

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

Date: 27 April 2022

Public Authority: Hastings Borough Council
Address: Hastings Town Hall
Queens Square
Hastings
East Sussex
TN34 1TL

Decision (including any steps ordered)

1. The complainant requested information relating to a planning enforcement investigation. Hastings Borough Council ("the Council") initially withheld the requested information but disclosed it during the course of the Commissioner's investigation.
2. The Commissioner's decision is that the Council has complied with its duty under Regulation 5(1) of the EIR to provide the information it holds. It also issued a refusal notice that complied with Regulation 14 of the EIR.
3. As the Commissioner was unable to identify a statutory breach of the legislation, no remedial steps are required.

Request and response

4. On 20 January 2021 the complainant requested information of the following description:

"Under FOI or otherwise, please send me the enforcement enquiry known as ENF/20/00076, on Rocklands. The HBC enforcement enquiry known as ENF/20/00076 is what it says it is."

"The enquiry began in about Spring 2020 and ran for a few months before being suspended. I doubt that the contents are extensive. What I would like are copies of everything with that reference. Possibly the Council will opt for redaction in a few places. Communications between HBC and me only can be omitted."

5. On 29 January 2021, the Council responded. It refused to provide the requested information. It relied on Regulation 12(5)(b) of the EIR (course of justice) to withhold the requested information.
6. The complainant requested an internal review on 8 February 2021. The Council sent the outcome of its internal review on 19 February 2021. It maintained that Regulation 12(5)(b) applied and also now considered that information would be exempt under Regulation 13 of the EIR (third party personal data).

Scope of the case

7. The complainant contacted the Commissioner on 19 April 2021 to complain about the way his request for information had been handled.
8. During the course of the Commissioner's investigation, the Council reconsidered its approach. Given the passage of time, it determined that the information it held was no longer as sensitive as it had been and it therefore disclosed the information to the complainant with some minor personal data redactions.
9. The information having been disclosed, the Commissioner wrote to the complainant inviting him to withdraw his complaint. The complainant declined to withdraw.
10. Where a public authority relies on an exception to withhold information, but subsequently discloses it, the Commissioner will not usually investigate whether the exception was appropriately cited. Firstly, it would act as disincentive for the public authority to disclose the information in the first place – disclosing information, whose sensitivity may have diminished since it was first requested, is often easier than dealing with an investigation by the Commissioner. Secondly, such an investigation would confer no practical advantage on the complainant as, even if the complaint were upheld, the public authority could only be required to disclose information the complainant already possesses. Equally, the Commissioner might conclude that the public authority was entitled to withhold the information at the point it did so – resulting in the perverse position whereby the Commissioner would be issuing a

decision finding that the complainant was not entitled to be provided with information they had already received.

11. The Commissioner considers that it would not be an appropriate use of either his own or the Council's finite resources to determine whether Regulation 12(5)(b) was applied appropriately. The Commissioner merely notes that, given the nature of the information involved, the exception was not one which was obviously unreasonable.
12. The complainant's grounds for not wishing to withdraw his complaint largely centred on the application of Regulation 12(5)(b) or were not matters that could be dealt with in the scope of this complaint (the adequacy of the information the Council held or how the Council had dealt with other requests he had made). However he did raise issue with the Council's refusal notice and the Commissioner has therefore made this the focus of the decision notice.

Reasons for decision

Is the requested information environmental?

13. 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);
14. As it is information relating to planning and the enforcement of planning law, the Commissioner believes that the requested information is information on a measure affecting the elements of the environment. For procedural reasons, he has therefore assessed this case under the EIR.

Regulation 14 – refusal notice

15. Regulation 14 of the EIR states that:

- “(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.
- (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.
- (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).
- (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.
- (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.”

16. The complainant argued that the Council's refusal notice was inadequate as it did not properly explain why Regulation 12(5)(b) applied and its public interest test was highly generic.
17. The refusal notice was issued just 9 calendar days after the request was received. It notified the complainant of his right to seek an internal review and of his right to complain to the Commissioner. Therefore the Commissioner considers that the Council's refusal notice met the requirements of subsections (1), (2), (5a) and (5b) of Regulation 14.
18. In its refusal notice, the Council stated that:

"Under Environmental Information Regulations [sic] the information you have requested...is being refused under Exception 12(5)(b) 'The course of justice and inquiries'. The course of justice has a wide meaning which includes material covered by Law enforcement, investigations and proceedings."
19. The complainant argued, when seeking an internal review, that this description was inadequate. He also argued (incorrectly) that Regulation 12(5)(b) could not be applied to an investigation of this type.
20. Having considered the wording of Regulation 14(3)(a), the Commissioner is satisfied that the Council has complied with the legislation.
21. The Council's response stated, clearly and unambiguously, the EIR exception on which it was relying to withhold the requested information. Whilst it could have provided a fuller explanation as to why the exception was engaged for this particular information, the Commissioner notes that the Council's internal review contained further justification for the use of the exception.
22. Whilst the Council's reasoning could have been more detailed (in particular in explaining why an adverse effect would have occurred), the Commissioner does not consider that the reasoning provided was so defective as to represent poor practice or a statutory breach.
23. In respect of the Council's public interest test, the Commissioner again considers that the Council's responses complied with Regulation 14. The Council's refusal notice stated:

"Factors for disclosure:

- Transparency and accountability

"Factors against disclosure:

- Protecting information that has been acquired during investigations.
- Correspondence contains confidential information
- The significance and sensitivity of the information
- Consideration of options and the exchange of views within a 'safe space'
- Maintaining the confidentiality of discussions in the interest of good governance and the perceived threat to candour and boldness in the giving of advice [sic]"

24. Whilst these arguments are somewhat concise, the Commissioner considers that the Council has set out "the matters it considered" when carrying out its public interest test. The complainant may consider that the arguments could be better-related to the circumstances of the case, or that there are other factors that the Council should have taken into account – but once again, this does not mean that the Council has failed to comply with its statutory obligations.
25. The purpose of Regulation 14 is to allow requestors to understand the legal basis for a public authority's refusal to disclose environmental information. This allows requestors to challenge that basis, via both an internal review and a complaint to the Commissioner. It is best practice for a public authority to provide as detailed an explanation as possible (particularly at internal review stage) as to why any exception applies – not only does this meet the spirit of the legislation but is likely to reduce the number of refusals that are challenged.
26. However, the wording of the legislation does not impart an onerous burden. It only requires the public authority to specify the exception(s) being relied upon and provide details of its public interest test. The Council did both and, whilst its original refusal notice did not mention Regulation 13, this was corrected at internal review. The Commissioner is therefore not persuaded that the Council breached Regulation 14 in responding to the request.

Right of appeal

27. 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

28. 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.
29. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF