

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 22 April 2020

**Public Authority:** Hastings Borough Council  
**Address:** Queens Square  
Hastings  
TN34 1TL

#### **Decision (including any steps ordered)**

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1. The complainant has requested information held by Hastings Borough Council (the council) that relates to proposals for a water drainage system following landslips in Hastings Country Park.
2. The Commissioner's decision is that the council is entitled to rely on regulation 12(5)(e) as its basis for withholding some of the requested information, and the public interest rests in favour of maintaining this exception.
3. With regards to all the remaining information held relevant to the request, the Commissioner has concluded that regulation 12(5)(e) is not engaged.
4. Furthermore, the Commissioner has found that the council has breached regulation 14(2) of the EIR by failing to issue a refusal notice within 20 working days. In addition, the council has also breached regulation 11(4) of the EIR by failing to provide its internal review response within the required 40 working days.
5. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
  - Release the cover email sent from the engineers to the council dated 4 August 2015.
  - Release the first part of the email correspondence which was sent between the council and its engineers (that part which precedes the extract set out within the complainant's request) on 22 July 2015, and 4 August 2015.

- Release the content of the internal email sent between council officers dated 7 August 2015.
6. The council must take these steps 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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7. On 12 August 2016, the complainant submitted an information request to the council. When setting out this request below, for ease of reference the Commissioner has highlighted in bold the extracts which the complainant had taken from an email sent between the council and Natural England on 1 September 2015:

*'SEG are aware that Coffey has produced drainage reports on potential remedial action in Ecclesbourne Glen. These reports are distinct and separate from the report known as Coffey 2 which we have constantly been refused access to.'*

*Correspondence from [council officer name redacted] dated 01/09/15 (see appendix below and attachment) to Natural England obtained under the FOI act refers to proposals from consultant engineers concerning an extensive drainage system to help manage ground water coming down from the caravan site.*

### **"Engineering Proposal**

- ***The engineer's proposal is to install an extensive surface water drainage system within Ecclesbourne Glen, to help manage ground water coming down from the caravan site.***
- ***This will require a network of trenches in the Glen, backfilled with rocks then topsoil. There is no clear identification as to where these trenches would eventually channel water to."***

*The email to Natural England includes extracts from emails between HBC and the Consultant Engineers:*

### **"Extracts from email exchange between HBC and consultant engineers**

**What do you think this work is most likely to point to in terms of options to stabilise the area? Drainage to help control ground**

**and surface water? Other engineering works to strengthen the ground?**

***As indicated in our earlier reports, we consider that the most viable solution will involve will involve [sic] the installation of drainage measures (land drainage) to control surface and groundwater and take such out of the land-slipped zone; however this solution would require a suitable outfall to be identified and agreed for such land drainage to flow into; such a suitable outfall isn't currently obvious. Other engineering works that could be viable, include soil nailing/rock anchoring or possibly mini-piling. However, as indicated in our report of 23 January 2015, we still do not really have sufficient information on the landslide form, failure mechanism, or triggers, to be able to determine, definitively, viable stabilisation options.***

**Will such works require on-going maintenance? Will they need replacing in 5 or 10 years or sooner?**

***The scope of maintenance works required will be dependent on the nature of the remedial solution selected/implemented. We would envisage that some form of land-drainage solution would probably require more maintenance than, say a passive soil nail/mini pile solution. These passive strengthening systems can be designed for 120 years, whereas the drainage is unlikely to last that long, especially on a landslide. That said both drainage and passive strengthening require less maintenance than active strengthening (such as pre-tensioned anchors, which we don't think are a viable option here).***

**Would they be likely to get Natural England approval?**

***At this stage we are unable to answer this question; the best way forward would be to investigate[sic] assess and determine viable options, then put such options to Natural England.***

***Alternatively, you could commence dialogue with Natural England to determine what, in principle[sic], would be acceptable to them.***

**If as I suspect essentially we're looking at lots of land drainage work, where will it drain to & what effect might it have in wherever that is (presumably the Country Park)?**

***This is the big question, as indicated above. One option would be to drain to the watercourse at the base of Ecclesbourne Glen; however, that could have implications in terms of enhanced erosion potential along the watercourse. Another option would***

***be to create (or allow the creation of) a new watercourse flowing southwards from the landslide area; but this could lead to accelerated slope/cliff erosion problems in an area that don't currently exist, and/or could precipitate/reactivate additional landslides further downslope."***

*The email also refers to an engineers report:*

***"I will also endeavour to have the latest engineers report sent to you for information."***

*This information has never been mentioned to SEG or to the public despite it being very relevant for the future of the glen.*

*I request a full copy of all correspondence between the consultant engineers and HBC on this issue of remedial actions and drainage.*

*I also request a copy of the engineers latest report referred to in the email from [council officer name redacted].*

*Please take this as a formal request for information under FOI and EIR regulations.'*

8. The council issued a refusal notice in response to the complainant's request on 14 October 2016. It stated that it believed the information requested to be exempt under regulation 12(5)(e) of the EIR.
9. The council then went on to say that it had considered the public interest test and that it regarded the factors in favour of disclosure to be '*transparency and accountability*' and the factor against disclosure to be '*maintaining commercial confidences*'. It confirmed that, in this instance, the public interest in maintaining the exception outweighed the public interest in the disclosure of the information.
10. On 3 November 2016, the complainant requested an internal review of the council's decision. He stated that the release of the requested information '*could provide valuable information on potential solutions to the landslip in Ecclesbourne Glen*' and that the council had not explained how its disclosure '*could possibly affect the legitimate economic interests*' of the site owners. He went on to say that even if there was some harm to the economic interests of the owners of the site that could be proven, he believed that the public interest lay in favour of the disclosure of the information. The complainant also asked the council to

take into account decision notice FS50619716<sup>1</sup>, issued by the Commissioner on 20 October 2016, as he believed this may have some relevance to the council's consideration of matters in this case.

11. The council provided its internal review response to the complainant on 19 November 2018. It advised that:

*'Having checked the correspondence I can confirm the information that you have requested in respect of drainage reports is commercially sensitive and confidential and will not be disclosed into the public domain.'*

12. The council went on to say that it was satisfied that the previous decision to refuse the complainant's request under the exception at regulation 12(5)(e) was correct.

### **Scope of the case**

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13. The complainant contacted the Commissioner on 3 February 2019 to complain about the way his request for information had been handled.

14. The Commissioner believes that part one of the complainant's request could, at first sight, be interpreted to mean he requires any information held at the time of the request that is contained within any correspondence sent between the council and Coffey about remedial actions, and also the drainage issues, following the landslip which affected the site and the Glen. If interpreted this way, it would be an extremely broad request.

15. However, in the complainant's representations to the Commissioner she notes that he states the following:

*'My EIR request [redacted] to HBC requested full copies of the report(s) and correspondence referred to in the emails to NE.'*

16. The Commissioner views such a comment to mean that the complainant's intention was to acquire copies of that correspondence which was referred to in, or directly relevant to, the email sent between

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<sup>1</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1625277/fs\\_50619716.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1625277/fs_50619716.pdf)

the council and Natural England dated 1 September 2015 only. She has therefore focussed her investigation specifically on this information.

17. The Commissioner has identified three emails contained within the bundle of information which the council has provided for her consideration that she regards to be relevant to the first part of the complainant's request. Two of these emails (the Coffey emails) were sent between the council and its engineers and are dated 22 July 2015 and 4 August 2015; the extract set out in the correspondence sent between the council and Natural England dated 1 September 2015 (which was quoted within the complainant's request), was taken directly from these emails. This information is therefore regarded to be directly relevant to the request.
18. The third email (internal email) which the Commissioner regards to be relevant is dated 7 August 2015 and was sent internally between officers within the council. Whilst it is not a 'report' as requested by the complainant, nor does it form direct communication between the council and its engineers, having had regard to the terms of the full request, the content of this email, and the context in which it is held, the Commissioner has decided that it should be included in her consideration of this particular request.
19. The complainant has clarified in recent representations which he has sent to the Commissioner that he requires the source of all the particular information that was quoted in his request, and it is apparent that he believes that the terms of reference which he set out would provide for this.
20. The internal email relates specifically to that part of the complainant's request set out in paragraph 7 of this decision notice which is bullet pointed under the heading '*Engineering Proposal*'. Whilst this information is clearly not contained in either a report, or direct correspondence between the council and its engineers (as requested by the complainant), it does record an exchange of communication between the council and the engineers which is relevant to the terms of the request.
21. It is also important to note that the internal email also forms part of an email chain; it follows on from the Coffey emails which have already been found to be directly relevant to the complainant's request. In addition, the internal email then appears to have directly preceded, and had an effect on, the council's subsequent correspondence to Natural England of 1 September 2015.
22. The Commissioner does not wish for the complainant to be penalised because he was unaware of the format in which part of the information

he required was held (i.e. not in a report or correspondence sent directly between the council and the engineers as he had assumed would be the case). Therefore, having considered all relevant factors, the Commissioner regards it to be appropriate to extend her consideration of the request to include the internal email.

23. The Commissioner notes that the relevant correspondence sent between the council and Natural England referred to by the complainant also includes brief reference to a report dated 23 January 2015 (the Coffey 2 Report); this report could therefore technically fall under the first part of the complainant's request. However, the Coffey 2 Report has already been considered in the First-tier (Information Rights) Tribunal case of *Hastings Borough Council v IC, EA/2017/0084*<sup>2</sup>.
24. The Tribunal case considered whether the council had been correct to withhold certain information in response to a request for the Coffey 2 Report. The Tribunal accepted that the withheld information could be linked to two other reports (a geotechnical report and a drainage report) that had been supplied to the council by the site owners. It went on to conclude that the site owners had provided this information to the council with the expectation that it would be treated in confidence, and that its disclosure would cause harm to their economic interests. It confirmed that the public interest lay in favour of withholding this information and upheld the council's decision.
25. It is the Commissioner's view that her decision about whether information contained within the Coffey 2 Report should be disclosed must concur with the Tribunal's findings. This is because there is no significant difference in the circumstances relating to these two cases which would lead her to be able to find an alternative outcome. As a result, the Commissioner finds that the council is correct to apply regulation 12(5)(e) to part of the Coffey Report. Given that the information which is not subject to the exception is already in the public domain, the Commissioner does not intend to ask that the council provide a copy of the redacted version of this report to the complainant.
26. With regard to the second part of the request, the complainant has contacted the Commissioner on a number of occasions to express concern that he is being denied access to a particular drainage report. He believes that the information already in his possession indicates that

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2167/Hastings%20Borough%20Council%20EA.2017.0084%20\(26.03.18\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2167/Hastings%20Borough%20Council%20EA.2017.0084%20(26.03.18).pdf)

such a report is held but that the council has persistently failed to acknowledge its existence. He has recently contacted the Commissioner to ask that she specifically investigate whether such a report, which he believes would be relevant to this request, is held. It would appear that he is of the view that the '*engineers latest report*' that he has asked for in the second part of his request could be this report.

27. The Commissioner has received several complaints about how the council has dealt with information requests that it has received about the landslips which occurred in the country park. She has been provided with a substantive amount of information held by the council during her investigations into these complaints as a result.
28. In response to this particular complaint, the council has provided a document titled '*Ecclesbourne Glen Landslide-Proposal for Investigation and Assessment 23 June 2015*' (the Proposal Report), and also information that was contained within attachments to this document, as part of the withheld bundle of information relevant to this request.
29. Having considered all the information which has been made available her, the Commissioner accepts that the Proposal Report is likely to have been the '*latest engineers report*' that was referred to by the council in its correspondence to Natural England (and which was quoted in the complainant's request). The Commissioner is satisfied that there is no indication from the information that she has considered that there is any other report held by the council which would meet the description that has been set out by the complainant.
30. In summary, having taken into account the additional information provided by the complainant set out in paragraph 15 of this decision notice, the Commissioner is satisfied that the Coffey 2 Report, the Proposal Report and the three emails (dated 22 July 2015, 4 August 2015 and 7 August 2015) is all the information held by the council that is relevant to the terms of the complainant's request.
31. As already stated in paragraph 19 of this decision notice, the Commissioner does not intend to consider the contents of the Coffey 2 Report further. She therefore considers the scope of her investigation to be whether the council was correct to apply regulation 12(5)(e) to all the remaining information that has been withheld which has been determined to be relevant to the request. In addition, the Commissioner will consider the council's compliance with procedural matters, as requested by the complainant.



## Reasons for decision

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### Is the information environmental information?

32. Information is 'environmental information' and must be considered for disclosure under the terms of the EIR, rather than the Freedom of Information Act 2000 (FOIA), if it meets the definition set out in regulations 2(1)(a) to 2(1)(f) of the EIR.
33. Regulation 2(1)(c) of the EIR says that any information on measures such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements or factors of the environment listed in regulation 2(1)(a) and 2(1)(b) will be environmental information. One of the elements listed under 2(1)(a) is land.
34. The information requested relates to proposals that concern drainage and the stability of the land following landslips. The Commissioner is satisfied that it is information that fits squarely into the definition of environmental information set out within regulation 2(1) of the EIR.
35. The Commissioner intends to firstly consider the Proposal Report which has been provided for her consideration. She will then go on to consider the emails which she has identified as being relevant to the request.

### **The Report**

36. The Proposal Report sets out possible options to investigate the stability of the land following landslips, and the costs to carry out such an investigation.
37. The Commissioner regards it to be appropriate at this point to refer to decision notice FS50817223<sup>3</sup>, issued on 6 March 2020. In that case, she considered the content of the same Proposal Report, and attachments. She found that regulation 12(5)(e) was engaged in respect of only part of the information contained therein. She therefore asked that the council take steps to release some of the information to the requester.
38. The Commissioner is mindful of the fact that the complainant in this case may not necessarily have been aware from the information available to him that the requests that had been made in both instances

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<sup>3</sup> <https://ico.org.uk/media/action-weve-taken/decision-notice/2020/2617390/fs50817223.pdf>

were, in effect, for the same report. In addition, she accepts that it is not necessarily the case that the decision reached in each case will be the same. In particular, she has had regard to the fact that the timing and circumstances relevant to the request can, in some cases, provide for a different conclusion in respect of the same withheld information.

39. The request that was considered in decision notice FS50817223 was submitted on 5 July 2018, and therefore much later than the request (dated 12 August 2016) that is currently under consideration. Having considered both cases in full, the Commissioner is satisfied that the circumstances are such that any decision reached in this case should still concur with the findings set out within decision notice FS50817223. This is because she has not found any significant factors that differ between the two cases which would lead her to form a different view.
40. Given the above, the Commissioner does not regard there to be any value to any party to set out in detail what would, in effect, be the same findings detailed within decision notice FS50817223. It would not provide for any further information to be released into the public domain from the Proposal Report, and attachments. Therefore, the Commissioner does not intend to consider this information any further within this decision notice.
41. She will now go on to consider the relevant correspondence which has been requested by the complainant.

### **Communications between the council and the geotechnical engineers and internal communications**

#### **Regulation 12(5)(e)-commercial confidentiality**

42. Regulation 12(5)(e) of the EIR states that a public authority can refuse to disclose information, if to do so would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
43. The construction of the exception effectively imposes a four-stage test and each condition as set out below must be satisfied for the exception to be engaged:
  - Is the information commercial or industrial in nature?
  - Is the information subject to confidentiality provided by law?
  - Is the confidentiality required to protect a legitimate economic interest?
  - Would the confidentiality be adversely affected by disclosure?

44. For clarity, if the first three questions can be answered in the positive, the final question will automatically be in the positive. This is because, if the information was disclosed under the EIR, it would cease to be confidential.
45. The Commissioner will, most often, consider the four-stage test in the order set out in paragraph 37 of this decision notice. Given the nature of the questions posed, it is apparent that, in most instances, it will be the most logical order to follow.
46. However, in this case, the Commissioner has decided that it would be appropriate to reverse the order of the first two stages of the test when considering whether regulation 12(5)(e) is engaged. Given this, she will firstly consider whether the withheld information is subject to confidentiality by law before then going on to consider if it is commercial or industrial in nature. She will then consider the final two stages of the test in the same order set out in paragraph 43 of this decision notice.

**Is the information subject to a duty of confidence provided by law?**

47. In relation to this element of the exception, the Commissioner has considered whether the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation, or statute.
48. The Commissioner has not been made aware of any statutory duty of confidence in this instance. She has therefore gone on to consider the common law of confidence, which has two key tests:
  - Does the information have the necessary quality of confidence? This involves confirming the information is not trivial and not in the public domain.
  - Was the obligation shared in circumstances importing an obligation of confidence? This can be explicit or implied.
49. The information that has been withheld relates to correspondence held about proposals to investigate land stability and water drainage following the landslip that had affected the site and the Glen. The Commissioner considers that the information, in the main, is not trivial.
50. The Commissioner firstly intends to consider the information contained within the internal email dated 7 August 2015. The information contained within this email is so sufficiently similar to that which was then included in the later correspondence sent to Natural England dated 1 September 2015 that the Commissioner has been unable to see how it can attract any duty of confidence to any party.

51. Given this, it is the Commissioner's decision that regulation 12(5)(e) is not engaged with regards to the information contained within the internal email dated 7 August 2015 and that its content should therefore be released in response to the complainant's request.
52. The Commissioner will now go on to consider the information contained within the Coffey emails dated 22 July 2015 and 4 August 2015.
53. She notes that it is the middle section of the Coffey emails that was extracted and included within the subsequent correspondence sent by the council to Natural England on 1 September 2015 (and which was quoted in the complainant's request).
54. The first section of the information contained within the Coffey emails (that which precedes the information which was included in the correspondence sent to Natural England) sets out, in the main, the options available to the council about how further study of the landslip could be carried out, and provides some technical detail. The Commissioner has had some difficulty establishing why the council would believe that this information would attract a duty of confidentiality and, in particular, a duty of confidentiality to the site owners.
55. Firstly, the Commissioner regards the information, in content, to be similar to that which is already in the public domain. This includes that information which is set out within the middle part of the same correspondence that was then included within the correspondence sent to Natural England (which is already into the public domain). In addition, there has been a number of other communications between the council and Coffey which have been published that provide very similar detail.
56. Having taken all factors into account, the Commissioner is not persuaded that this information is subject to a duty of confidentiality. In addition, she has formed the same view in respect of the cover email sent by Coffey with its response on 4 August 2015. She therefore concludes that regulation 12(5)(e) is not engaged in respect of this particular information and that it should be released.
57. The Commissioner will now go on to consider the remaining withheld information contained within the correspondence sent between the council and Coffey i.e., all that information contained within the Coffey emails which follows that part which was subsequently quoted within the council's correspondence to Natural England of 1 September 2015.
58. Having considered this information, the Commissioner accepts that, whilst it is not the same information that was considered in the Tribunal case, the content is such that its comments are directly relevant. This is

because she regards it to be in the same vein as the information which the Tribunal determined was subject to a duty of confidence. Given this, in order not to contradict the Tribunal's decision, it is the Commissioner's view that she must reach the same conclusions set out by the Tribunal in respect of this particular information.

59. As a result, the Commissioner is satisfied that the information that has been withheld by the council that is contained within the latter part of the Coffey emails (dated 22 July 2015 and 4 August 2015) is not trivial in nature, and it has the necessary quality of confidence. As this stage of the test is met in respect of this particular information, she has gone on to consider whether such information is commercial or industrial in nature.

### **Is the information commercial or industrial in nature?**

52. The Commissioner considers that for information to be commercial or industrial in nature it will need to relate to a commercial activity. The essence of commerce is trade, and a commercial activity will generally involve the sale or purchase of goods and services for a profit.
53. The Commissioner has assumed it to be the case from the council's representations that it regards the information that has been withheld to relate to the commercial activities of the site owners and their business.
54. In the Tribunal case the Commissioner was described as having taken a restrictive approach to the issue of whether the information that had been withheld was commercial or industrial.
55. In light of the Tribunal's comments, where she has deemed it to be relevant and appropriate to do so, the Commissioner has taken a broader approach to this particular issue in her consideration of the council's handling of other requests that relate to the same site, the landslips and Ecclesbourne Glen.
56. The Commissioner accepts that, given the nature and content of the remaining withheld information, it must be viewed in the same context as that information contained within the Coffey 2 Report which the Tribunal case concluded did constitute commercial information for the purposes of regulation 12(5)(e). She also acknowledges that it must then also follow that this information '*relates to a major asset of a business venture*' as described by the Tribunal.
57. The Commissioner is satisfied that, for the same reasoning set out in the Tribunal case, the disclosure of the remainder of the withheld information would have an effect on how the site owners could use their land and run their business. This, in turn, is likely to have some effect on the site owners' revenue and expenditure.

58. The Commissioner, following the principles of the Tribunal case, has therefore concluded that the information that has been withheld that is contained within the latter part of the correspondence sent between the council and Coffey i.e., that information which follows on from that part of the correspondence set out in the complainant's request, relates to a commercial activity for the purposes of regulation 12(5)(e) of the EIR and that this stage of the test is met.

**Is the confidentiality required to protect a legitimate economic interest?**

59. The Commissioner considers that to satisfy this element of the exception, disclosure would have to adversely affect a legitimate economic interest of the person (or *persons*) that the confidentiality is designed to protect.

60. In the Commissioner's view, it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish that, on the balance of probabilities, some harm *would* be caused by the disclosure. In accordance with various decisions heard before the Information Tribunal, the Commissioner interprets 'would' to mean '*more probable than not.*'

61. It would appear from the representations made by the council that it believes the disclosure of the withheld information would cause harm to the economic interests of the site owners.

62. The Commissioner regards some elements of the Tribunal's consideration of this stage of the test to also be of relevance to this case; of particular significance is that the request that was under consideration in the Tribunal case was submitted in June 2016, and was therefore very close in timing to the request under consideration in this notice.

63. The Commissioner has considered the conclusion reached by the Tribunal that the disclosure of the information that had been withheld in that case would result in '*adverse publicity*' and that '*some economic harm would flow from that.*'

64. Having taken all factors into account, the Commissioner is satisfied that there is sufficient evidence for her to conclude that, at the time of the request, there was a realistic possibility that the disclosure of the withheld information would harm the legitimate economic interests of the site owners.

65. The Commissioner therefore accepts that the disclosure of the withheld information that she has determined to be confidential would adversely

affect the legitimate economic interests of the site owners and that this stage of the test is met.

**Would the confidentiality be adversely affected by disclosure?**

66. Although this is a necessary element of the exception, should the first three tests set out in paragraph 43 be met, the Commissioner considers it inevitable that this element will also be satisfied. In her view, disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available and this would harm the legitimate economic interests that have been identified.

**The public interest test**

67. As the exception under regulation 12(5)(e) is engaged, the Commissioner has gone on to consider whether the public interest in the disclosure of the requested information outweighs the public interest in maintaining the exception.

68. When carrying out the test the Commissioner must take into account the presumption towards disclosure provided in regulation 12(2).

69. The council advised that it regarded those factors in favour of disclosure to be '*transparency*' and '*accountability*'.

70. The Commissioner understands that the landslips have not only affected the landscape but also amenities within the country park. She also appreciates that there is a strong public interest in establishing the causes of the landslips, what remedial action is to be taken, and whether there is anything that can be done to prevent a reoccurrence.

71. However, when considering the important factors of transparency and accountability, the Commissioner has taken into account that some information about Ecclesbourne Glen, the landslips and the site have been placed in the public domain. This includes information about drainage of water in the affected area.

72. For example, the '*Ecclesbourne Glen Statement (June 2014)*'<sup>4</sup> provides details on the issue of drainage, including the detailed Coffey report dated May 2014. Additional information has also been released via other

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<sup>4</sup> [https://www.hastings.gov.uk/planning/news/ecclesbourne\\_glen/](https://www.hastings.gov.uk/planning/news/ecclesbourne_glen/)

means, including a redacted version of the Coffey 2 Report<sup>5</sup> and other letters sent between Coffey and the council<sup>6</sup>.

73. In this instance, there are wider factors at play which the Commissioner regards to have had an effect on the expectations of confidentiality to the information that has been withheld. The cause, and effects, of the landslips have been the subject of some contention, and it would seem that the site has received some negative publicity following their occurrence.
74. The Commissioner is aware that there is strong feeling amongst certain interested parties about what caused the landslips and this has, understandably, resulted in a greater level of interest in any actions taken that may relate in some way to this. She accepts that it is not unreasonable for the local community to want to be properly informed of matters relating to the landslips, particularly given the severe damage that they have caused. However, there is, in the Commissioner's view, a balance to be struck between what is truly in the public interest, and the site owners' right to a certain level of privacy in the running of their business.
75. The council's response to the complainant, and to the Commissioner, references harassment that it states that the site owners have been subjected to. The council also makes reference to the consideration of this same point in the Tribunal case.
76. The complainant has provided the Commissioner with a police report which he believes provides evidence that no harassment has occurred in the way that has been described by the council.
77. The Commissioner is satisfied that any conclusions she might reach in relation to the issue of harassment would not actually affect the balance of those factors she regards to weigh in favour of, and against, disclosure so significantly that it would alter her final decision. Given this, she does not regard it to be necessary, or appropriate, to make any determination in respect of the validity of any claims of harassment that have been made.

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<sup>5</sup><https://www.whatdotheyknow.com/request/589159/response/1406900/attach/4/FOI131066053%20Redacted.pdf>

<sup>6</sup><https://www.whatdotheyknow.com/request/416905/response/1095215/attach/html/3/FOI22391%20Redacted.pdf.html>



78. The Commissioner regards the arguments for transparency and accountability to carry some weight in support of disclosure in this particular case. However, given the information which is already in the public domain about the matter of drainage and the options which are available to the council, she is not persuaded that any value that may be derived from the disclosure of the withheld information would outweigh the potential harm caused to the site owners right to run their business with some degree of privacy, which she views to be real and significant.
79. Having taken all relevant factors into account, the Commissioner is satisfied that the disclosure of that information that she has determined is subject to regulation 12(5)(e) would not be in the public interest. The harm disclosure would cause to the site owners weighs the balance heavily in favour of withholding the latter part of the information contained within the Coffey emails in this instance.

### **Procedural matters**

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80. The complainant has requested that the Commissioner also consider the general handling of his request by the council.

### **Regulation 14-refusal notice**

81. Regulation 14(1) of the EIR requires a public authority that refuses a request for information to provide a refusal notice in writing and in accordance with the provisions of this regulation. Regulation 14(2) requires the refusal notice to be issued within 20 working days of receipt of the request.
82. Regulation 11(4) requires a public authority to inform a requester of the outcome of the internal review as a soon as possible and not later than 40 working days after that date on which an internal review was requested.
83. The complainant made his request on 12 August 2016 and the council issued its refusal notice on 14 October 2016. The complainant then asked for an internal review on 3 November 2016 but the council did not provide its response until 19 November 2018.
84. The council has provided the Commissioner with an explanation for the delays in dealing with a number of requests that it has received that relate to the landslips, the site and the Glen. These have been taken into account as part of her consideration of this case.
85. The council has described the difficulties it has faced when having to deal with a large number of requests and the burden that this has placed on its limited resources. The Commissioner is aware that it was

also involved in protracted negotiations with the site owners about a site licence which was the subject of an appeal until April 2018. In addition, the Tribunal appeal in relation to decision notice FS50650700 was only decided on 26 March 2018. The council has confirmed that it placed a number of information requests that it had received on hold until these two matters were concluded.

86. Whilst the Commissioner appreciates the difficulties faced by the council in the circumstances which it has described, it is not in dispute that it failed to issue a refusal notice within 20 working days of receiving the original request and that it did not respond to the request for an internal review within 40 working days. As a result, the Commissioner is satisfied that the council has breached regulations 14(2) and 11(4) of the EIR respectively.

## Right of appeal

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87. 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](mailto:grc@justice.gov.uk)

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

88. 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.
89. 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**