

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

Date: 20 August 2019

Public Authority: Hastings Borough Council
Address: Town Hall
Queens Road
Hastings
East Sussex
TN34 1QR

Decision (including any steps ordered)

1. The complainant requested from Hastings Borough Council (the Council) information consisting of a report or document from which two figures were extracted following a previous information request. The Council stated that it did not hold information of such description.
2. The Commissioner's decision is that, on the balance of probabilities, the Council stated correct that it did not hold the requested information, but that it breached regulation 11(4) of the EIR as its internal review was not carried out within the required 40 working days.
3. The Commissioner does not require the Council to take any steps.

Background information

4. The present complaint is part of a series of complaints submitted by the complainant against the Council mainly related to the Council's decisions and activities in relation to a location named Ecclesbourne Glen.

5. In June 2018 the complainant requested from the Council copies of any documents produced concerning monitoring of the landslip in "Ecclesbourne Glen".
6. The Council responded to the complainant by providing the information it held, which included two figures / diagrams. Both diagrams were produced by the engineering consulting company "Coffey Ltd" (Coffey) for the Council as part of the project "Ecclesbourne Glen Licence". Figure 5 was titled "SLOPE ANGLE PLAN" and figure 7 was titled "SCHEMATIC GEOLOGICAL CROSS SECTION A-A FROM CHAINAGE 80 TO 250".
7. The information provided led the complainant to believe that they form part of a larger report/document.

Request and response

8. On 21 June 2018, the complainant wrote to the Council and requested information in the following terms:

"A recent FOI request (FOI76891398) provided two extracted figures from a recent Coffey report whose project title was 'Ecclesbourne Glen Licence'.

Figure 5 showed a slope angle plan dated Jan 2018 and figure 7 shows a slope cross section dated Dec 2017. Both figures have a Coffey Project code of 02255AG and a project title of 'Ecclesbourne Glen Licence'.

It is clear that these two figures are extracts from a larger report/document.

I request a full copy of this report/document under EIR regulations."

9. The Council responded on 3 July 2018. It stated that it did not hold information of that description.
10. Remaining dissatisfied with the response received, on the same day the complainant requested an internal review.
11. Following an internal review the Council wrote to the complainant on 18 October 2018. It upheld its original position that the requested information was not held, explaining that "... the 2 pdf's (figures 5 and 7) were in fact from a draft document for the Caravan Site Licence appeal which the Council does not hold."

Scope of the case

12. The complainant contacted the Commissioner on 3 October 2018 to complain about the way his request for information had been handled. He is of the opinion that the Council should be in possession of the information requested which should be in form of a document or report.
13. The complainant also complained that at the time that he submitted his complaint he had not received the outcome of the internal review that he requested. As recorded above, the Council subsequently responded with the outcome of the internal review, but the delay in completing the review is covered in the analysis below.
14. The scope of this case is to determine whether the Council stated correctly that it did not hold the information requested by the complainant.

Reasons for decision

Is the requested information environmental?

15. Information is "environmental" if it meets the definition set out in regulation 2 of the EIR. Environmental information must be considered for disclosure under the terms of the EIR.
16. Under regulation 2(1)(c), information on any measure that will affect, or be likely to affect, the elements of the environment referred to in 2(1)(a) or the environmental factors referred to in 2(1)(b) will be environmental information. In the present case, the requested information is a document/report relating to an application to operate a caravan site. This type of activity is a measure that may affect several of the environmental elements and factors listed in regulations 2(1)(a) and (b). The Commissioner therefore considers the request to have been seeking environmental information under the terms of the EIR.

Regulation 5(1) - Information held/ not held

17. Regulation 5(1) of the EIR states that "*...a public authority that holds environmental information shall make it available on request.*"
18. 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

balance of probabilities, the public authority held at the time of the request any information which fell within the scope of the request.

19. For clarity, the Commissioner is not expected to prove categorically whether the information was held. She is only required to make a judgement on whether the information was held on the balance of probabilities¹. The question for the Commissioner here is whether on the balance of probabilities the Council holds information falling within the scope of the request of 21 June 2018.
20. The complainant stated that he was not convinced with the Council's response that it did not hold the requested information. He insisted that the two diagrams obtained following a previous information request indicate that *"it is absolutely clear that these figures are part of a larger report."*
21. The Commissioner has therefore asked the Council what searches it carried out to determine that no information was held falling within the scope of the complainant's request.
22. The Council confirmed that it conducted all relevant searches including electronic files, email correspondence and hard copy materials. These searches were conducted by a number of Council officers who have been involved in these matters over many years.
23. The Council stated that if the requested information was held it would probably be in electronic format.
24. With that in mind, the Council advised the Commissioner that it also searched its electronic servers which hold all electronic information on all computers, including laptops. None of these searches resulted with a document or report as per the complainant's description.
25. The Council also confirmed that *"no information was ever deleted or destroyed relating to the complaint as the document was never held."*
26. The Council asserted that there is no business or statutory requirement to hold a document of the complainant's description.
27. During the course of her investigation the Commissioner was contacted by the complainant who stated that he had obtained further information in relation to his case. The complainant stated that following an

¹ This approach is supported by the Information Tribunal's findings in *Linda Bromley and Others / Environment Agency* (31 August 2007) EA/2006/0072

information request submitted to East Sussex County Council (ESCC), he was provided with a document consisting of two photographs and a footnote that contained a similar description to the diagrams that he obtained from the Council. The complainant was told by ESCC that the information in question was sent from the Council to ESCC.

28. Following this development, the Commissioner contacted the Council again seeking its representation in this regard.
29. The Council responded by explaining that it provided ESCC with a briefing paper relating to footpaths in Ecclesbourne Glen, which also contained those two photographs which subsequently were disclosed to the complainant.
30. In the Commissioner's question whether these two photographs and the diagrams that the complainant obtained from the Council form part of the same report, the Council stated that *"it appears from the ref number that they are of the same report."*
31. Nevertheless, the Council confirmed once again that it does not hold a copy of the entire report.
32. The Commissioner has reviewed the copies of the responses that the Council has provided to the complainant and the correspondence it had in the course of handling the complainant's requests, as well as the additional supporting evidence provided by the complainant.
33. The Commissioner has carefully considered the Council's submission, and the circumstances of this case, as well as the fact that the Council on several occasions categorically denied having ever held a report or document of the complainant's description. On this basis, the Commissioner is prepared to accept that, on the balance of probabilities, the Council did not hold the requested information.

Regulation 11 of the EIR – Internal review

34. Regulation 11 of the EIR permits a complainant to make representations following a public authority's response to an environmental information request.
35. Regulation 11(4) of the EIR requires public authorities to carry out the internal review within 40 working days of receiving representations from the requester.
36. In this case the complainant requested an internal review on the 3 July 2018 and the Council, despite acknowledging receipt, did not provide the outcome of its review until 18 October 2018.

37. This is outside the required 40 working days permitted by the EIR and therefore the Commissioner finds that the Council breached regulation 11(4) of the EIR.
38. As the internal review has been carried out, the Commissioner does not require the Council to take any steps.

Right of appeal

39. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

40. 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.
41. 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

Ben Tomes
Team Manager
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