

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

### **Decision notice**

**Date:** 2 July 2020

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

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

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1. The complainant requested information relating to the erection of a fence on the boundary between a holiday park and Ecclesbourne Glen. The council refused the request on the basis he had asked questions rather than made requests for recorded information. On review it directed the requestor to its planning portal, and responded directly to the questions asked, but it did not provide any further recorded information. The complainant considers that further information should have been provided to him. The complainant also complained about the time which the council took to respond to his request for review.
2. The Commissioner's decision is that on a balance of probabilities, the council does not hold any further information falling within the scope of the complainant's request. She has, however, decided that the council did not comply with the requirements of Regulation 11(4) in that it did not provide a response to the complainant's request for review within 40 working days. She has also decided that it did not comply with the requirements of Regulation 14(1) as it did not state that it was applying the exception in Regulation 12(4)(a) to the request in its response.
3. The Commissioner does not require the council to take any steps.

## Request and response

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4. On 24 June 2019, the complainant wrote to the council and requested information in the following terms:

*"My questions refer to this Heras Fencing that was installed by Rocklands across Ecclesbourne Glen in April please provide answers under EIR:*

- 1. Is the fencing permanent or temporary?*
- 2. What is the purpose of the fence?*
- 3. Was planning permission applied and obtained for the works?*
- 4. Do these works comply with site licence conditions? There are conditions stipulating that prior to any works being carried out a site stability survey must be carried out.*
- 5. Does this sort of fencing comply with the terms of the site licence?*
- 6. Does this sort of fencing comply with planning regulations for the site*
- 7. Were Natural England consulted (as is required by regulations) and have they given approval for these works on the border of the SSSI/SAC?*
- 8. Were the AONB consulted concerning the impact of these works on the AONB?*
- 9. Did HBC give consent for the use of a digger on the unstable lower slopes?*
- 10. Was specialist geotechnical advice sought prior to allowing a digger on these unstable slopes? Coffey have advised no such works should be carried out until slope stability has been assessed.*
- 11. Was specialist geotechnical advice sought prior to the pile driving on the sensitive lower slopes?*
- 12. Was permission sought and granted for the works carried out on protected trees ?*
- 13. Did HBC consider an alternative less intrusive form of fencing*
- 14. Did HBC consider an alternative way to mark the borders such as planting a hedgerow?"*

5. The council responded on 30 July 2019. It refused to respond to the request. It stated that:

*"The Freedom of Information Act is not a tool to answer questions or for the council to give opinions.*

*Your request ref: FOIR-126737550 are questions and not requests for recorded information."*

6. The complainant then requested that the council review its decision on 19 September 2019. He pointed to guidance from the Commissioner that stated questions should be considered under the Regulations and the FOI Act and recorded information should be considered for disclosure where it would respond to the questions asked.
7. Following an internal review, the council wrote to the complainant on 13 January 2020. It broadly responded to the complainant's requests directly but did not provide any recorded information which responded to those questions.
8. It did provide a general link to its planning portal and indicated that some information was available through this, but it did not specify what information was available, nor which planning applications to search for to obtain it. It also did not provide a link to any specific planning applications to consider. The complainant is however aware of the fact that there have been planning applications which are relevant to the activities of the holiday park.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 16 November 2019 to complain about the way his request for information had been handled.
10. His initial concern was that the council had not responded to his request for internal review. Following the Commissioner's intervention, the council then responded to this, but the complainant is still concerned that the council has failed to respond to his request properly. He argues that it has not provided any recorded information which it holds which responds to the questions he asked. He asked the Commissioner to consider:
  1. *That the initial response to the request was in breach of information regulations and ICO guidance.*
  2. *That the review was delayed and required intervention from the ICO.*
  3. *That the review does not address the issues raised in the request, gives unsubstantiated opinions, and fails to provide available recorded information.*

11. The Commissioner therefore wrote to the council again, asking it to reconsider its position and to respond to both the complainant, and to the Commissioner stating what recorded information it had found, and to consider whether that recorded information could be disclosed to the complainant.
12. The council responded on 19 June 2020. It clarified that it holds no recorded information, other than the information on its planning portal. It did not however specify what information is held on its planning portal which meets the questions of the complainant, nor where on its portal this information is held. As noted above, however, the complainant is aware of planning applications made by the holiday park owners which are relevant to his concerns and these can be found via the search function on its planning portal.
13. However, the council did amend its response to question 3 and said that it would write to the complainant to inform him of the new response. It said its new response to the question is that *"The information provided is correct as all planning applications can be found on our website however upon further investigation the answer to this question is: Fencing is part of the site licence, as such no separate permission required"*.
14. The complainant disputes that this is a correct interpretation of the licence, however it is not within the Commissioner's remit to consider such arguments as they relate to the interpretation of the planning documents. If the complainant considers that the council has acted incorrectly in its supervision of the site he is able to take legal advice as to whether he has other legal avenues to dispute the erection of the fence or the councils actions. The Commissioner has no powers to investigate whether the council's actions met with its obligations in planning law or any wider environmental laws. Her consideration is restricted to whether the council's response met with its obligations under the EIR, or the FOI Act.
15. The complainant also argues that the relevant information was not provided to him, but acknowledges that he does hold a copy of the relevant licence to consider.
16. The Commissioner therefore considers that the remaining part of the complaint for her to consider is whether the council holds any further information falling within the scope of the complainant's request for information. She also needs to consider whether the council's responses complied with the procedural requirements of the EIR.

## Reasons for decision

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### Background to the case

17. The complainant is concerned about a fence which has been erected bordering a holiday park. He considers that the fence, and the manner in which it was built, damaged the environment in surrounding the area, which forms part of an Area of Natural Beauty (and AONB) and Site of Special Scientific Interest (an SSSI). .
18. He is therefore seeking information demonstrating what licences and permissions the landowners had in place to put the fence up, what consultations were carried out prior to the work commencing, and overall proof that the council had adequate oversight into the activity prior to the fence being erected.

### Are the questions asked by the complainant valid requests for information?

19. The complainant argues that his questions were requests for recorded information rather than simply questions. He argues that the requests should therefore have been dealt with the council as an EIR request, and recorded information should have been disclosed in response to his questions. He also argues that the responses he received were not compliant with the requirements of the EIR in that they did not provide copies of any recorded information held by the council which could answer his questions.
20. Although questions may not be direct requests for recorded information, where recorded information is held which can respond to the questions asked then the First-tier Tribunal has previously decided that this information should be considered for disclosure as required by the Regulations.
21. The Commissioner's guidance on this issue highlights the difficulties which authorities may face when receiving questions rather than specific requests for recorded information. It highlights that in some cases, providing bundles of recorded information, or in the alternative, stating strictly that no recorded information is held, may frustrate individuals who simply want an answer to a question they have asked.
22. On the counter side, and as in this case, an informal response to the questions may not be what the requestor wanted or intended. They may wish the questions to be answered in terms of their rights under the EIR or the FOI Act. The Commissioner's guidance on this point states:

*"The Information Commissioner's Office (ICO) recognises that some public authorities may initially respond to questions informally, but we will expect you to consider your obligations under the Act as soon as it becomes clear that the applicant is dissatisfied with this approach. Ultimately, if there is a complaint to the ICO, the Commissioner will make her decision based on whether recorded information is held and has been provided."*<sup>1</sup>

23. In this case, the council responded to the complainant by initially stating that it had no obligation to respond to questions under the FOI Act. This was an incorrect response. The complainant had identified in his initial request that he was seeking to use his information access rights under the EIR. The council should therefore have responded as required by the Regulations.
24. It is also clear that the response should have been provided under the EIR rather than the FOI Act. The information relates to the erection of a fence on the site, and the associated permissions and oversight which allowed this. It therefore fits within the definition of Environmental information as defined in Regulation 2 of the EIR.
25. In his request for review the complainant asked the council to respond under the EIR and provide him with access to any recorded information it holds. The council subsequently reconsidered its position, but the complainant considers that the council's response still did not provide him with the recorded information he was seeking, and he also argues that its response still did not comply with the requirements of the EIR.
26. The complainant asked questions; he did not make specific requests for information. He argues that the council should have provided further explanatory information beyond that which would be needed to respond to the actual question he asked. This is not a requirement of the Regulations. The duties of the council under the Regulations is to provide any recorded information it holds which answers the question asked. It does not have to provide any further explanation, nor clarify why no information is held. It should however state that no information is held, and state that it is applying the exception in Regulation 12(4)(a) for this reason.

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<sup>1</sup> <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/receiving-a-request/>

27. For instance, the complainant suggests that in the council's response to question 7 was not correct:

*Q7. Were Natural England consulted (as is required by regulations) and have they given approval for these works on the border of the SSSI/SAC?*

*Answer No. Natural England is not a statutory consultee for the caravan site licencing process so weren't involved in that process. The works did not require planning permission and are not in the SSSI.*

28. The complainant argues that the question does not refer to the site licencing process but to works which impact on the borders of the SSSI/SAC and within the SSSI impact risk assessment zone. He argues that the council's response should have stated whether information on the position, scale and scope of the fencing exists to show that consultation with Natural England was unnecessary and if information exists, it should either be released or refused using an exception. He further argues that the councils response should have stated whether information on the impact of the fencing works exists to show that consultation with Natural England was unnecessary and if information exists it should either be released or refused using an exception.
29. The wording of the question is important in this context. The complainant's question asked whether Natural England were consulted. He did not ask the council for any information it holds as to why Natural England was not consulted.
- If the council holds information on any discussions it had as to whether to consult or not then that information would need to be considered for disclosure, as it is recorded information which responds to the question asked.
  - If Natural England had been consulted, the information relating to the consultation should also have been considered as this is, again, recorded information held by the council which responds to the complainant's question.
  - As the council argues that no information is held, however, neither of these two options could apply to its response in this case.
30. If no information is held which could respond to that question, then the council's duty under the EIR is met by it stating that no information is held which can respond to the question, and stating that it is therefore applying Regulation 12(4)(a). The council, however, did neither of these things. It sought to answer the question from the point of view of providing an explanation as to why it had not been consulted. Whilst

technically this is a response which does not comply with the requirements of the EIR, it did however provide a degree of information to the complainant which he would not otherwise have known.

31. The question for the Commissioner to consider therefore, is whether any recorded information is held which could respond to the complainant's questions.

**Regulation 12(4)(a) – information held at the time of the request**

32. Regulation 12(4)(a) provides that of EIR states that a public authority may refuse to disclose information to the extent that – *it does not hold that information when an applicant's request is received.*
33. The council's response to the Commissioner argues that it does not hold any further information other than that which is published on the links to its planning portal, and it has already supplied the link to this to the complainant. None of these applications appear to specifically relate to the erection of the fence, although the complainant notes that there are specific planning conditions and licences regarding the boundaries of the site.
34. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First Tier Tribunal decisions, applies the civil standard of the balance of probabilities.
35. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
36. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. She will also consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and the results the searches yielded. In addition, she will consider any other information or explanation offered by the public authority (and/or the complainant) which is relevant to her determination.



37. During the course of her investigation, the Commissioner asked the council to describe the searches it carried out for information falling within the scope of the request. She also asked other questions, as is her usual practice, relating to how it established whether it held further information within the scope of the request.
38. The council firstly clarified that some of its responses to the complainant's questions were given from personal experience and site visits by the council's Licensing Manager. It said that this information is not required to be recorded on its data bases, and that no records are held from which these responses were drawn.
39. It clarified that the records it does hold have been viewed by its licensing and planning department, including emails between Hastings Borough Council and the site owners, along with the content held on its back office systems, which includes the current site licence and conditions. No additional information was located which could respond to the questions asked.
40. It said that information would be held in both paper, and electronic formats, and that searches have been carried out of both of these formats. It said that searches have been carried out via Acolaid and IDOX, the council's main database for relevant information.
41. It clarified that no information is held on personal laptops.
42. It said that due to its retention policy, there would be a record held if any information had been destroyed, but none had. It provided a copy of its records retention policy to the Commissioner. It confirmed that if information were held its purpose in doing so would be due to a statutory duty to hold such records.

#### The Commissioner's conclusion

43. The Commissioner has carefully reviewed the submissions of both parties and the arguments put forward.
44. The complainant has provided further arguments as to why he considers that further information should be held. Primarily his points surround whether the actions of the third party met with previous planning conditions, and how, and why, the council should have addressed this.
45. He has also suggested that some of the council's initial responses, and its response to review, suggest that further information must be held. He has questioned what additional actions were required to construct the fence, whether any additional permissions were required of the council or other authorities however the council has confirmed that none

were required. He has also questioned how the council has been able to respond to some of the questions he has asked if it holds no recorded information.

46. The Commissioner accepts that these questions are valid and do suggest that the council had a degree of knowledge and foresight into the holiday parks actions, and must have considered these at some point, but the council argues it holds no information which would clarify to the complainant as to how it came about that knowledge, how it reached its decisions, nor what action it took, or is taking in respect of this, if any.
47. The council has described the searches which were carried out. Its response also appears to clarify that where the complainant has asked for some information relating to consultations etc, it had considered that no additional actions were required by the holiday park or the council in order for work to be carried out, and so no information was recorded. In answer to question 6 it provided the following explanation to the complainant in its review:

*"Under the terms of the site license, fencing is required to be provided to demarcate the area hatched red on the site plan (the "lower slopes"). As long as the fencing extends along the boundary of this area and no further, it would constitute Permitted Development under Part 5 of the Town and Planning (General Permitted Development) (England) Order 2015 Caravan Sites and Recreational Campsites. This is because the fencing is a requirement of the site license. No planning application would be required."*

48. The council also responded to question 10 by stating that it considered that *"Installing fence posts to comply with another of the caravan site licence conditions doesn't therefore require a slope stability survey"*.
49. Whether its decisions in respect of the fence are correct or not is not a matter for the Commissioner. The council has sought to respond to the complainant's questions through the officer concerned simply responding directly to the questions. However, it said that the responses were from the officer's memory, not from any recorded information.
50. The question for the Commissioner to consider is not whether information 'should' be held, but whether relevant information 'is' held. Given the council's responses, the Commissioner considers that the council has provided a description of having carried out adequate searches in appropriate places to determine whether any further information is held falling within the scope of the complainant's request. Given the explanation provided by the council, and in the absence of evidence to the contrary, she considers that there is no evidence that

further information is held falling within the scope of the complainant's request for information.

51. This being the case, the Commissioner's decision is that, on a balance of probabilities, no further information is held by the council falling within the scope of the complainant's requests for information.

### **Regulation 5(1)**

52. Regulation 5(1) provides that "*Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.*"
53. The complainant asked the Commissioner to consider whether the council's initial response was in accordance with the requirements of the Regulations in that it did not provide any recorded information which could respond to his request for information. It simply provided answers to the questions he had asked.
54. The council directed the complainant to its planning portal, where the information it does hold is available to him to view. Had further recorded information been held by the council, but not provided to him, the council's response would have failed to comply with the requirements of Regulation 5(1).
55. However, as no further recorded information was held, the council's response complied with the requirements of Regulation 5(1).

### **Regulation 14 - Refusal to disclose information**

56. Regulation 14(1) provides that:

*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.*

57. Regulation 14(3) provides that:

*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).*

58. The complainant argues that the council was not clear in stating whether it held any information which could respond to any of his questions.
59. The council did not clarify that it held no recorded information in either its initial response or in its response to the request for review.
60. Regulation 12(4)(a) is an exception to the requirements of Regulation 5(1) where no information is held which can respond to the request. The council's response should therefore have stated clearly within it that it was applying Regulation 12(4)(a) as no recorded information was held.
61. The Commissioner has therefore decided that the council did not comply with Regulation 14(3) when responding to the complainant's questions.

#### **Regulation 11(4)**

62. Regulation 11(3) provides that:

*3) The public authority shall on receipt of the representations and free of charge—*

*(a) consider them and any supporting evidence produced by the applicant; and*

*(b) decide if it has complied with the requirement*

63. Regulation 11(4) states that:

*(4) A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations.*

64. The complainant's made a request that the council reviewed its initial response on 19 September 2019, however the council did not respond to the request until 10 January 2020 following the Commissioner's intervention.
65. This falls outside of the 40 working days to respond required by Regulation 11(4).
66. The Commissioner therefore considers that the council did not comply with the requirements of Regulation 11(4) in responding to the request for review.

## Right of appeal

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67. 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)

68. 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.
69. 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**  
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