

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 1 April 2020

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

Decision (including any steps ordered)

1. The complainant has requested certain information relating to comments made by Hastings Borough Council (the council) in correspondence which it sent to the Local Government and Social Care Ombudsman.
2. The council stated that it did not hold recorded information relevant to the first part of the complainant's request. Regarding the second part of the request, the council confirmed that 'related' information was contained within a particular report which it had already provided to the complainant in a redacted format in response to a previous request. The council went on to advise that it maintained its position that the withheld information contained within this report was exempt from disclosure on the basis of regulation 12(5)(e) of the EIR.
3. It is the Commissioner's decision that the council does not, on the balance of probabilities, hold any recorded information that is relevant to the terms of the complainant's request.
4. However, 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) by failing to provide its internal review response within the required 40 working days.
5. The Commissioner does not require the council to take any steps as a result of this decision notice.

Request and response

6. On 30 November 2016, the complainant wrote to the council and requested information in the following terms:

In a response to the Ombudsman draft decision document dated 16/09/2016 [name redacted] comments against paragraph 41 that:

"We must beaer [sic] in mind that there is clear evidence of surface cracking and land slips on land to the East of the site, which can't possibly be anything to do with drainage issues on the site."

Please supply the following information regarding the surface cracking and land slips to the East of the site:

- *The location of the surface cracking and landslips.*
- *Copies of this 'clear' evidence and any related correspondence.*

This information is critical to a full understanding of the causes of the landslide and potential remedial action to stabilise it.

Please take this as a formal request under EIR 2004 regulations.

7. On 5 January 2017 the council provided the complainant with its response. It advised that it believed regulation 12(5)(e) to be engaged because the disclosure of the information is *'more likely to have an adverse effect on the economic interest of the owners of Rocklands Caravan Park.'*
8. The council also confirmed to the complainant that it had considered the public interest test and that it believed that, *'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.'*
9. The council went on to say that when engaging regulation 12(5)(e) it must demonstrate what harm the release of the information would cause to the site and set out the factors it considered to be relevant to this as follows:
- *Unfounded, critical (and defamatory) reviews and postings about their business, and resultant bad press/media, leading to a loss of trade.*
 - *Diversion of their attention away from the efficient running of their business.*

- *A material reduction in the funds they have available to invest in their business*
 - *Undue upset and worry for caravan owners and holiday makers*
 - *Loss of privacy for the caravan owners, holiday makers and themselves, including via the use of the drones, invasive photography and spying.*
 - *Harm to their good reputation.*
 - *A reduction in the value of their park/business.*
10. On 13 January 2017 the complainant requested an internal review.
11. The Commissioner regards it to be relevant at this point to include details of separate correspondence which was submitted to the council on 24 March 2017 by the complainant, who was acting on behalf of a local campaign group, 'Save Ecclesbourne Glen' (SEG). This correspondence was considered by the council under its formal complaint process. The complainant made direct reference to the handling of one of his own requests as evidence in support of the complaint; this was the same request as that which is currently under consideration.
12. The council's subsequent response to the complaint then included some further detail about its specific handling of this request. It stated that it had '*now come to light*' that the original response to the complainant's request of 5 January 2017 should have stated '*information not held.*' The council went on to say that whilst it had originally believed that the information that the complainant had requested was contained in a report that '*has been refused in the past*', it now appeared that the information that had been requested was not held.
13. The council also confirmed to the complainant that the comment made by a particular council officer which he had quoted in his request of 30 November 2016 '*was supplied to her from a Senior Manager of the Council following a site visit on the 16 March 2016, no notes were taken.*'
14. On 24 December 2018 the council then provided the complainant with a separate, formal response to his request for an internal review. This stated the following:

'The location of the surface cracking and landslips.

Hastings Borough Council holds no information in relation to the exact location of the surface cracking as we do not have a document showing

them. The comment made by [council officer name redacted] was based on an observation made by [council officer name redacted] during a site visit with [name redacted] in March 2016 when they were explaining the general meta-stability of all the slopes in the vicinity of Rocklands and the Glen.

Copies of this 'clear' evidence and any related correspondence

As above the 'clear evidence' was that there were some cracks in the ground due to slope instability in an area of the Glen. The only related correspondence is the Options Assessment dated June 2016 which has now been supplied to you (redacted version).'

Scope of the case

15. The complainant contacted the Commissioner on 19 March 2019 to complain about the way his request for information had been handled. The primary concerns which were set out in his complaint are as follows:
- The delays in the council's handling of the request.
 - The complainant believes the council has made claims about the harm that would be caused if information was released without proper consideration of the circumstances.
 - That the council has taken a 'blanket approach' when applying regulation 12(5)(e) to a number of requests for different information and has not considered this request in isolation.
 - That the council did not view it to be in the public interest to disclose the information. The complainant has argued that it is 'crucial' to have access to the information which formed the basis of the statement made by the council officer to the Ombudsman about 'surface cracking' because it was contradictory to information that had been set out in other reports.
 - That the council is incorrect in stating that the information requested is commercially confidential to the caravan park and would affect the legitimate economic interests of the park.
 - That the detailed representations submitted at the internal review stage were not properly considered and addressed by the council.
 - That the council's response of 5 January 2017 contradicts other information that it has provided to the complainant. He refers to a letter dated 28 February 2017 in which the council advised that, in

response to another request that he had made, it did not hold information about whether there had been any investigations and/or reports into the landslips and surface cracking.

- That the internal review contradicts the original response and does not explain why the initial request was refused under regulation 12(5)(e) when no documents existed. There was also a significant delay in issuing the council's internal review response.
16. The Commissioner intends to firstly investigate whether the council does actually hold information that is relevant to the complainant's request. If this is the case, she will then go on to consider whether regulation 12(5)(e) is engaged in respect of that information.
 17. In addition, the Commissioner will also consider certain procedural matters as requested by the complainant.

Reasons for decision

18. Regulation 12(4)(a) of the EIR provides that a public authority may refuse to disclose the requested information, if it does not hold that information when the applicant's request is received.
19. The Commissioner is required to make a judgement on whether, on the balance of probabilities, the requested information is held, or not held.
20. The complainant's request makes direct reference to comments made to the LGO about cracks and landslips to the 'east' of the site. In addition, in the complainant's internal review request to the council, he also stated the following:

We understand this statement to mean that there have been other landslips and surface cracking which cannot be attributed to activities at the Rocklands site. This statement was given to the Ombudsman to show that landslips and surface cracking occur [sic]

In areas away from the Rocklands site and cannot have any connections with the Rockland site.

21. The Commissioner is aware that there is some dispute between various parties about what caused, or contributed to, the main landslip which has affected the site and the Glen; the complainant makes some comment in relation to the causes in his internal review request. This is not relevant to the Commissioner's consideration of the request. However, it is apparent from the comments that the complainant has made in support of his request that he is explicitly asking for information

that is held by the council relating to cracking and landslips which have occurred in an area away from the site, and not in relation to the main landslip.

22. The Commissioner notes that the council, in its internal review response, did not provide any indication that the complainant had misinterpreted the intended meaning of the comments made in the correspondence sent to the LGO. Given this, the Commissioner has taken it to be that his interpretation of the comments was correct; she has therefore focussed her investigation on whether there is any recorded information held by the council that relates to landslips and surface cracking that does not form part of, or originate from, the main landslip i.e. in areas *'away from the site'*.
23. The council, in its representations to the Commissioner, advised that it had originally believed that all the information that had been requested was contained within a particular report, *'Ecclesbourne Glen Footpath Diversions, Options Assessment, June 2016'* (the Options Assessment Report). It also stated it believed that a decision made by the First tier (Information Rights) Tribunal in the case of Hastings Borough Council v IC EA/2017/0084¹ (the Tribunal case) was relevant to its consideration of the request. This was because it believed the Options Assessment Report contained information from other reports that the Tribunal had already accepted should not be released into the public domain.
24. The council advised that, upon its review of the complainant's request, it had found that it did not hold information *'in regard to the location of the surface cracking and land slips and clear evidence. The related correspondence was within the Options Assessment report.'*
25. The council then went on to advise the Commissioner that whilst it does not hold any information relating to the first bullet point of the request, it does hold information that relates to the second bullet point, and that this is contained within the Options Assessment Report.
26. The council has also provided the Commissioner with further details of its stage 2 complaint response to the complainant, referred to previously in paragraph 11 of this decision notice. It has advised that this response confirmed that whilst information relating directly to the location of the cracks was not held by the council, there was *'general related information'* about the cracks in the Options Assessment Report (which had already been provided to the requester in a redacted format).

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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)

27. The council also advised the Commissioner that it had been necessary to redact the Options Assessment Report before its release (in response to the previous request made by the complainant) because it contained information that was the subject of the Tribunal case.
28. The Commissioner has considered the information contained within the Options Assessment Report. She accepts that, as the council has advised that the relevant observations were based on a site visit in March 2016, that if there was any information held, then it is likely that it would, in the main, be contained within the report which sets out the findings of that visit.
29. The council has not specified directly what parts of the Options Assessment Report it had identified as 'relating' to the request under consideration; this has led the Commissioner to have some difficulty in fully understanding the council's position. Whilst she has identified information which may perhaps be seen to be 'related' to the general matter of surface cracking, this appears to be in relation to the main landslip only and therefore does not fall within the specific terms of the complainant's request.
30. Whilst the Options Assessment Report does make brief reference to another landslip when setting out the various footpath diversion options, it provides no further details about other landslips or surface cracking in areas that were separate to the main landslip which occurred. The Commissioner would add that all the references to the other landslips that she has made within this decision notice that are contained within the Options Assessment Report are already in the public domain.
31. The Commissioner accepts the council's assertion that the Options Assessment Report sets out the findings of that same site visit where the observations were made in relation to cracking in landslips to the east of the site. It may be the case that this is what the council meant when it confirmed that this report 'related' to his request; this is not clear from the council's responses to the complainant, or to the Commissioner. However, aside from the brief mention of other landslips which have already been referred to within this decision notice, the Commissioner is satisfied that there is no other information contained within the Options Assessment Report which would provide the complainant with the specific information he has requested.
32. The Commissioner is currently investigating a number of complaints about how the council has handled requests for information that relate to the landslips, the Glen and, or, the site. She is therefore in the unusual position of having access to some additional information held by the council about the landslips and associated matters. She has decided it is appropriate to take such information into account when deciding

whether, on the balance of probabilities, the council holds any other information that is relevant to the terms of the complainant's request. She has also taken into account of some information that is already in the public domain.

33. The Coffey Report dated May 2014², which was published in its entirety, appears to be the first technical report commissioned by the council following the occurrence of the main landslip which affected the site and the Glen. It provides details of this landslip and another much smaller landslip located in the 'east' area of the Glen that had been observed during the site visit in 2014.
34. This small landslip is described as being several hundred metres away from the main landslip and is marked on a map attached with the Coffey Report. The Commissioner also notes that a map attached to the Options Assessment Report not only marks out the main landslip but also the same smaller landslip to the east (an additional 'historic landslip' which is very close by is also marked).
35. It is not clear whether the smaller landslip referred to in the Coffey Report has any relevance to the comments that were made to the LGO about landslip and surface cracking to the east of the site. It is clearly separate from the site itself. However, given that all the information about the smaller landslip is already in the public domain and that the complainant is already aware of the existence of this information, the Commissioner did not regard it to be necessary to seek further clarification from the council about this particular point.
36. In saying the above, the references to this smaller landslip are relevant to this case in that it has been the only detailed recorded information (that existed at the time of the request) which the Commissioner has been able to identify about land slippage in the Glen which does not relate in some way to the main landslip that occurred. The documents which she has in her possession, which includes details of site visits, technical advice, proposals for further investigations etc, all focus on the main landslip. For example, the Coffey 2 Report³, which has been released into the public domain in a redacted format, is about the '*Ecclesbourne Glen Landslide*' (only the main landslip). The Options Assessment Report, which the council has referred to as being the only

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https://www.hastings.gov.uk/content/parks_gardens_allotments/pdfs/ecclesbourneglen_landslides_report.pdf

3

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

information held relevant to the request, was commissioned by the council to investigate options to divert a footpath in an area around the site which was damaged by the main landslip.

37. The complainant has provided the Commissioner with details of another, very similar, information request⁴ which was submitted to the council on 28 February 2017. The request is set out below with the council's responses to each point following in bold:

In a response to the Ombudsman draft decision document dated 16/09/2016 [council officer name redacted] comments against paragraph 41 that:

" We must bear in mind that there is clear evidence of surface cracking and land slips on land to the East of the site, which can't possibly be anything to do with drainage issues on the site."

Please supply the following information regarding the surface cracking and land slips to the East of the site:

Q1. Where are the locations of the surface cracking and landslips?

Ecclesbourne Glen to the side of the Rocklands site.

Q2. At what date were HBC made aware of them?

17 March 2016.

Q3. Are they in the Hastings Country Park or on private land?

Country Park.

Q4. Are they in an area which remains open to the public?

Yes.

Q5. What actions have been taken to protect the public?

None

Q6. Have the landslips and surface cracking been reported to the British Geological Society?

No

⁴ <https://www.hastings.gov.uk/my-council/freedom-of-information/category/?id=FOI204954>

Q7. Have the landslips and surface cracking been reported to Natural England?

No.

Have any investigations and /or reports been made into these landslips and surface cracking?

Information not held.

38. Whilst the complainant had concerns that the reply to the above request had contradicted the council's original response to the request under consideration, it has been useful for the Commissioner to see that it does appear to be consistent with the details that the council has now provided for her consideration.
39. The council has explained to the complainant that the comments made about the surface cracking which he had quoted in his request originated from an '*observation*' made by a council officer during a site visit. The Commissioner has found no evidence which would indicate anything to the contrary. Indeed, in response to another information request⁵ which was submitted to East Sussex County Council, the following correspondence dated 15 March 2017 sent by the council (recipient redacted) was released:

The cracks/signs of landslip referred to by [redacted] to the LGO are those that [redacted] from Coffey noticed when you & I were on site with her last March. You will recall that we wandered up through the trees in the Glen on our way to look over the boundary to where the Rocklands drainage system is located. On the way [redacted] pointed out the signs of landslip. It was some distance into the Glen away from the Rocklands boundary & across from Rocklands not down slope of Rocklands, & therefore clearly unlikely to be caused by activity on the Rocklands site. From memory [redacted] pointed out that it was more evidence that the whole area was a meta-stable slope liable to landslips.

Based on our last report from Coffey (June 2016) [information redacted].

Anyone visiting this part of the Glen can see the extensive damage caused by the landslips, and Coffey have advised [information redacted].

⁵ https://www.whatdotheyknow.com/request/escs_rights_of_way_correspondenc#incoming-1375403

40. Whilst the correspondence quoted above does not fall within the scope of the complainant's request (as it was produced at a later date), the Commissioner does regard it to be pertinent to her consideration of this case. This is because, in her view, it appears to support the council's assertion that the surface cracking that had been identified away from the main landslip area at the time of the site visit had not been formally recorded by any officer.
41. The Commissioner appreciates why the complainant has concerns that the council had originally advised him that it held information relevant to the request, but that this was subject to the exception at regulation 12(5)(e) of the EIR. However, the internal review process is an opportunity for a public authority to revise its position and correct any errors, which it has done in this instance.
42. The Commissioner is satisfied that the information which has been made available to her is sufficient for her to conclude that, on the balance of probabilities, the council does not hold any recorded information that is relevant to the complainant's specific request. Accordingly, she does not consider there is a breach of regulation 12(4)(a).

Procedural matters

43. The complainant has also complained about the time it has taken the council to deal with this request.
44. Regulation 14(2) of the EIR states that a refusal notice shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.
45. 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.
46. The complainant submitted his request on 30 November 2016. The council issued a refusal notice on 5 January 2017, citing regulation 12(5)(e) of the EIR as the reason for withholding information in response to the request.
47. Whilst the complainant then requested an internal review on 3 January 2017, the council did not respond to this until 24 December 2018.
48. The Commissioner is aware that this request was one of a number of requests relating to matters relevant to the caravan park and/or the landslip that the council had put 'on hold' in the period 2017-18. The explanation that the council provided to the complainant, and the Commissioner, for putting this request on hold was that it was awaiting

the outcome of the Tribunal case decision and a site licence appeal, both of which it believed may have some relevance to the decision to be made in response to this request.

49. Whilst the Commissioner appreciates the difficulties faced by the council, 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. Indeed, the council took some 23 months to provide an internal review response in this case. The pending appeals do not provide adequate justification for the council's failure to respond to the request appropriately and within the relevant timescales. As a result, in this instance, the Commissioner is satisfied that the council has breached regulations 14(2) and 11(4) of the EIR respectively.

Right of appeal

50. 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

51. 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.
52. 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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