

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 12 September 2024

Public Authority: Folkstone and Hythe District Council
Address: Civic Centre
Castle Hill Avenue
Folkstone
Kent, CT20 2QY

Decision (including any steps ordered)

1. The complainant has requested information relating to the installation of fencing at a village green. Folkstone and Hythe District Council ("the council") responded under the Freedom of Information Act 2000 (the FOIA) stating the information was not held.
2. The Commissioner's decision is that the request was for environmental information and so the council should have responded under the EIR. However, he has decided that, on the balance of probabilities, the council does not hold the requested information.
3. The Commissioner has also decided that the council did not comply with regulation 11(3) of the EIR as it did not carry out an internal review.
4. The Commissioner does not require any steps.

Request and response

5. On 20 December 2023 the complainant made the following information request to the council:

 "Letter or email correspondence to Lydd Town Council advising them to install fencing, for whatever the reason, on a registered Lydd Village Green i.e. The Rype."
6. The council responded on 15 January 2024 under FOIA. It said that no information was held by it falling within the scope of the request.
7. The complainant requested an internal review on 22 January 2024.

Scope of the case

8. The complainant contacted the Commissioner on 15 March 2024. The complainant argued that the council's response was incorrect, and that it had not responded to the request for review.
9. The Commissioner chose to accept this case without firstly requesting that the council carry out an internal review. He asked the council to consider whether the request was for environmental information, however it maintained that the request was correctly responded to under the FOIA.
10. The Commissioner therefore considers that the scope of this case is to decide whether the council should have dealt with this request under the EIR, and whether the council is correct when it says it does not hold the requested information.

Reasons for decision

Is the request a request for environmental information?

11. Regulation 2(1) of the EIR defines environmental information as being information on:
 - (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 areas, 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, affecting or likely to affect the elements of 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)...as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
12. The Commissioner is satisfied that the request, which relates to the installation of fencing on a village green, is a request for information that would be a 'measure' in part (c) that would or is likely to affect the elements of the environment in part (a) – namely an affect on the landscape.
13. The Commissioner has therefore decided that the requested information fell to be considered under the EIR.

Regulation 12(4)(a) – information held/ not held

14. Regulation 5(1) of the EIR requires a public authority that holds environmental information to make it available on request.
15. Regulation 12(4)(a) of the EIR allows a public authority to refuse to provide the requested information if it does not hold it at the time of the request being received.
16. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request).
17. In this case, the council has stated that it does not hold the requested information.
18. The council explained that its planning team had carried out searches of its document management system, its online planning portal and its email accounts. No relevant information was located.
19. It said that if the information was held, it would be held electronically. Key word searches were performed, using terms such as 'fence', 'Lydd Town Council' 'Lydd Village Green' and 'The Rype'.
20. It said that no relevant information has been deleted or destroyed.
21. In the complainant's internal review request, he provided the council with Lydd Town Council's meeting minutes (9th January 2023-Item 13B- Highlighted in red) that states they received permission from the council to install this fencing.
22. The Commissioner asked the council if it has reviewed these minutes in order to determine if any information was held regarding this statement.
23. The council responded to the Commissioner stating that it has carried out relevant searches across all appropriate areas and it has been unable to locate any recorded information to corroborate Lydd Town Council's statement in those minutes. It said that it can only speculate that generic advice was given in an unrecorded form, such as verbally.

The Commissioner's conclusion

24. The Commissioner has considered the arguments and evidence provided by both parties.
25. The complainant has provided the Commissioner with evidence that the council had provided advice to Lydd Town Council regarding the fence. The complainant therefore believes that relevant information will be held by it.
26. The council, however, has confirmed that it has carried out adequate and appropriate searches in the relevant areas of its records, but it has failed to locate any information falling within the scope of the request.
27. There is no contradictory evidence available to the Commissioner that indicates the council's position is wrong.
28. On this basis the Commissioner has concluded that, on the balance of probabilities, the requested information is not held by it.

Regulation 11 of the EIR – Internal review

29. Under regulation 11 of the EIR, a person who has made a request for information is entitled to ask for an internal review if they consider a public authority has failed to comply with the requirements of the EIR.
30. Regulation 11(3) states:

“The public authority shall on receipt of the representations of charge

 - (a) Consider them and any supporting evidence produced by the applicant; and
 - (b) Decide if it has complied with the requirement.
31. A public authority should then provide its internal review as soon as possible, and no later than 40 working days.
32. In this case, the complainant requested an internal review on 22 January 2024. To date, the Commissioner has not been provided with any evidence that an internal review has been carried out.
33. As the 40 working days has passed since the internal review was requested, the Commissioner finds that the council has breached regulation 11(3) of the EIR.

As the Commissioner has since found that the requested information is not held, he does not require any steps in this case.

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.

Ian Walley
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Water Lane
Wilmslow
Cheshire
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