 4:

"Concealment and deletion

Public authorities should also remind staff that deleting or concealing information with the intention of preventing its disclosure following receipt of a request is a criminal offence under section 77 of FOIA. For example, where information that is covered by a request is knowingly treated as not held because it is held in a private email account, this may count as concealment intended to prevent the disclosure of information, with the person concealing the information being liable to prosecution."

40. The Commissioner highlighted to the council by telephone that deliberately withholding, concealing or destroying information from disclosure where an applicant for information would otherwise be entitled to that information may amount to a criminal offence, by the individual involved, under section 77 of the FOI Act. Section 77 applies equally to information requested under the EIR.

41. As stated, the clerk said that she has taken legal advice which she said that the council has no ability to search the private email accounts of its councillors. Nevertheless she asked the councillors to confirm what information is held, and the councillors have all responded to the council's questions on more than one occasion. They have confirmed that they do not hold any information falling within the scope of the complainant's request for information, other than the emails outlined earlier.
42. The Commissioner is to an extent reliant upon the arguments of the parties to determine whether information is held or not. The council has already faced a formal complaint to the District Council about its actions in respect of this planning application, and the Councillors' actions have therefore already been scrutinised by the District Council as regards the Parish Council recommendation to it. The Commissioner understands that the Parish Council was found to have erred in respect of its actions on this case and that action was taken by the District Council or the Monitoring Officer as a result of this. The complainant has used evidence from this inquiry to suggest that further information must be held by the Councillors. However the Commissioner notes that there may be a difference between information which 'should' be held and that which 'is' held by the council. The question for the Commissioner is what information was held by the council at the time that the request for information was received.
43. In this case, given that the councillors have specifically stated to the clerk that no further information is held by them, and given that the District Council has already scrutinised the actions of the councillors the Commissioner has reached the conclusion that on a balance of probabilities no further information is held by the council in respect of this request.

Other matters

The Commissioner's guidance outlined above refers to records management issues relating to the use of private email accounts for public authority business. It states:

"Records Management

The Lord Chancellor's Code of Practice under section 46 of FOIA stresses the importance, and benefits, of having good records management. As such, public authorities are strongly advised to use their records management policies to clarify the types of information that could be considered as records relating to the public authority's business. These

policies should include clear advice to staff that recorded information held by individuals, regardless of the form in which it is held, and which relates to the business of the authority, is likely to be held on behalf of the authority and so subject to FOIA.

In order to avoid the complications of requesting searches of private email accounts, and other private media, records management policies should make clear that information on authority-related business should be recorded on the authority's record keeping systems in so far as reasonably practicable."

- (a) As a statutory consultee on decisions it is important that records are made on decisions taken by the council, and that these records also explain how those decisions were reached.
- (b) It is clear that the failure of the council to stress to councillors the importance of making records for the decisions they take, and in the issue of the private emails being used for council business, has led to suspicions that further information was held by the councillors which have not been provided to the council for records management purposes. This could have been avoided entirely if members of the Planning Committee had copied the clerk into all correspondence between them for Parish Council records purposes.
- (c) The Commissioner therefore wishes to put on record that the Parish Council's records management was deficient at this time. She notes however the assurances of the clerk that the council has now taken steps to rectify this situation.
- (d) Nevertheless the Commissioner will be writing to the council, separate to this decision notice, and asking it to outline the steps it has taken to ensure adequate records are retained in the future.
- (e) She will also outline other issues which the complainant raised as part of his complaint which do not fall to be considered under section 50 of the Act and so fall to be considered outside of the remit of this decision notice.

Right of appeal

44. 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

45. 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.
46. 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
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