

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 13 March 2020

Public Authority: Hastings Borough Council
Address: Queens Square
Hastings
TN34 1TL

Decision (including any steps ordered)

1. The complainant has requested information held by Hastings Borough Council (the council) relating to comments which had been included within particular correspondence sent to the Local Government and Social Care Ombudsman (the LGO).
2. The Commissioner is satisfied that, on the balance of probabilities, the council does not hold any information in addition to that which is already in the public domain that would fall within the specific terms of the complainant's request.
3. However, as the council failed to respond to the complainant's request for an internal review within the required 40 working days, it is the Commissioner's decision that the council has breached regulation 11(4) of the EIR.
4. The Commissioner does not require the council to take any steps as a result of this decision notice.

Request and response

5. On 30 November 2016, the complainant wrote to the council and requested information in the following terms:

'In a response to the Ombudsman draft decision document dated 16/09/2016 [council officer name redacted] comments against paragraph 40 that:

"This was on the advice from geo-technical engineers and our Environment and Natural resources manager."

Please supply the following information regarding the advice not to plant on the lower slopes:

- Copies of documents and correspondence regarding the advice received from the Geotechnical engineers.*
- Copies of documents and correspondence regarding the advice received from the Natural Resources Manager.*

This information is critical to a full understanding of the causes of the landslide and potential remedial action to stabilise it.

Please take this as a formal request under the EIR 2004 regulations.

6. At the end of the complainant's correspondence, he included the following extract from the LGO document that he had referred to earlier in his request:

LGO draft decision letter:

'40. The plan said the council would not issue a license immediately but it expected this would follow around Autumn 2015. The council wanted to give the owners time to make some changes to the site. The Council said the license would include areas of planting and vegetation. There was also a need for further research to find out what could be done with the lower 'unstable' part of the site subject to landslips.'

Council's comments that immediately followed in response:

'This was on the advice from geo-technical engineers and our Environment and Natural resources manager. There was concern that forcing the licensees to go in there and plant a load of trees could make things worse, depending on how they did it. The lower slope is continuing to move, we really could not insist in the licence that people planted trees on unstable land. Whatever was planted could end up down the Glen. The decision was made, on safety grounds to let it naturally regenerate seed from trees and shrubs already in the vicinity.'

7. The council responded to the complainant on 1 December 2016. It advised that it was withholding the information held that was relevant to the request under regulation 12(5)(e) of the EIR. It confirmed that when

applying this exception it had given consideration to the following:

- *Is the information commercial or industrial.*
 - *Is the information subject to confidentiality provided by law*
 - *Is the confidentiality protecting a legitimate economic interest.*
 - *Would disclosure adversely affect the confidentiality.*
8. The council stated that the disclosure was 'more likely' to have an adverse effect on the economic interests of the site owners. It then went on to confirm that it regarded the public interest factors in support of disclosure of the information to be 'transparency' and 'accountability' and those against to be as follows:
- *Adverse effect on the economic interest if the owners of [the site]*
 - *Maintaining commercial confidences*
 - *The release of this information could lead to further harassment to the owners.*
 - *Reports contain highly sensitive and confidential information and the disclosure of these reports is likely to prejudice the owners commercial interests.*
 - *If the information is disclosed it could be used to seek harm on the owners commercial interests.*
 - *Were such information disclosed, then it could be used by competitors and potential purchasers to the owners financial detriment.*
 - *In all circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.*
9. The council also advised the complainant that when engaging the exception, it should demonstrate what harm the release of the information would cause and believed this to be as follows:
- *Unfounded critical (and defamatory) reviews and postings about their business, and resultant bad press/media. Leading to a loss of trade.*
 - *Diversion of their attention away from the efficient running of their business.*
 - *A material reduction in the funds they have available to invest in their business*
 - *Undue upset and worry for the caravan owners.*
 - *Loss of privacy for the caravan owners, holiday makers and themselves, including via the use of drones, invasive photography and spying.*
 - *Harm to their good reputation.*
 - *A reduction in the value of their park/business.*

10. On 14 January 2017 the complainant requested an internal review.
11. On 20 November 2018 the council provided its internal review response. It stated that it was unsure where the complainant had found the version of paragraph 40 of the LGO draft decision which he had quoted within his request. The council then went on to quote the version of the same paragraph that it held on record (which did not include the council's comments), stating that this was the same as the information contained within the LGO's formal decision letter dated 25 November 2016.
12. The council also informed the complainant that the Enforcement and Natural Resources Manager had confirmed that there had been no direct reference to, or quote from, any correspondence from geotechnical engineers in the relevant part of its response to the LGO's enquiries. It went on to provide the following statement which it advised had already been released in response to a complaint it had received on the same subject:

'In considering this matter the council concluded the existing natural scrub and tree screen will, in time, increase both girth and height, out-performing in terms of year growth any new planted trees. Significant planting as requested would alter the landscape and therefore have an adverse impact upon the designated site.

The council has therefore concluded that the environmental conditions favour natural regeneration rather than amenity tree planting.'
13. The council stated that there were no other reports, or any further correspondence, which related to the complainant's request.

Scope of the case

14. The complainant originally contacted the Commissioner on 16 October 2018 about the council's failure to respond to his request for an internal review. Following the Commissioner's intervention, the council provided its internal review response. The complainant then contacted the Commissioner again on 4 February 2019 to raise further concerns about the handling of his request.
15. The council's internal review decision indicates a change in its position in that it now stated that there was no additional information held relevant to the complainant's request.
16. The council has advised the Commissioner that it introduced a new records management system in 2018 and no longer holds full details of

how it originally dealt with the request. It states, however, that it believes that it had originally viewed information that was contained within a report (the Coffey 2 Report) that was considered by the First - tier (Information Rights) Tribunal case of Hastings Borough Council v IC/2017/0084¹ (the Tribunal case), to be relevant to the complainant's request. It states that it was therefore correct to have applied regulation 12(5)(e) when responding to his request.

17. However, it cannot be both correct to have applied regulation 12(5)(e) at the time of the council's initial response to the request, and to have confirmed at the internal review stage that the information requested was not held.
18. The Commissioner has considered the content of the Coffey 2 Report which was considered in the Tribunal case. She is satisfied that it does not contain any information that falls directly within the specific terms of the request that is currently under consideration. Given that this was the only information purported by the council to have been relevant to its application of regulation 12(5)(e) in its original response to the request, the Commissioner does not intend to consider this exception further within this decision notice.
19. Therefore, the Commissioner views the scope of her investigation to be whether, on the balance of probabilities, the council holds any information that is relevant to the complainant's request. In addition, she will consider certain procedural matters as requested by the complainant.

Reasons for decision

Regulation 5(1): Duty to make environmental information available on request

20. Regulation 5(1) of the EIR states:

'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

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2167/Hastings%20Borough%20Council%20EA.2017.0084%20\(26.03.18\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2167/Hastings%20Borough%20Council%20EA.2017.0084%20(26.03.18).pdf)

these Regulations, a public authority that holds environmental information shall make it available on request.

Regulation 12(4)(a) of the EIR

21. By virtue of regulation 12(4)(a) a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
22. In scenarios where there is some dispute between the amount of information that has been located and/or provided by a public authority and the amount of information that a complainant believes might be held, the Commissioner, in accordance with a number of First-tier Tribunal decisions, will apply the civil standard of the balance of probabilities. In other words, the Commissioner will determine whether, on the balance of probabilities, the council holds information that falls within the scope of the complainant's request.
23. In making her decision, the Commissioner will take into account the arguments and information presented for her consideration by the complainant. She will also consider the representations made by the council including any actions it has taken to check that the information requested is not held, and any other reasons it has offered 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.
24. For clarity, the Commissioner is not expected to provide categorically whether the information is held; she is only required to make a judgment on whether the information is held on the civil standard of the balance of probabilities.
25. The complainant has raised concerns about the reviewing officer's comment that they had been "*unsure*" where the comments referring to advice from the geotechnical engineers and the Natural Resources Manager were made.' The council, in response to the Commissioner's enquiries, has provided further clarification in relation to this point.
26. The council does not appear to dispute that it provided the information to the LGO which has been quoted by the complainant in his information request. It has confirmed that the LGO had sent a draft version of its decision letter to the council which was then circulated to the relevant council officers for further comment. It states that whilst an annotated version of the draft decision letter which has been presented by the complainant includes the council's response to the LGO's enquiries, the

information he quotes did not form part of the LGO's draft decision letter itself, or the final decision letter².

27. The council has advised that the specific details which it provided to the LGO, and which the complainant has referred to in his request, were a '*pragmatic response to the information that the council had received from officers over time.*' It advised that whilst it does hold copies of reports from geotechnical engineers, the details which were provided to the LGO in response to paragraph 40 of the draft decision letter do not include direct quotes from such reports.
28. The complainant states that the council's comments which it had submitted to the LGO contradict information which it had previously provided to the campaign group, 'Save Ecclesbourne Glen' (SEG), and that it was important to understand why it had changed its position.
29. The Commissioner is aware that there was some information in the public domain at the time of the request about the landslips, including their potential causes and future management.
30. In June 2014 the council had published information on its website under the title '*Ecclesbourne Glen Statement*'³. It would appear that the information included within this detailed statement was updated for a period of time following its initial publication and certain information postdates June 2014. The webpage includes links to a number of documents and reports relating to the landslips, including representations that were made by SEG.
31. The Commissioner notes that one document dated 13 November 2014 sets out SEG's response to a Compliance Audit report (dated 20 August 2014) which had been commissioned, and then published, by the council. In this document, SEG requested that the council make appropriate provision for the '*substantial replanting of trees*' in the recreation area of the site that had been damaged by the landslip.
32. The council's published statement also listed a number of concerns that had been raised about the landslips, including an allegation that trees may have been removed on the site contrary to planning conditions. The

² <https://www.lgo.org.uk/decisions/planning/planning-applications/14-014-511#point5>

³ https://www.hastings.gov.uk/planning/news/ecclesbourne_glen/

council had published the following statement in response to this concern:

'A number of trees were lost in the recent landslip and it would not be appropriate to undertake tree planting on the lower, unstable, part of the site, because the earth is still liable to move. The landslip has meant that the lower part of the caravan park will be more visible for the foreseeable future. The site owners have been asked to prepare a landscaping scheme for the site to provide adequate screening again.'

33. The information set out above is not explicitly what the complainant had asked for in his request. However, it does appear to support the council's response to the LGO about planting trees on the lower slopes, and that this was not a new decision. The council has advised the Commissioner that it was *'a matter of general common sense that any local authority would not impose conditions on landowners if they were in any way subject to land that was not stable. It is a matter of public safety.'*
34. The Commissioner regards it to be unlikely that each council officer who provided comments in response to the various points set out in the LGO's detailed draft decision letter would be able to provide the specific evidence that they used to reach each individual conclusion, or comment, that they set out in response. In addition, it is not unreasonable to assume that, when considering the specific questions and comments that were set out by the LGO in the draft decision letter, council officers would have also used their own knowledge and experience of the issue, and exercised their professional judgement, in order to respond.
35. The council has also argued that the details it provided were a direct response to very specific points that the LGO had set out relating to the complaint that it was investigating; it was not an FOI type request which required the council to provide copies of any relevant information that it held in a recorded format.
36. It is the Commissioner's view that the council should not be expected to separately justify each point that it has made in its response to the LGO. The principle behind the EIR is that providing public access to environmental information will encourage greater awareness of the issues that affect the environment. It helps increase public participation in decision making, makes public bodies more accountable and transparent, and builds up public confidence and trust. However, whilst the EIR can help to provide a greater understanding of decisions that have been reached, it is not intended to be a mechanism for individuals to 'interrogate' a public authority about each and every point that they may make about a particular matter. There will be separate avenues to

follow should any person be concerned that the council is not following proper processes.

37. Whilst the Commissioner accepts that there is a possibility that the council could have held the information that the complainant had asked for, it would not necessarily be the case that it should be expected that it would do so.
38. In addition, even if it was theoretically possible for the council to attempt an exercise to establish what information was considered when providing its response to the comments contained within paragraph 40 of the LGO's draft decision letter, the Commissioner is of the view that this would, in essence, require interpretation that is beyond the scope of the EIR. It is also not unreasonable to assume that, in all likelihood, the outcome would result in the same response.
39. In this particular instance, the Commissioner has taken the unusual step of taking into account the bundles of withheld information which the council has provided in connection to its handling of a number of other requests that are currently under investigation. These requests also relate to the landslips, the site and Ecclesbourne Glen.
40. The Commissioner has not identified any evidence which would indicate that the council holds any information in addition to that which is already in the public domain that falls within the specific terms of the complainant's request. Whilst she appreciates the complainant's frustration at having been initially advised that the information he had requested was held, the internal review process is an opportunity for a public authority to reconsider its position, and this is what the council has done in this case.
41. Taking all factors into account, the Commissioner is satisfied that, on the balance of probabilities, the council does not hold any further information that would fall within the scope of the request under consideration.

Procedural matters

42. The complainant has requested that the Commissioner also consider the council's general handling of this request.
43. Regulation 11(4) requires a public authority to inform a requester of the outcome of the internal review as soon as possible and not later than 40 working days after that date in which an internal review was requested.
44. The complainant requested an internal review on 14 January 2017, but the council did not provide its response until 23 November 2018. This was one of a number of requests that the council put on hold for a

considerable period of time pending the outcome of two separate appeals.

45. The Commissioner appreciates that the council has been involved in a number of complex and time consuming matters which have been difficult to manage. The council has also had to deal with a high volume of information requests over an extended period of time and this has all placed a significant burden on its limited resources. However, the Commissioner does not regard it to have been reasonable to expect any requester to have to wait for so long for a formal decision to be made in response to any information request. In this instance there was nearly a two year gap between the date of the complainant's internal review request and the council's response.
46. In those cases where the information requested was identified as being relevant to either, to both, of the two appeals referred to by the council, and it was satisfied that such information should be withheld as a result, a refusal notice setting out the exceptions which were engaged should then have been issued in respect of each of the requests. Had the council taken such action, it is likely that most of the requests that were put on hold would have been resolved within much more reasonable timescales.
47. Furthermore, the appeals that have been referred to by the council were not actually relevant to this particular request, as it has now been found that the information is not held. Had the internal review request been carried out in a timely manner, the expectations of the complainant would have been better managed. As it is, he had to wait nearly two years to receive the correct response.
48. Taking all relevant factors into account, the Commissioner is not satisfied that there are any mitigating factors which would justify the inordinate length of time that it took the council to provide its internal review response in this instance. As a result, the Commissioner is satisfied that the council has breached regulation 11(4) of the EIR.

Right of appeal

49. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

50. 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.
51. 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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