

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 7 April 2020

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

Decision (including any steps ordered)

1. The complainant has requested information provided to Hastings Borough Council (the council) by geotechnical engineers about the causes, and possible stabilisation, of a landslip which had occurred in the local area.
2. The Commissioner's decision is that the council is entitled to withhold that information which has been identified as being relevant to the complainant's request.
3. However, the Commissioner has found that the council has breached regulation 14(2) of the EIR as it failed to issue a refusal notice within 20 working days of receipt of the request. In addition, as the council failed to specify in its responses to the complainant what exception it was relying on, or its consideration of the public interest test, it has breached regulation 14(3)(a) and 14(3)(b) of the EIR respectively. The council has also breached regulation 11(4) of the EIR as it did not provide its internal response within the required 40 working days.
4. The Commissioner does not require the council to take any steps as a result of this decision notice.

Request and response

5. On 15 February 2017 the complainant wrote to the council referring to a question that was raised with full council on the same date. This question related to the council's consideration of the possible engineering solutions which would provide public access to areas of Ecclesbourne Glen where footpaths had been damaged by a landslip. The complainant then went on to request information in the following terms:

I note that Councillor [name redacted] does not refer to any documents or advice received from the geotechnical contractors concerning slope stability within Rocklands caravan park.

It is clear that footpaths cannot be reopened without first understanding the causes and stabilising the landslip.

Please provide me with all supporting documents and correspondence provided by the Geotechnical consultants which refers to the causes of the landslip and the possible means by which it can be stabilised.

6. The council issued a refusal notice on 30 November 2018. This stated of the following:

Hastings Borough Council has provided you with all the reports they are willing to disclose.

7. On 15 December 2018 the complainant requested an internal review. On 29 March 2019 the council then provided the following response:

The subject of Rocklands Caravan Park and Ecclesbourne Glen has been ongoing for the past 5 years. Hastings Borough Council has provided you with information that has been requested subject to redaction and exemptions/exceptions.

As you are aware some of the information that we withheld was subject to a recent First Tier Tribunal decision EA/2017/0084 - Hastings Borough Council vs Information Commissioner in which the council was successful. Many of the requests for Information/reports that have been requested by you are of a similar nature and will not be disclosed.

Hastings Borough Council will not visit this again.

Scope of the case

8. The complainant contacted the Commissioner on 16 March 2019 to complain about the way his request for information had been handled.
9. In this instance, the council's responses to the complainant did not explicitly confirm whether there was information that was held that was relevant to the terms of his request. Given this, during the course of the her investigation, the Commissioner asked that the council clarify whether it had withheld information in response to the request and, if so, what exceptions it had believed to be engaged in respect of such information. The Commissioner also gave the council the opportunity to revisit the request.
10. In response the council confirmed that it had believed that certain information held within one particular report (the Coffey 2 Report) was relevant to the request. Whilst the council did not confirm to the Commissioner the exception(s) which it had applied to such information, it made reference to the First tier (Information Rights) Tribunal in the case of *Hastings Borough Council v IC EA/2017/0084*¹ (the Tribunal case) as being directly relevant to its decision not to provide any information in response to the complainant's request.
11. In the Tribunal case it was determined that the council was correct to have withheld part of the Coffey 2 Report in response to another request that it had received. The council has advised the Commissioner that as it regarded matters to have already been '*resolved*' by the Tribunal, it did not intend to revisit how it had dealt with the complainant's request.
12. The Commissioner considers the scope of her investigation to be whether, on the balance of probabilities, the council has identified all the information that is relevant to the request. She will then go on to decide whether the council is correct to have withheld this information in response to the complainant's request.
13. In addition, the Commissioner will also consider certain procedural matters, as requested by the complainant.

1

[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)

Reasons for decision

14. The Commissioner regards it to be pertinent to note that the terms of the complainant's request are quite specific in that he states he only requires information held by the council that was provided by geotechnical consultants which (a) refers to the causes of the landslip or (b) provides details of how the landslip can be stabilised. Given this, any other information that may be held by the council that was provided by geotechnical advisers about the landslips, for example, proposals for further investigation of the land stability in the affected areas, would not fall within the scope of the request, and will therefore not be considered.
15. In addition, the Commissioner regards some information that is already in the public domain to be relevant to the request, including part of the Coffey 2 Report. However, as the Commissioner is satisfied that the requester would already be aware of such information, she does not intend to consider this further within this decision notice.
16. The Commissioner agrees with the council that there is information relevant to the complainant's request contained within that part of the Coffey 2 Report which is not already in the public domain. She also accepts that the outcome of the Tribunal case (previously referred to in paragraph 11 of this decision notice) is relevant to this case.
17. The request which was considered in the Tribunal case had been submitted to the council on 22 June 2016. The case was then heard in November 2017, deliberations took place in January 2018 and the Tribunal's decision was issued on 26 March 2018.
18. The complainant's request was submitted to the council after the date of the request which was considered in the Tribunal case, but prior to the relevant appeal hearing. Given this timeline, the Commissioner is satisfied that any decision she is to reach about the release of information contained within the Coffey 2 Report must concur with the decision set out by the Tribunal. In particular, she is satisfied that as the Tribunal ruled that the council was correct to rely on regulation 12(5)(e) when withholding the relevant information contained within the Coffey 2 Report, she must conclude the same.
19. As a result, the Commissioner finds that the council is entitled to withhold that information contained within the Coffey 2 Report which is relevant to the complainant's request. This is for the same reasons set out by the Tribunal.
20. The Commissioner has gone on to consider whether there is any indication that the council may hold additional information that is relevant to the terms of the request made by the complainant.

21. The Commissioner has received several complaints about the council's handling of information requests that relate to the landslips, the site and the Glen. She is therefore in the unusual position of having access to additional sets of information that have been withheld by the council in response to those requests.
22. The Commissioner has identified some information contained within one further report, the *Ecclesbourne Glen Footpath Diversions Options Assessment Report, June 2016* (the Options Assessment Report) which she regards to be relevant to the complainant's request. This report has already been considered within decision notice FER0832391 (issued on 9 March 2020).
23. In decision notice FER0832391, the Commissioner considered whether the council had been correct to withhold the information contained within the Options Assessment Report in its entirety in response to a request that had been received. Whilst the Commissioner decided that certain information that had been withheld by the council should be released into the public domain, she accepted that the council was correct to have withheld the remainder of the information under regulation 12(5)(e) of the EIR.
24. The Commissioner has considered whether any of that information which she had decided was subject to regulation 12(5)(e) in decision notice FER0832391 should, in the circumstances of this case, be released.
25. The Commissioner has noted that there is a significant time difference between the submission of the request relevant to decision notice FER0832391 (5 July 2018), and the request that is currently under consideration (15 February 2017). However, she is satisfied that, in the main, the circumstances relating to both requests are still so similar that the difference in the timing of the requests has no substantive effect on her decision.
26. Having taking into account all relevant factors, the Commissioner is satisfied that her consideration of the information contained within the Options Assessment Report (that falls within the scope of the complainant's request) should be the same as that set out within decision notice FER0832391. This includes her consideration of the public interest test.
27. Therefore, the Commissioner's decision is that the council is entitled to withhold the information contained within the Options Assessment Report that is relevant to the complainant's request (where it is not due to be released following decision notice FER0832391).

28. Given that the Commissioner has already set out, in full, her reasoning for deciding that the council is entitled to withhold some of the information contained within the Options Assessment Report (including that part which is relevant to this request) within decision notice FER0832391, she sees no value to any party in repeating these details within this decision notice.
29. In addition, the Commissioner, having considered all the available information, is of the view that, based on the balance of probabilities, the information that is contained within the Coffey 2 Report and the Options Assessment Report is the only information held by the council (that is not already in the public domain) which is relevant to the complainant's request.
30. To conclude, the Commissioner is satisfied that the council is entitled to withhold that information that it holds that falls within the scope of the request which is not already in the public domain.

Procedural matters

31. The complainant has requested that the Commissioner also consider the general handling of this request by the council.
32. Regulation 14(2) of the EIR states that a refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.
33. The complainant submitted his request to the council on 15 February 2017. The council then issued what the Commissioner regards to have been a refusal notice on 30 November 2018.
34. The council has provided a number of reasons why there was a delay in responding to the complainant's request. It has explained of the difficulties it experienced trying to manage the large volume of requests that it was receiving that related to the landslips, the Glen and the site. It has also referred to the fact that the site licence that had been issued to the site owners was subject to an appeal, and that an agreement on its content was only reached in April 2018. In addition, the Tribunal case was only decided in March 2018. The council goes on to say that whilst these matters remained outstanding it could not respond to the complainant's requests if they related to either subject as the relevant information was to be used within the appeals, and it would be *sub judice*.

35. The Commissioner appreciates that the council was in receipt of a high number of requests about the landslips, the Glen and the site and that this would have placed some burden on its resources. She also accepts that these are factors which may have had some bearing on some of the requests that were received by the council on related matters.
36. However, these arguments are not sufficient for the Commissioner to be able to conclude that the council has met its obligations under the EIR in relation to its handling of this request.
37. As the council failed to provide this response within the prescribed 20 working days, the Commissioner must find that the council has breached regulation 14(2) of the EIR.
38. Furthermore, regulation 11(4) requires a public authority to inform the requester of the outcome of the internal review as soon as possible and not later than 40 working days after that date on which an internal review was requested.
39. In this instance the complainant requested an internal review of the council's decision on 15 December 2018. The council did not provide its response until 29 March 2019. Given this, the Commissioner also finds that the council has breached regulation 11(4) of the EIR.
40. Finally, regulation 14(3) states that the refusal shall specify (a) any exception relied upon and (b) the public interest considerations.
41. The council's response to the complainant's request did not confirm the exceptions it was relying on, nor its consideration of the public interest test. As a result, the Commissioner finds that the council has breached regulation 14(3)(a) and 14(3)(b) respectively.

Right of appeal

42. 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

43. 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.
44. 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