

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 23 October 2024

Public Authority: Hastings Borough Council
Address: Aquila House
Breeds Place
Hastings TN34 3UY

Decision (including any steps ordered)

1. The complainant requested information relating to a landslip. Hastings Borough Council (the "Council") refused the request under the exception for manifestly unreasonable (regulation 12(4)(b)).
2. The Commissioner's decision is that
 - The Council was entitled to rely on regulation 12(4)(b) when refusing to supply the requested information.
 - The Council failed to comply with its duty under regulation 9(1) to offer advice and assistance to the complainant.
3. The Commissioner requires the Council to take the following step to ensure compliance with the legislation.
 - Provide the complainant with advice and assistance to help them to submit a request that does not create a manifestly unreasonable burden.
4. The public authority must take these steps within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 26 February 2024, the complainant wrote to Hastings Borough Council (the "Council") and requested the following information:

"(in relation to Old Roar Gill – Landslip to rear of Foxcote and Penhurst)
 1. Details of all works carried out in the vicinity of the landslip (including the gill,footpath, fence and slopes) over the last ten years
 2. Details of all site visits and investigations in the vicinity of the landslip (including the gill,footpath, fence and slopes) over the last ten years
 3. Copies of all reports, documents concerning this area in the vicinity of the landslip (including the gill,footpath, fence and slopes) over the last ten years"
6. The Council responded on 26 March 2024 and confirmed that it was withholding the information under the exception for the course of justice (regulation 12(5)(b)).
7. On 12 April 2024 the complainant asked the Council to review its handling of the request.
8. On 10 June 2024 the Council provided its internal review response. This confirmed that it was maintaining its reliance on regulation 12(5)(b) and additionally relying on the exception in regulation 12(4)(b) on cost grounds.

Scope of the case

9. On 14 June 2024 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
10. During the Commissioner's investigation the Council confirmed that it was now solely relying on regulation 12(4)(b) to refuse the request, dropping its reliance on the exception in regulation 12(5)(b). The Commissioner has considered whether the Council is entitled to refuse the request.

Reasons for decision

Is the requested information environmental?

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. As the request relates to decisions taken in relation to a landslip, the Commissioner believes that the requested information is likely to relate to a measure as defined in regulation 2(1)(c). For procedural reasons, he has therefore assessed this case under the EIR.

Regulation 12(4)(b) – manifestly unreasonable

13. Regulation 12(4)(b) of the EIR states that:

“For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable”.

14. The EIR do not offer a definition of what is considered manifestly unreasonable. Guidance published by the Commissioner explains that:

“In assessing whether the cost or burden of dealing with a request is “too great”, public authorities will need to consider the proportionality of the burden or costs involved and decide whether they are clearly or obviously unreasonable” and;

“In assessing whether the cost, or the amount of staff time involved in responding to a request, is sufficient to render a request manifestly unreasonable the FOIA fees regulations may be a useful starting point.”¹

15. Section 12(1) of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the “appropriate limit” as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the “Fees Regulations”).

16. The appropriate limit is set in the Fees Regulations at £600 for central government, legislative bodies and the armed forces and at £450 for all other public authorities, including the Council. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 18 hours in respect of the £450 threshold.

17. Where a public authority claims that regulation 12(4)(b) is engaged it should, where possible, provide advice and assistance to help the requester refine their request so that it is not manifestly unreasonable.

The Council’s position

18. The Council has confirmed that all of the requested information is held electronically and that there are approximately 1000 pages that will need to be printed, read, checked for confidentiality and exceptions,

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-12-4-b-environmental-information-regulations-manifestly-unreasonable-requests/>

scanned and then redacted. It confirmed that information held covers a 10 year period.

19. The Council confirmed that it estimated that to print, read, check and redact each page would take approximately 5 to 8 minutes per page which calculates taking somewhere between 83.33 to 133.33 hours.
20. The Council has argued that this would incur a huge time cost burden to the Council which does not have the resources to carry out such a task. It explained that many officers have been and still are heavily involved with dealing with the landslide since it occurred in February 2024. The Council has argued that officers need to concentrate and focus on the stability and monitoring of the area of landslide and assist residents during this major incident without the additional burden and distractions of such an onerous task.

The Commissioner's conclusions

21. The Commissioner must determine whether this is a reasonable estimate. The estimate must be sensible, realistic and supported by cogent evidence. It should be based on the quickest method of gathering the information requested, considering how the public authority actually holds its records.
22. The Commissioner notes that the request is broad in that it is asking for all relevant information held, which effectively covers a 10 year period.
23. The council has described how its searches and sampling exercises have uncovered some 1000 pages of information. In relation to its estimate of 5-8 minutes per page to consider whether exceptions apply, the Commissioner considers that this appears somewhat excessive, however, he accepts that, even if this was reduced to a more conservative figure (for example, 3 minutes per page), the time taken would still exceed the 18 hour limit by some margin.
24. The Commissioner is, therefore, satisfied that responding to the request would clearly exceed the 18-hour limit set by section 12 of FOIA by some degree. His decision is, therefore, that regulation 12(4)(b) is engaged by the request. He must, therefore, carry out the public interest test required by Regulation 12(1) of the EIR.
25. The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in the information being disclosed.
26. When doing so, he must also take into account that Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the Regulation 12 exceptions.

The public interest in the information being disclosed

27. The Commissioner recognises that there is a general public interest in transparency and accountability in relation to decisions made by public authorities. He also accepts that, where decisions have a significant impact on the environment as it affects local residents, there is an enhanced need for public scrutiny.
28. The Council has explained that, in February 2024, a landslip occurred in Old Roar Gill and residents of the affected properties were forced to move out of their homes near the Old Roar Gill after the Council issued an evacuation order. The Council has confirmed that the landslip started on private land and the residents were advised to contact their insurance companies.
29. The Council has confirmed that it owns neighbouring land in the lower part of Old Roar Gill, and it instructed its insurers and, in order to determine the potential cause(s) of the landslip, the Council's insurers agreed to pay for a geotechnical report of the area.
30. The Council confirmed that the resulting geotechnical report and FAQs in relation to the landslide were published on its website. The Council has stated that a number of complex issues caused the landslide. The Council has also suggested that affected residents were not happy with the report and its conclusions.
31. The complainant has stated that there have been previous landslips at the site and works carried out on Council owned land in the vicinity of the current landslip. They have explained that the purpose of this request was to obtain information concerning previous landslips and works carried out. The complainant has stated that there are a large number of houses that border the landslip site and there are concerns that further landslips could compromise the safety of these properties.

The Public interest in maintaining the exception

32. The Council has described how responding to the requests would entail it carrying out a substantial amount of work, creating a significant burden on its resources.
33. There is a strong public interest in protecting the limited resources of public authorities against requests which would create a significant burden upon them and affect their ability to carry out their primary functions.
34. In this case, the Council has explained that investigations in relation to causes of the landslide and remedies are ongoing and there is a public

interest in allowing these investigations to run their course without their effectiveness being curtailed by burdensome requests.

The balance of the public interest

35. The Commissioner recognises that the central public interest in the exception being maintained relates to preserving the Council's resources. It is not in the public interest to require an authority to respond to a disproportionate request which places a significant burden on it, but which would not provide information of significant value to the public.
36. Even where a request would provide information of value to the public, it is not in the public interest to require the authority to fully respond to the request where it would cause such a burden on the authority that this would significantly affect its ability to carry out its other functions.
37. The Commissioner has taken into account that there is a clear public interest in ensuring transparency relation to the Council's management of the landslip and in allowing the public access to information which will allow it to be satisfied about the probity of the decision making process.
38. The Commissioner notes that the Council has published information relating to the landslip and facilitated public engagement with the issue².
39. The Commissioner notes the public value in allowing access to information which relates to matters which have a significant impact on individuals' homes and wellbeing. However, taking into consideration the significant burden that responding to the request would place on the Council, balanced against the information which is already publicly available regarding the Council's handling of the landslip, and the opportunities for affected residents' involvement in the process, the Commissioner has decided that the public interest in the exception being maintained outweighs the public interest in disclosure in this case.
40. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the Regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019):

² See, for example, the "Options For Old Roar Gill Landslide" report:
https://hastings.moderngov.co.uk/documents/s54269/ORG_Full%20Council_Part%201%20Report_Draft05_Shared%20HC%20amends%20no%20watermark.pdf

“If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure...” and “the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations” (paragraph 19).

41. As highlighted above, in this case the Commissioner’s view is that the balance of the public interest clearly favours the exception being maintained in this case. Therefore, the Commissioner’s decision, whilst informed by the presumption provided for in regulation 12(2), is that Regulation 12(4)(b) was applied correctly.
42. The Commissioner's decision is therefore that the Council was able to refuse to respond to the complainant's request further under regulation 12(4)(b) of the EIR.

Procedural matters

Regulation 9 – advice and assistance

43. Regulation 9(1) requires a public authority to consider what advice and assistance it can reasonably provide to an applicant in cases where it relies on regulation 12(4)(b) of the EIR on the basis of burden. Even if this is simply to confirm to the complainant in a given case that no reasonable or practicable advice and assistance can be provided.
44. In this case the Council provided no such advice and assistance to the complainant.
45. The Commissioner, therefore, requires the Council to contact the complainant and provide advice and assistance as to how their request can be refined or focused so that it does not create an unreasonable burden

Right of appeal

46. 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

47. 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.
48. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Christopher Williams
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF