

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

**Decision Notice**

**Date: 13 September 2010**

**Public Authority:** Rogate Parish Council  
**Address:** c/o Hollies  
Plantation Road  
Hill Brow  
Liss  
Hampshire  
GU33 7QB

**Summary**

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The complainant requested information relating to a dispute concerning a piece of land. Rogate Parish Council ('the Council') stated that this information could not be disclosed as it was subject to legal professional privilege. The Council refused to provide the requested information under section 42 of the Act. The Commissioner's finds that the information requests is environmental information and as such the request should have been dealt with under EIR. The Council have failed to respond under the EIR and the Commissioner therefore finds that the Council have breached regulation 14(1). The Commissioner requires the Council to respond to the request by either providing the requested information or issuing a refusal notice in compliance with regulation 14(1).

**The Commissioner's Role**

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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.

## Background

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2. The complainant resides in a village. There is a piece of land adjacent to a residential property in the area which has become the subject of dispute.
3. In 1991, the property's previous owner sold this land to the Parish Council for a nominal sum. A clause of the conveyance required that the Council held the property in trust for the benefit of residents of the local area. However, a portion of the land was retained for the private use of the residential property.
4. Upon the previous owner's death, the property was purchased by new owners. A dispute ensued as to the ownership of a portion of the adjacent land. Eventually, a claim was brought in the County Court against the Council. This claim was eventually discontinued when the Council conceded the case and accepted that the reservation in relation to the portion of land retained for the property's private use endured for the benefit of the previous owner's successors in title. The issue was settled out of court and the owners of the adjacent property registered their title to the land in October 2008.
5. A group of local residents continue to dispute the ownership of the land and the Council's handling of the issue.

## The Request

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6. On 1 October 2009, the complainant submitted a request to the Council for the following information:
  - 1) "An email dated 21 August sent by Hedleys Solicitors on behalf of Rogate Parish Council to [name redacted], Warner Goodman, solicitors for [names redacted] on the application to register Terwick Woodland.
  - 2) The four documents dated 1<sup>st</sup>, 4<sup>th</sup>, 29<sup>th</sup> and 30<sup>th</sup> September 2008 where Rogate Parish Council undertook to use "best endeavours...to ensure that the transferred land remains clear of any restrictions", referred to by [name redacted] in his letter to Chairman Mr Peter Moss dated 15 April 2009"

The complainant specified that she would like to receive photocopies of these documents.

7. The complainant did not receive a response and submitted a complaint to the Information Commissioner's Office on 20 November 2010. After the intervention of the Commissioner, the Council responded to the complainant on 7 December 2009 and explained that it considered the requested information was exempt from disclosure under the Freedom of Information Act ('the Act'). The Council stated this was because the communications were between a legal counsel and client but it did not apply a specific exemption to the information.
8. On 22 December 2009, the complainant contacted the Council to request an internal review of the decision not to disclose the information. The complainant drew the Council's attention to a document from the Council's solicitor which stated that the settlement referred to in the correspondence did not include a confidentiality clause. She also suggested that as part of the information had been disclosed to the public via Council meetings, any legal professional privilege had been waived.

## **The Investigation**

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### **Scope of the case**

9. On 25 January 2010 the complainant again contacted the Commissioner to complain about the way her request for information had been handled.

### **Chronology**

10. On 1 February 2010, the Commissioner wrote to the Council and informed it that a complaint had been received regarding this request.
11. The Council responded on 18 February 2010 and enclosed copies of the withheld information.
12. On 19 March 2010, the Commissioner wrote to the Council and advised that the request should have been considered under the provisions of the Environmental Information Regulations (EIR), rather than the Act. The Commissioner asked that the Council reconsider the request under EIR and provide a response to both the complainant and the Commissioner by 19 April 2010. The Commissioner also provided guidance on the exemptions provided by the EIR, and on how to

- conduct a public interest test. The Commissioner acknowledged that whilst no specific exemption had been applied to the information under the Act, it seemed likely that the Council were referring to section 42. The Council were advised that regulation 12(5)(b) provided a similar exception should it wish to continue to withhold the information on the grounds of legal professional privilege.
13. On 13 April 2010, the Council wrote to the Commissioner and asked if it should release the information. It appeared that the Council had not received the Commissioner's earlier email and so this was resent electronically and in hard copy on 15 April.
  14. On 26 April 2010, the Council confirmed that it had now received the Commissioner's email and reviewed its content. The Council again asked if the information should be disclosed. It did not apply any exceptions to the requested information.
  15. On 29 April 2010, the Commissioner wrote to the Council and explained that it was the Council's responsibility to consider the information for disclosure. The Commissioner again provided the Council with advice on the exceptions provided in the EIR.
  16. On 20 May 2010, the Commissioner wrote to the Council and again advised that if the Council did not consider the requested information to be exempt from disclosure, it should be communicated to the complainant as soon as possible, in accordance with regulation 5(1). The Commissioner again advised the Council that if it had decided an exception applied to the information preventing its disclosure, it should inform the complainant.

## Analysis

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### Substantive Procedural Matters

#### Regulation 2

17. The Commissioner has considered whether the information requested by the complainant is environmental information as defined by the EIR.
18. The Commissioner considers that the information requested falls within regulation 2(1)(c): "measures (including administrative measure), 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 these elements". Information about a plan or a measure or an activity that affects or is likely to affect the elements of the environment is environmental information. The complainant requested information about the ownership of, and restrictions relating to a piece of land. These restrictions may affect the land's nature or use. The Commissioner considers the requested information to be environmental, as it relates to information on an activity which may affect the land or landscape.

### **Regulation 5 and Regulation 14**

19. Regulation 5(1) provides that a public authority that holds environmental information shall make it available on request.
20. Regulation 14 states that if a request for environmental information is refused, this refusal should be made in writing no later than 20 working days after the date of the request. The refusal must specify any exception being relied upon under regulations 12(4), 12(5) or 13; and the matters considered in reaching a decision with respect to the public interest under regulation 12(1)(b). The refusal should also inform the applicant of how to make representations against the public authority's handling of the request and of the applicable enforcement and appeal provisions.
21. The Council has confirmed to the complainant and the Commissioner that it holds the requested information.
22. The Council has been informed that the Commissioner considers that the information should have been considered for disclosure under the EIR, and of the exceptions to disclosure the EIR provides.
23. The Council has refused to provide the complainant with the requested information. The Council has not however considered the request under the EIR and as such, the Commissioner finds that the Council breached regulation 14(1) of the EIR in its handling of these requests for not issuing a refusal notice stating that the information requested was exempt under a specific exception.

### **The Decision**

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24. The Commissioner's decision is that Rogate Parish Council has breached regulation 14(1) failing to provide a refusal notice compliant with regulation 14 of the EIR within twenty working days of the receipt of the request.

## **Steps Required**

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25. As the Commissioner has determined the requested information is environmental information, he therefore requires the Council to consider the information under the provisions of the EIR. The Council should either comply with regulation 5(1) and provide the information, or issue a refusal notice compliant with regulation 14 of the EIR.
26. The Council must take the steps required within 35 calendar days of this notice.

## **Failure to comply**

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27. 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.

## Right of Appeal

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28. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://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 13 day of September 2010**

**Signed .....**

**Rachael Cragg  
Group Manager - Complaints Resolution**

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

## Legal Annex

### **Regulation 5 - Duty to make available environmental information on request**

**Regulation 5(1)** Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

**Regulation 5(2)** Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

### **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.