

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

Date: 22 August 2024

Public Authority: Forestry Commission
Address: 620 Bristol Business Park
Coldharbour Lane
Bristol BS16 1EJ

Decision (including any steps ordered)

1. This decision concerns a request that was submitted to Forestry England. Forestry England is an executive agency of the Forestry Commission. In the interests of clarity, the decision will refer to the Forestry Commission throughout.
2. The complainant has requested information associated with a report about a landslide. The Forestry Commission (FC) disclosed relevant information, withholding some under regulation 12(5)(e) of the EIR (commercial information) and 12(5)(g) (protection of the environment). The complainant considers that FC holds further information within scope of their request.
3. The Commissioner's decision is that, on the balance of probabilities, FC holds no further relevant information. However, the timeliness of FC's response didn't comply with the requirements of regulations 5(1), 5(2) and 14(2) of the EIR.
4. It's not necessary for FC to take any corrective steps.

Background and context

5. In its submission to the Commissioner, FC has provided a background and context to the request. The Commissioner won't include all the detail here as to do so would risk disclosing the complainant's personal data. However, it appears that FC commissioned Atkins to carry out a survey and to provide a report as technical experts to help FC understand the cause of a landslip.
6. FC shared the report with the complainant, who disagreed with its findings. Their concerns culminated in a complaint to the Parliamentary and Health Services Ombudsman (PHSO), which was concluded in November 2023. The complainant was dissatisfied with the PHSO's conclusions.

Request and response

7. On 27 December 2023, the complainant wrote to FC and requested information in the following terms:

"I hereby request copies of all Forestry Commission/Forestry England recorded information with Atkins on [redacted] since 24 February 2021 up to the present date. This includes, but is not limited to, documents, reports, memos, paper correspondence, email correspondence, text messages, WhatsApp messages, presentations, spreadsheets, inspection notes, maps, videos, photographs and records of telephone calls related to:

1. The Atkins report 'Technical Note, Geotechnical Inspection Report, Wass Village Landslide' Rev 1.0 dated 20 April 2021 (Ref. 20210178_001, 19 pages) and all previous revisions, including Rev 0.0.
 2. The Atkins report 'Wass Valley Landslip, Detailed Desk Study, Forestry England' Rev 2.0 dated 12 October 2022 (Ref. 5213569_GE_RP_002_DDS (Rev 2.1) 211 pages including Appendices) and all previous revisions, including Rev 0.0 and Rev 1.0."
8. FC responded on 15 February 2024 and disclosed information relevant to the request.
 9. On 6 March 2024 FC disclosed further relevant information and advised it was withholding some information under regulations 12(5)(e) and 12(5)(g) of the EIR.

10. On 28 March 2024, FC addressed a query the complainant had about draft versions of the Atkins reports. FC confirmed that Atkins had carried out the drafting process, that Atkins hadn't shared drafts with FC and that FC therefore didn't hold this information. FC advised that the request for draft versions of the Atkins reports therefore engaged regulation 12(4)(a) of the EIR, which concerns information that isn't held.
11. The complainant requested an internal review on 2 April 2024. They noted what they considered to be shortcomings in FC's handling of their request, which had resulted in multiple responses, and information that appeared to be missing. Regarding the response of 28 March 2024, the complainant said they hadn't requested drafts of the reports but earlier versions and there was a difference. The complainant said that it was known that Atkins had submitted earlier versions of the reports to FC for review and comment.
12. Following an internal review, FC wrote to the complainant on 29 April 2024. It first acknowledged that certain of the responses had been incomplete which had caused "an administrative and a technical breach" of the EIR.
13. FC went on to explain that it had carried out fresh searches for relevant information to identify any undisclosed information and had considered how exceptions had been applied and explained.
14. Regarding recordings and messages, FC confirmed that it doesn't routinely record telephone conversations and WhatsApp isn't supported for work purposes. FC acknowledged that regulation 12(4)(a) should have therefore been applied to this element of the request as that particular information isn't held.
15. FC then discussed information in certain documents that hadn't been disclosed. It confirmed regulation 12(5)(e) applied to the 'Wass 2' and 'Wass 9' attachments. FC said that 12(4)(a) applied to a 'Wass 7' document, which included a link to an Atkins SharePoint site which FC said was for information held by Atkins and not FC. FC advised that there was a further document, which Atkins had shared with FC, that identifies the nesting site of a protected species, and this information was therefore excepted under regulation 12(5)(g).
16. Finally, FC provided a revised draft of the report that had been referred to in an email chain between FC and Atkins that hadn't been provided previously. FC confirmed that this was the only draft version that was held, beside the final version.

Scope of the case

17. The complainant contacted the Commissioner on 1 May 2024 to complain about the way their request for information had been handled.
18. In a telephone conversation with the Commissioner on 24 July 2024 the complainant confirmed that the focus of their complaint is certain information that they consider FC should disclose. This comprises two emails in which FC commented on Atkins' reports, and copies of those two earlier versions of the reports.
19. The information that FC has redacted is therefore outside the scope of this investigation. The Commissioner considers the scope of his investigation to be whether FC holds further information within scope of the request; namely the four items of information above. He'll also consider procedural aspects of the handling of the request.

Reasons for decision

20. Based on the Commissioner's correspondence to FC (which in turn was based on the Commissioner's conversation with the complainant), FC said in its initial submission to him that it understands that the complainant is seeking the following:
 - 2022 Atkins Report (Detailed Desk Study) Rev 0.0
 - FE 'reviewers comments'
 - 2022 Atkins report (Detailed Desk Study) Rev 1.0
 - FE 'feedback on the detailed desk study'
21. FC said that it understands that the complainant isn't challenging the excepting of commercially sensitive information under regulation 12(5)(e) (this information is the provision of services contract with Atkins, its invoices etc) or the exception of information relating to protected species under 12(5)(g). This is because all the comments in their complaint to the Commissioner (which the Commissioner had passed to FC) relate to the study reports themselves.
22. FC went on to explain that contact with the complainant and Atkins has primarily been at a local level, with the Area Land Agent and Civil Engineer, so any information held would be known to these individuals.
23. FC said that, as the complainant was advised on 29 April 2024 in the outcome of the internal review, access to the Atkins reports was via a

restricted access link to an Atkins owned site. This site enabled permitted individuals to access and comment on the report. However, conscious of the 'risk' of disclosure, FC colleagues didn't download and hold [earlier versions of] the report on FC's own account as recorded information because there was no business need to do so. The final report was downloaded however, and it has been retained and provided to the complainant. FC says it considers that it's good information management practice to hold a single version of the report.

24. FC drew the Commissioner's attention to paragraph 70 of the decision in FER0791200¹ (April 2019). Here, there's recognition of the fact that FC deliberately avoids holding information when it has no business need to do so because of the recognised 'risk' of disclosure. If the earlier versions of a report in this case **had** been downloaded, FC said, then it can confirm that they were not held at 27 December 2023, when the complainant submitted their request.
25. FC noted that feedback on the draft reports referred to in the documents 'Wass 7' and 'Wass 10' (which were provided to the complainant in February 2024) were not in response to actual comments made. The feedback was in standalone emails indicating that comments had been made by another means at another time (and FC hasn't retained these).
26. FC also assured the Commissioner that none of the documents disclosed to the complainant were amended before disclosure. Where necessary, text was redacted, but otherwise the documents were provided as held. It said that the caution with which it was approaching this issue can be seen in an email of 28 March 2022 (which was disclosed to the complainant on 6 March 2024) which notes that the complainant had written to their MP and that Atkins also needed to proceed with caution.

The Commissioner's conclusion

27. Two aspects of FC's submission weren't clear to the Commissioner, and he questioned FC further on those matters. First, it appeared that FC had said it doesn't hold any draft or earlier versions of the reports that the complainant has requested, just the final version. But it also appeared to have said that it had provided the complainant with one draft report.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2614795/fer0791200.pdf>

28. The Commissioner asked FC to clarify why it held one draft/earlier report but not others.
29. In a further submission on 21 August 2024, FC explained that the complainant has had two copies of the 'Technical Note' - one dated 20 April 2021 disclosed on 7 March 2024, the other dated 1 April 2021 disclosed on 29 April 2024 as part of the internal review. These are not the same as 'the report' which Forestry England and FC only have only one version of. This document is labelled 'Detailed Desk Study' and forms the advice provided by Atkins. The final report had been disclosed on 12 October 2022.
30. Second, the Commissioner questioned FC about any information that may be held by Atkins. This is because if another person holds information on behalf of a public authority, then the public authority can be said to hold the information for the purposes of the EIR.
31. The Commissioner noted to FC that it has a relationship with Atkins; it commissioned Atkins to carry out research and produce a final report. As such, it could be the case that, if Atkins holds earlier versions of the report and associated material, it holds this on FC's behalf and so FC holds the information. The Commissioner asked why Atkins would have created this information or need to retain it if it weren't for the purpose of fulfilling its contract with FC? And if Atkins held any relevant information and held it on FC's behalf, couldn't FC instruct Atkins to provide the information (assuming none of it was subject to an exception)?
32. It wasn't clear to the Commissioner from the 'Offer of Service' letter and 'Order Form' that FC sent to him what the situation was with any other information Atkins might hold ie who would "own" that information.
33. In its 21 August 2024 submission, FC confirmed that Atkins was commissioned as a consultant to provide professional advice. It says that the signed Order Form is the signed contract and defines the work and relationship. Page 23 of the Order Form details the work agreed - the Detailed Desk Study is "the deliverable." Supporting activities to enable this are also outlined. FC maintains that whatever information Atkins holds, it holds this on its own account for the purpose of providing advice (the Report) to FC. Page 25 line S1305 of the Order Form confirms that the deliverable shall be and remains the sole and exclusive property of Atkins.
34. The Commissioner accepts FC's reasoning and is satisfied, on the balance of probabilities, that at the time of the request FC didn't hold the four pieces of information that the complainant is seeking. Furthermore, based on its contract with FC, if Atkins held relevant

information, it held it on its own behalf and not on FC's behalf. As such, FC wouldn't hold that information.

35. The Commissioner's decision is therefore that on the balance of probabilities, FC doesn't hold any further information within scope of the request.

Procedural matters

36. Regulation 5(1) of the EIR states that, in accordance with paragraph (2), a public authority that holds environmental information shall make it available on request, if it's not subject to an exception.
37. Regulation 5(2) of the EIR requires a public authority to comply with regulation 5(1) as soon as possible and within 20 working days after the date of receipt of the request.
38. In respect of information to which a public authority has applied an exception, under regulation 14(2) the authority should provide the applicant with a refusal notice within the same timescale.
39. There was no EIR breach in respect of FC's initial response of 15 February 2024. This is because FC had advised the complainant that it needed an additional 20 working days to respond to the request, which regulation 7 of the EIR permits.
40. However, FC disclosed further information and applied exceptions in subsequent responses on 6 March 2024, 28 March 2024 and 29 April 2024 – all of which were provided after the extended deadline of 40 working days had passed. FC didn't therefore comply with regulations 5(1), 5(2) and 14(2).

Right of appeal

41. 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

42. 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.
43. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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