



**IN THE FIRST-TIER TRIBUNAL  
(GENERAL REGULATORY CHAMBER)  
[INFORMATION RIGHTS]**

**EA/2015/0070**

**ON APPEAL FROM:**

**Information Commissioner's Decision Notice: FER0559816  
Dated: 16 February 2015**

**Appellant: PAUL CAMPBELL ON BEHALF OF FRIENDS OF MEMORIAL  
PLAYING FIELD**

**Respondent: THE INFORMATION COMMISSIONER**

**Date of hearing: 10 November 2015**

**Date of Decision: 30 November 2015**

**Date of promulgation: 15<sup>th</sup> December 2015**

**Before  
Suzanne Cosgrave  
Narendra Makanji  
Annabel Pilling (Judge)**

**Subject matter:**

**EIR – Regulation 12(5)(d) – confidentiality of proceedings**

**Representation:**

**For the Appellant: Paul Campbell**

**For the Respondent: Peter Lockley**

## **Decision**

For the reasons given below, the Tribunal allows the appeal and issues a Substituted Decision Notice.

### **Substituted Decision Notice**

Dated 30th November 2015

**Public Authority:**

West Sussex County Council

**Address:**

County Hall

West Street

Chichester

PO19 1 RQ

West Sussex County Council is not entitled to rely on the exception provided in Regulation 12(5)(d) EIR to refuse to disclose the withheld information.

West Sussex County Council must now either disclose the information held or issue an appropriate refusal notice under the Environmental Information Regulations 2004.

### **Reasons for Decision**

#### **Introduction**

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 16 February 2015.
2. The Decision Notice relates to a request to West Sussex County Council ('WSCC') for information relating to communications between WSCC and Steyning Parish Council ('SPC') in respect of Steyning Memorial Playing Field (the 'MPF') in Steyning, West Sussex.

3. A public authority that holds environmental information is required to make it available upon request (reg.5(1) Environmental Information Regulations 2004 ('EIR')). Reg.12 EIR provides as follows:

*“(1) Subject to paragraphs (2), (3), and (9), a public authority may refuse to disclose environmental information requested if-*

*(i) an exception to disclosure applies under paragraphs (4) or (5); and*

*(ii) 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. “Environmental Information” is defined in reg.2(1) EIR as:

*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 area, 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 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.”*

5. There is no dispute that the information requested is environmental information and that the EIR is the appropriate access regime in this

case.

### Factual Background

6. Part of the MPF had been registered as a village green in 1974 (VG65). SPC had announced plans to build a skate park on the other part of MPF and had submitted a planning application to Horsham District Council. An unincorporated association formed to oppose these plans; Friends of Memorial Playing Field ('FOMPF'). In September 2012 FOMPF applied to WSCC for the remainder of the MPF to be registered as a village green. This application was granted in February 2013 (VG93), at a time when the planning application by SPC had yet to be decided. SPC was aggrieved at what it perceived to be the unusual speed with which the village green application had been processed. In December 2014 SPC announced that it had dropped its plans to build the skate park.

### The Request to WSCC

7. The Request for environmental information on behalf of FOMPF was as follows:

*"It is known that Steyning Parish Council has been in discussion with WSCC officers about the Steyning Memorial Playing Field village greens number VG65 and VG93 and that it has also been in discussion about the public footpath 2717 which crosses the same area.*

*Please could you let me have copies of all emails, letters, file notes of telephone conversations, and memoranda etc. both passing between officers and between them and Steyning Parish Council relating to these three topics and produced between January 2013 and now."*

8. WSCC disclosed some information and withheld the remainder relying on the exceptions provided in reg.12(5)(b) (course of justice), 12(5)(e)

(internal communications) and 12(5)(f) (interests of person providing information) of the EIR.

9. The Appellant, on behalf of FOMPF, complained to the Commissioner who investigated the way in which WSCC had dealt with the request. The Commissioner was provided with items 1-18 which comprised the withheld material. During the Commissioner's investigation WSCC sought to rely on reg. 12(5)(d) (confidentiality of proceedings) for the first time in respect of items 1-5.

10. The Commissioner concluded that:

(i) Disclosing items 1-5 would not adversely affect SPC and so reg.12(5)(f) was not engaged;

(ii) No litigation between FOMPF and SPC was live or contemplated at the time of the request, no legal professional privilege attached to the information and so reg.12(5)(b) was not engaged;

(iii) The exchange of correspondence in items 1-5 amounted to "*proceedings*" for the purposes of reg.12(5)(d), the confidentiality of those proceedings was provided by the common law duty of confidence, and disclosure would adversely affect that confidentiality. Reg.12(5)(d) was engaged and in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(iv) The disclosure of the remainder of the information (items 6-18) would adversely affect the course of justice so that reg.12(5)(b) was engaged, and in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(v) The Commissioner did not go on to consider whether

reg,12(4)(e) had been correctly applied in respect of items 6-18.

### The appeal to the Tribunal

11. The Appellant appeals against the Decision of the Commissioner, in respect of the application of reg.12(5)(d) EIR. He complains that this was an additional exception claimed by WSCC during the Commissioner's investigation and one which he had not been given an opportunity to address.
12. The Appellant does not challenge the Commissioner's conclusions in respect of items 6-18.
13. This appeal is confined to a consideration of whether the Commissioner was right to conclude that items 1-5 fell within the scope of the exception provided in reg.12(5)(d) EIR and, if so, whether in all the circumstances of the case, the public interest in maintaining that exception outweighs the public interest in disclosing the information.
14. WSCC is aware of this appeal but has confirmed that it does not wish to be joined as a party or provided any further submissions to the Tribunal.
15. All parties agreed that this was a matter that could be dealt with by way of a paper hearing.
16. The Tribunal was provided in advance of the hearing with an agreed bundle of material, and written submissions from the parties. We also received a small closed bundle containing the withheld information, referred to as items 1-5. These could not be provided to the Appellant as to do so would defeat the purpose of the appeal. He is aware that the withheld information consists of five items of correspondence, three letters from SPC to WSCC and two letters from WSCC to SPC. We cannot refer to every document and submission but have had regard to all the material when considering the issues before us.

### Analysis and decision

17. Regulation 12(5)(d) EIR provides an exception to the duty to make environmental information available upon request *“to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law”* if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
18. We agree with the Commissioner’s approach to forming a decision on whether WSCC correctly applied reg. 12(5)(d) EIR to items 1-5:
- (i) can the information be considered *“proceedings”*?
  - (ii) is the confidentiality of those proceedings provided by law?
  - (iii) Would disclosing the information adversely affect that confidentiality?
  - (iv) And, if so, whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
19. The Commissioner’s guidance on reg.12(5)(d) defines *“proceedings”* as the means to formally consider an issue and reach a decision, including formal meetings, situations where an authority is exercising its statutory decision making powers, and legal proceedings. The word implies some formality and in each of these examples, the proceedings are a means to formally consider an issue and reach a decision.
20. In his Decision Notice, the Commissioner concluded that *“through the correspondence, an issue is being considered, a course of action justified and WSCC is exercising its statutory powers to broadly reach a decision”* and that the information could also be categorised as pre-action communications regarding possible judicial review proceedings with an allegation of maladministration in item 3 and a potential judicial review at the close of item 5.

21. Having not had sight of the withheld information, the Appellant has had some difficulty formulating the argument that these items are not “*proceedings*”. He submits that it is likely that some of the correspondence relates to SPC questioning the speed at which the village green application was processed by WSCC and WSCC justifying its position. He submits that correspondence held by WSCC from SPC cannot be “*proceedings*”. He argues that the Commissioner was wrong to find that the information is a decision being reached by WSCC, it could only amount to a justification for a previous decision. WSCC’s exercise of its statutory powers relate to the decision to register the MPF as a village green and it was not exercising any statutory powers in its correspondence with SPC after that decision had been made in February 2013.
22. The Appellant submits that the Commissioner has wrongly stretched the definition of “*proceedings*” to include the “*mere exchange of correspondence between these two public authorities.*”
23. In his submissions to the Tribunal, the Commissioner drew our attention to a number of decisions of both the First-Tier and Upper Tribunals in respect of matters which have been decided fall within the definition of “*proceedings*”; including legal proceedings, meetings of a public authority, an item of business taken in a closed session at a local authority meeting, and the preparation of a report required in respect of disciplinary proceedings against local authority staff.
24. The Commissioner also drew our attention to the decision of the Court of Justice of the European Union in *Flachglas Torgau v Germany*<sup>1</sup> which considered that proceedings as specified in Art.4 (2)(a) of the Directive “*refers to the final stages of the decision-making process of public authorities.*”

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<sup>1</sup> (Case C-204/09) [2013] QB 212



25. We agree with the Commissioner that “*proceedings*” can cover a wide variety of activities of public authorities, provided that they are engaged in the latter stages of decision-making.
26. We have looked closely at the withheld information and disagree with the Commissioner’s conclusion that the disputed information is proceedings by virtue of being “*formal correspondence between two public authorities related to the discharge of their functions*”.
27. We have seen the documents and examined the contents closely.
28. In our assessment, the correspondence falls broadly into two distinct areas; (1) a request for information under the Freedom of Information Act (FOIA) by SPC to WSCC made on 30 April 2014 following recent notification of the village green application and (2) SPC seeking an explanation for the apparent speed at which that application to register MPF as a village green was dealt with by WSCC.
29. The Commissioner submits that the correspondence amounts to pre-litigation proceedings. In his view, by that correspondence SPC is seeking information to decide whether there is a basis for litigation against WSCC to protect its interests as landowner of the MPF. He submits that “*through that correspondence, SPC is in the latter stages of taking the decision whether to proceed with litigation,*”
30. We consider that the Commissioner has miscategorised the purpose or nature of the correspondence and attached to it a purpose or significance not expressed or intended by SPC. SPC makes it clear that the reason for their FOIA request was to help them understand how the application for village green status had been processed. Its enquiries are at a very early stage. It does not intimate that it is contemplating legal proceedings let alone that this is pre-litigation correspondence following a decision having been taken by SPC to pursue that course of action. We do not consider that the correspondence is “*proceedings*” rather is part of the process querying a planning decision which has already been made. It is a very far leap

by the Commissioner to conclude that this is correspondence between SPC and WSCC at the “*latter stages of decision making*”; this is first enquiries about a decision that has been made and seeking information under FOIA.

31. Similarly, we disagree with the Commissioner’s submission that the correspondence amounts to proceedings of WSCC. He submits that WSCC “*is in the latter stages of taking the decision whether to defend the decision to register VG93 in the way that to did, or to revisit that decision.*” The Commissioner has, in our view, “read into” the correspondence an intention not expressed nor implied by WSCC. The two letters from WSCC to SPC provides information in respect of the process followed when dealing with the application for village green registration and appear to contain the refusal notice and the outcome of the internal review required under FOIA. There is no suggestion that WSCC intended to revisit the decision to register the village green nor that it sought to defend its decision; it was setting out the process by which that decision had been dealt.

32. We agree with the Appellant that far from being in the “*final stages of decision making*” by either SPC or WSCC, the correspondence concerns the early stages of making enquiries about the way in which the application for village green status had been dealt with, or in respect of the way in which WSCC appears to have dealt with SPC’s request for information under FOIA.

33. For these reasons we conclude that there are no proceedings of WSCC or any other public authority the confidentiality of which would be adversely affected by disclosure of the withheld information. WSCC is not entitled to refuse to comply with request for this environmental information on basis of reg. 12(5)(d) EIR. There may be another exception or exceptions which apply. We direct WSCC to either disclose the withheld information or to issue an appropriate refusal notice.

34. We therefore allow the appeal.

35. Our decision is unanimous.

30th November 2015