

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

**Date:** 20 March 2017

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

**Decision (including any steps ordered)**

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1. The complainant has submitted two requests for recorded information to Hastings Borough Council. The information which the complainant seeks relates to the digging of six, one metre square test pits in Speckled Wood in Ore Hastings.
2. The Commissioner's decision is that Hastings Borough Council is not entitled to rely on Regulation 12(4)(b) of the EIR in respect of the complainant's second request. The Commissioner has also decided that the Council has, on the balance of probabilities, provided the complainant with all of the recorded information it holds in respect of the complainant's first request and the Council has therefore complied with Regulation 5(1) of the EIR.
3. In view of the Council's failure to respond to the complainant's second request, the Commissioner has decided that Hastings Borough Council has not complied with Regulation 5(1) in respect of that request.
4. The Commissioner therefore requires the Council to respond to the request made by the complainant on 22 September 2016.
5. The public authority must take this step within 35 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

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6. On 16 June 2016, the complainant submitted a request for information via the WhatDoTheyKnow website. The terms of the complainant's request are:  
  
"Documents in relation to Enforcement ENF/16/00172 in relation to six or seven 1m<sup>3</sup> holes dug in Speckled Wood by JCB.  
  
I would be grateful you provide redacted communications in relation to this case from builder's communications. I would be grateful you provide any evidential documents that HBC holds that proves unequivocally that these holes dug by a JCB and builder are not related to development and therefore where not subject to enforcement."
7. The Council responded to the complainant's request on 21 June 2016, advising him that it holds the information he had requested and by providing him with copies of redacted emails dated 22 and 23 March 2016.
8. The Council informed the complainant that, "names, email addresses, telephone numbers etc have been redacted as these fall under Section 40 (2) of the Freedom of Information Act...", and, "the works were undertaken in preparation for designing a pathway through the wood, on behalf of Ore Community Land Trust. The works undertaken do not require planning permission and are not considered development. All parties understand that the any eventual path is likely to be considered development and therefore would require planning permission".
9. On 23 June 2016, the complainant wrote to the Council again on the same WhatDoTheyKnow stream. The complainant quoted [a named councillor] as stating: "Ore Community Land Trust doesn't own any land. No idea what's going on here, but I'll get someone from planning enforcement to take a look. Where in the woodland is it?" and subsequently, "Not having a detailed knowledge of building contractors, no, I've no idea, although I suppose I could look them up on the internet, as could you!"
10. The complainant also quoted the Council's Corporate Services as saying they had nothing further to add and he asserted that he was still "awaiting my documents that show this work was not development these have not been provided on request". The complainant argued that, "It is reasonable as you state in communications this is not development that you have documentary evidence to show this is the case". The complainant then asked the Council to supply "these evidential documents as part of this request".

11. On 21 July, the Council informed the complainant that it had nothing further to add in respect of this request.
12. The complainant responded to the Council on 23 July. In his response the complainant stated that, "This information is long overdue as it was requested 16th June 2016. I asked you to provide me the date you will start enforcement".
13. On 10 August, the Council wrote to the complainant following its review of its handling of his request. The Council advised the complainant that, "I have contacted the department concerned and [I] am satisfied that you have received all the information that is held by this authority in relation to your original request. Your email dated 23rd July 2016 is simply a question and not a request for recorded information, I am therefore satisfied that your request has been answered fully by Hastings Borough Council".
14. On 15 August the complainant wrote again to the Council. He informed the Council that he would refer this matter to the Information Commissioner's Office and stated that he was, "...appalled you cannot answer this FOIA and provide the documents you have used to make what should be a reasonable decision". The complainant then stated, "It therefore follows that if this is true that your department decision making processes in regard planning matters are flawed and not based on evidence".
15. On 16 August 2016, the complainant again corresponded with the Council. He drew the Council's attention to his request of 23 July and reminded the Council that he had asked for "any evidential documents that HBC holds that proves unequivocally that these holes dug by a JCB and builder are not related to development and therefore where not subject to enforcement". The complainant stated that, "This is not a question but a request for evidential documents in regard to the decision making process involved when you decided that you would not enforce ENF/16/00172".
16. The complainant asked the Council to, "...please provide documents in relation to this investigation and the direction and any decision tree [sic] used for you to decide not legally enforce this breach of planning?" The complainant stated, "Your Enforcement team was sent by communication parts of the Town and Country Planning Act which are pertinent in regard to Enforcement of this case. Please note you are already in breach of Freedom of Information Act 2010 in regard to not supplying this information in a timely fashion. I would point out it is reasonable to ask questions when trying to obtain information".
17. On 17 August, the complainant reminded the Council of its duty to supply environmental information under Regulation 5 of the EIR. The

complainant then submitted a number of questions to the Council to enable him to determine whether it holds the information he had asked for in his request of 16 August.

18. The Council responded to the complainant on 20 September. The Council informed the complainant that it was refusing his request in reliance of sections 14(1) and 14(2) of the Freedom of Information Act. The Council advised the complainant that his request is considered vexatious because it exhibits unreasonable persistence, frequent and overlapping requests and presents a significant burden to the authority. The Council also advised the complainant that it was also applying section 14(2) to his request.
19. On 22 September, the complainant wrote to the Council in response to its application of sections 14(1) and 14(2) to his request. The complainant made clear his opinion that the Council had not provided him with the information he seeks. He advised the Council that the information it had sent him related to information associated with Earthscapes Design Associates and this was not the information being requested in this current request. In consequence of this, the complainant argued that the Council was not able to cite section 14(1) to refuse his request.
20. The complainant maintained that the information was not pertinent to any enforcement document held by the Council: He stated that he understood, "that an Enforcement Number was given and this would mean communications would have occurred. These documents have not been provided. There has been no information provided under either of these requests from the Town and Country Planning Act which removes the necessity for Enforcement. You cannot choose what to release. Your officer [a named person] chose this route to deal with this online request outside of this site and therefore it is not vexatious but the same request".
21. The complainant then went on to request the following information:
  - 1) "Please provide documents pertaining to the Town and Country Planning Act failure of enforcement ENF/16/00172. These should consist of legal reason in messages to and from other officers showing reasons for the lack of enforcement.
  - 2) I understand [a named person] attended this site and investigated ENF/16/00172. Can you provide his report and any costs that were legally exacted on the contractors?
  - 3) Please provide documents in relation to any referral of this matter in nomenclature Speckled Wood or under reference ENF/16/00172 to PINS.
  - 4) Please provide documents in relation Ecological Surveys & Report before these 7 x 1m3 holes where dug in ground.

- 5) Please provide documents in relation to Environment Agency handling of digging 7 x 1m<sup>3</sup> holes and information on how to proceed. I understand Knotweed is a controlled waste under the Environmental Protection Act.
- 6) Please provide documents showing legal owner of Titles consent to this work.
- 7) Please provide documents giving permission for this work to commence during the bird nesting season.
- 8) Can you provide the name of the Ecologist who attended and supervised the project?
- 9) and provide information in relation to reports on wildlife crime to the police."

### **Scope of the case**

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22. The complainant contacted the Commissioner on 22 September 2016 to complain about the way his request for information had been handled.
23. The Commissioner has investigated whether the Council holds information beyond that which it disclosed to the complainant on 21 June 2016, and which falls within the scope of his initial request. The Commissioner has also investigated the Council's reliance on sections 14(1) and 14(2) of the FOIA to refuse to respond to the complainant's subsequent request – that of 22 September 2016.

### **Background information**

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24. The information which the complainant seeks relates to the digging of six, one metre square trial pits, which were dug as part of a survey in support of a potential footpath through the area of Speckled Wood. The test pits were dug in order to determine ground types.
25. The Council acknowledges that those involved in digging the trial pits were aware that any future footpath would require planning consent.
26. The dimension of the six trial pits was such that planning consent was not required and they were in-filled after the survey was completed.

### **Reasons for decision**

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#### **Is the requested information environmental information?**

27. Regulation 2(1) of the EIR defines what constitutes 'environmental information'. Subsections (a) to (c) state –

'(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 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) and (b) as well as measures or activities designed to protect those elements.'

28. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.
29. In the Commissioner's opinion the information sought by the complainant is likely to constitute environmental information as it relates to elements of the landscape or matters which would affect the landscape. The information requests therefore fall to be considered under the EIR.

#### **Regulation 12(4)(b) – where a request is manifestly unreasonable**

30. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose environmental information to the extent that the request for information is manifestly unreasonable.
31. There is no definition of 'manifestly unreasonable' under the EIR. The Commissioner considers that 'manifestly' implies that the request should 'obviously' or 'clearly' be unreasonable.
32. A request can be manifestly unreasonable for two reasons: Firstly where it is vexatious and secondly where the public authority would incur unreasonable costs or where there would be an unreasonable diversion of resources.
33. The key to determining whether a request is vexatious is a consideration of whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
34. Where this is not clear it is necessary to weigh the impact of the request on the public authority against the purpose and value of the request. To do this a public authority must be permitted to take into account wider factors associated with the request, such as its background and history.

35. In this case, the Council's position in respect of the two requests made by the complainant is that they are manifestly unreasonable by virtue of being vexatious. The Council's justification for its position rests solely on its assertion that the Council has provided the complainant with all the recorded information it holds which is relevant to his requests.
36. Other than this, the Council has not provided the Commissioner with any further grounds to support why the complainant's requests are manifestly unreasonable.

*The Commissioner's decision*

37. In view of the Council's failure to adequately justify its application of Regulation 12(4)(b) of the EIR, the Commissioner has decided that the Council is not entitled to rely on Regulation 12(4)(b) in respect of each of the requests made by the complainant on 22 September 2016.
38. The Commissioner has noted that the Council did not respond to the 9 questions asked by the complainant in this request. The Commissioner acknowledges that, since her intervention, the Council has provided the Commissioner with a response to each of the complainant's nine questions. Notwithstanding this action. The Commissioner requires the Council to send its response to the complainant.
39. The Commissioner has gone on to consider whether the Council holds any information falling within the scope of the complainant's first request of 16 June, which has not already been provided to him.

**Duty to make environmental information available on request**

*Request of 16 June 2016*

40. Regulation 5(1) of the EIR states that –

“...a public authority that holds environmental information shall make it available on request.”

41. The Commissioner has sought to determine whether, on the balance of probabilities, the Council holds information which falls within the scope of the complainant's request which has not been disclosed to him directly. The Commissioner makes this determination by applying the civil test of the balance of probabilities which is in line with the approach taken by the Information Rights Tribunal when it has considered whether information is held in cases which it has considered in the past.
42. In this case, the Council concedes that it should have dealt with the complainant's request under the Environmental Information Regulations 2004, rather than under the Freedom of Information Act.

43. The Council has assured the Commissioner that it has provided the complainant with all the information it holds which is relevant to his request.
44. To be certain of this, the Council has carried out a search of the database where relevant information is likely to be held. This database is called the 'Acolaid' database and it is where the Council holds all planning applications, queries and enforcement matters. The Council used the search terms 'Speckled Wood' and "Church Street' as these were considered most appropriate.
45. The Council has advised the Commissioner that any relevant information would be stored on its computer network and that it would not be held on the personal computers of its officers.
46. The Council has also assured the Commissioner that no relevant information would be held manually as paper-based records.
47. Further to the above, the Council has advised the Commissioner that it has not destroyed or deleted any relevant information and that it follows the Retention Guidelines for Local Authorities which are issued by the National Archives.
48. The Council asserts that the complainant has been given all the recorded information it holds in respect of his request of 16 June 2016 despite the complainant's apparent belief that this is not the case.

*The Commissioner's decision*

49. In view of the Council's representations and assurances given in respect of the complainant's request of 16 June, the Commissioner has decided that, on the balance of probabilities, the Council does not hold any further recorded information other than that which it has already provided to him.
50. The Council's representations are credible and in the absence of any evidence to the contrary, the Commissioner has decided that the Council has complied with Regulation 5(1) of the EIR in respect of this request.



## Right of appeal

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51. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

52. 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.
53. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**