

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

Date: 17 August 2021

Public Authority: Llanelidan Community Council

Address: Clerk@LlanelidanCC.Wales

Decision (including any steps ordered)

1. The complainant requested various pieces of information relating to Llanelidan Village Green (the Village Green). Llanelidan Community Council (the Council) refused the request under section 42 (legal professional privilege) of the FOIA. At the internal review stage the Council reconsidered the request under the EIR, disclosed some additional information and sought to rely on regulation 12(5)(b) to withhold information relating to the request. During the course of the Commissioner's investigation, the Council reconsidered the request again under the FOIA and sought to rely on section 43 (commercial interests) to withhold information relevant to the request.
2. The Commissioner's decision is that the Council does not hold any further information relevant to the request. The Commissioner has also determined that the Council has failed to demonstrate that section 43 applies to the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information which has been withheld under section 43 of the FOIA to the applicant.
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. The request in this case was the subject of a previous decision notice issued by the Commissioner under case reference FS50798143¹. The Council originally refused to comply with the request under section 14(1) as it considered the request to be vexatious. In the decision notice, issued on 4 October 2019, the Commissioner determined that the Council incorrectly relied on section 14(1) as the basis for refusing to provide the requested information. She ordered the Council to issue a fresh response to the request that did not rely on section 14.
6. On 22 September 2018, the complainant wrote to the Council and requested information in the following terms:

"I am making a Freedom of Information request for the following items listed below and should like all copies of these documents sent to me or I can collect them when informed:

- 1. All documents and electronic forms of communication supplied by Llanelidan Community Council to Swayne Johnson Solicitors in connection with Llanelidan Village Green and Nantclwyd Estate. This to include communication via individual councillors.*
- 2. All records of phone calls and e-mails in respect of the commissioning of the "Report" on Llanelidan Village Green, referred to in Item 50 (a) of draft minutes including copy of letter from Council to Swayne Johnson dated 5th June 2018.*
- 3. Copy of the Report on Llanelidan Village Green supplied by Swayne Johnson Solicitors referred to in Item 50 of draft minutes and in previous minutes, together with the advice given in a letter dated 4th Sept.*
- 4. Copies of any letters, e-mails, faxes or notes sent to or from Nantclwyd Estate office, Belfour's with Berrington, William Shuttleworth and Sir Philip Naylor Leyland in connection with Llanelidan Village Green since 1st January 2015 to present day. Including the "all previous correspondence and information" referred to in Item 50 of the draft minutes.*

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2615963/fs50798142.pdf>

- 5. A copy of the Public Liability Insurance held by the Community Council for Llanelidan Village Green.*
 - 6. Copies of all e-mails, notes, letters and any other notes made to or from Councillors and Clerk in connection with Llanelidan Village Green or me from January 2016 to the present day.*
 - 7. A copy of the "Motions" record".*
7. The Council complied with the earlier decision notice and issued a fresh refusal notice on 17 December 2019. It disclosed information relating to parts 4, 5 and 6 of the request, stating it did not hold any information relating to part 7 of the request and withheld information relating to parts 1, 2 and 3 of the request under section 42 of the FOIA.
 8. On 11 January 2020 the complainant requested an internal review of the Council's handling of the request, submitting detailed reasons to support her view that additional information was held and that section 42 had been applied incorrectly to withhold some information.
 9. The Council provided the outcome of its internal review on 12 March 2020. The Council disclosed some additional information it had identified, and confirmed that it was now relying on regulation 12(5)(b) to withhold information in relation to parts 2 and 3 of the request. The Council also stated that other than the information disclosed and withheld under regulation 12(5)(b) it did not hold any further information falling within the scope of the request, including specific items that the complainant suggested were missing from the information disclosed. The Council confirmed it was relying on regulation 12(4)(a) in respect of these specific items.

Scope of the case

10. The complainant contacted the Commissioner on 8 April 2020 to complain about the way his request for information had been handled.
11. During the course of the Commissioner's investigation the Council confirmed that it did not hold any further information relevant to the request. It also accepted that the request falls to be considered under the FOIA as opposed to the EIR. The Council reconsidered the request under the FOIA and confirmed that it now considered section 43 to apply to the information it had withheld relevant to parts 2 and 3 of the request.
12. The scope of the Commissioner's investigation is to determine whether any additional information is held by the Council relevant to the request

and whether the Council has correctly withheld information relating to parts 2 and 3 of the request under section 43 of the FOIA.

Reasons for decision

Background

13. This request relates to the ownership of Llanelidan Village Green, a parcel of land of approximately 3.29 acres north west of the Village of Llanelidan. According to a Community Consultation issued by the Council:

"The land was the subject of an award to the Churchwardens and Overseers of the Poor of Llanelidan on 20th August 1861, to be held in trust as a place of recreation or exercise for the inhabitants of the Parish. The land was confirmed as a Village Green in the Land Section of the Commons Register by the Commons Commissioner on 29th October 1976. From the legal advice that Council has been given, neither of these confirm that the Council are owners of the freehold.

The Village Green has been registered with possessory title to Sir Philip Vivian Naylor-Leyland with the Land Registry's Title Registers".

14. In May 2010 Nantclwyd Estate ('the Estate') registered a possessory title over the Village Green. The complainant is of the view that the Council has been negligent in its management of the Village Green by allowing the Estate to register a possessory title over it. She considers that the Council has failed to take appropriate action to reclaim ownership of the Village Green for the benefit of the local community.
15. At a Council meeting in December 2017 it decided to instruct solicitors to provide advice on the legal rights and ownership of the Village Green. Following the legal advice received, at its meeting on 6 September 2018, the Council resolved not to challenge the registration of possessory title of the Village Green. It also resolved to seek a discussion with the Estate to notify the land agents of the community's expectations concerning maintenance of the Village Green and ground rules for the use and management of the Village Green.
16. As a result of further discussions with the Estate, at a meeting on 8 November 2018 the Council agreed to consult with the local community in terms of the options available in respect of the Village Green. The consultation exercise took place in January and February 2019. The outcome of the consultation exercise was debated at a Council meeting on 2 May 2019. Based on the responses received to the consultation the Council proposed to move forward with the most popular option for a land exchange with the Estate. This option required the submission of a

proposal to the Secretary of State to de-register Penybryn Common (the current Village Green) and an offer to register replacement land.

Is the information environmental?

17. The Commissioner has first considered whether the information requested is environmental in accordance with the definition given in regulation 2(1) of the EIR. Environmental information is defined within regulation 2(1) as:

"any information in written, visual, aural, electronic or any other material form on –

(c) measures (including administrative measures), such as policies, legislation, plans, programmes...and activities affecting or likely to affect the elements and factors referred to in (a) and (b)...".

18. In coming to her view as to whether the requested information is environmental, the Commissioner is mindful of the Council Directive 2003/4/EC which is implemented into UK law through the EIR. A principal intention of the Directive is to allow the participation of the public in environmental matters. The Commissioner therefore considers that the term "any information...on" in the definition of environmental information contained in regulation 2 should be interpreted widely. It will usually include information concerning, about or relating to measures, activities and factors likely to affect the state of the elements of the environment. In other words information that would inform the public about the element, measure etc under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.
19. In this case, the withheld information relates to a dispute regarding the ownership of an area of land known as Lllanelidan Village Green. Whilst the Commissioner acknowledges that this is, in essence, the sale of land and property, it is not apparent to her how this sale would affect the environment. In light of this, the Commissioner considers that the correct access regime is the FOIA as opposed to the EIR.

Section 1 – general right of access

20. Section 1 of the FOIA states that any person making a request for information is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request and, if that is the case, to have that information communicated to him.
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 she will consider 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.

The Council's position

22. The Council advised the Commissioner that it is one of the smallest community councils in Wales with no offices and its Clerk only works 10 hours a month. The Council has very limited resources and keeps very limited amounts of data, almost exclusively stored electronically.
23. The previous clerk used his own computer for Council work and when he left he backed up all Council information on to a memory stick which was passed on to the new clerk. As a result of the Commissioner's investigation further contact was made with the previous clerk who confirmed that he did not hold any outstanding council information as everything he held was put on to the memory stick which was returned to the Council.
24. The Council has carried out extensive searches of the information held on the memory stick and within its email system and all the information that has been located has been provided to the complainant, with the exception of the information which the Council has withheld under section 43 of the FOIA. The Council also confirmed that it is not aware of any information relevant to the request which has been destroyed or deleted.
25. In correspondence with the Council the complainant submitted detailed representations to support her view that further information was held. The Commissioner put these points to the Council during her investigation and its response is summarised below:
 - The complainant asked why no documentation or records had been provided to indicate decision making, meetings, correspondence in establishing the vote/consultation, any instructions to the Clerk to carry out Council wishes or a record of resolution or motions record. The Council confirmed that any decision making would have been made in public, in line with its Standing Orders, and be a matter of public record. There would have been no closed meetings of the Council about the matter.
 - The complainant asked why no correspondence had been disclosed in relation to the press release issued by Nantclwyd Estate which had been published on the Council website. She also explained that a request for a press release to be issued giving an alternative point of view was refused by the Council. No information relating to this had been disclosed. The Council

reiterated that no such information was located during the searches carried out to identify any relevant information.

- The complainant pointed out that a reference was made at a meeting of the Council in May 2018 to a box of evidence on the subject matter. The Council stated that it had no knowledge of such a box of evidence and had asked all councillors about the issue and none of them had any recollection of there being such a 'box of evidence'.

The Commissioner's conclusion

26. The Commissioner acknowledges the complainant's reasons for believing that additional information is held by the Council, particularly in light of the amount of time the matter has been ongoing and the controversial nature of the subject matter associated with the request in terms of local interest. However, it is not within the Commissioner's remit to investigate what information a public authority should hold. The Commissioner role here is to assess whether, on the balance of probabilities, a public authority held information within the scope of the request at the time the request was made.
27. The Commissioner notes the Council's statements about the limited amount of information it holds generally, being one of the smallest community councils in Wales. Based on the representations provided she accepts that the Council has undertaken reasonable searches and that the searches ought to have identified information relevant to the request, if it were held by the Council at the time of the request. Based on the searches undertaken and the other explanations provided, the Commissioner is satisfied that, on the balance of probabilities, the Council does not hold any further recorded information relating to the request.

Section 43 – Commercial interests

28. Section 43(2) of the FOIA states that information is exempt if its disclosure would prejudice the commercial interests of any person, including those of the public authority holding it.
29. The exemption can be engaged on the basis that disclosing the withheld information either 'would' or 'would be likely to' prejudice commercial interests. This establishes two thresholds for engaging the exemption. The lower one, 'would be likely to' prejudice has been interpreted by the Tribunal as meaning that the chance of prejudice being suffered should be more than a hypothetical possibility; there must be a real and significant risk. It follows there must be a greater risk of the prejudice occurring for the exemption to be engaged on the basis that the prejudice 'would' occur.

30. The Council originally applied section 42 of the FOIA to the withheld information and then at the internal review stage it applied regulation 12(5)(b) to the information. During the Commissioner's investigation, the Council confirmed that it was now seeking to rely on section 43 to withhold the information in question.
31. The withheld information comprises letters the Council received from its solicitors and a report on ownership issues associated with the Village green. The Council believes that section 43 applies to the withheld information because:

"Negotiations on the transfer of the land are at a delicate stage (and are delayed by COVID). We therefore seek to withhold this information at this stage under the Commercial Interests (section 43) of the FOIA"
32. Despite asking the Council to provide detailed representations to support the application of any exemptions it considered applicable to the withheld information, the above paragraph represents the totality of the Council's submissions regarding its reliance on section 43.
33. The Council's submissions are not sufficient to persuade the Commissioner that the exemption is engaged. The Council has not explained why it considered this exemption applied, nor can the Commissioner glean the same from her reading of the withheld information. Accordingly, the Commissioner is not persuaded that this exemption is engaged. Her conclusion is, therefore, that this exemption is not engaged and at paragraph 3 above the Council is now required to disclose the information withheld under this exemption.

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

Joanne Edwards
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