

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 29 January 2020

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

Decision (including any steps ordered)

1. The complainant has requested information held that relates to any consultations that may have taken place between Hastings Borough Council (the council) and East Sussex Fire and Rescue Service (ESFRS) about a particular site licence.
2. The council issued a refusal notice confirming that it was withholding the information requested under regulation 12(5)(e) of the EIR. However, during the course of the Commissioner's investigation, the council disclosed some information to the complainant. The Commissioner is satisfied that, on the balance of probabilities, the council has now provided all the information that it holds that is relevant to the complainant's request, and has therefore complied with regulation 5(1) of the EIR.
3. However, it is the Commissioner decision that the council has breached regulation 5(2) of the EIR as it failed to provide the requested information within the statutory time limit.
4. The Commissioner does not require the council to take any steps as a result of this decision notice.

Request and response

5. On 1 December 2016 the complainant wrote to the council and requested information in the following terms:

'In comments made to the first draft Ombudsman report [officer's name redacted] states;

*The process of issuing a new site licence is complex and time consuming. It has Required Consultation with the licensees, the council's planning service **and the Fire and Rescue Service**. We have also had extensive correspondence with our geotechnical advisors in relation to proposed new conditions.*

Please provide us with copies of all correspondence and documents relating to the consultations with the Fire and Rescue Service referred to in this comment.

Please treat this as a formal request under the EIR 2004.'

6. On 22 March 2017 the council contacted the complainant about a number of his information requests which were still under consideration. It advised that as the owners of a local park site had submitted an appeal against a new site licence it was unable to respond to the complainant's requests for information, or conduct internal reviews, as the evidence used as part of the proceedings would include *'geotechnical information and may involve correspondence from Natural England, East Sussex Fire and Rescue Service and GVA.'*
7. The council went on to say that as it could not release any information that may prejudice the licence process it was *'refusing all information'* under the exception at regulation 12(5)(d) of the EIR until the site licence appeal had been heard at the Magistrates Court. However, it did add that any requests that did not involve potential evidence for the appeal would be dealt with *'in the normal manner'*.
8. Further communications were then sent between the two parties about the way in which the council was handling the complainant's requests. On 2 October 2017 the council, in response to a stage 1 complaint, confirmed to the complainant that a number of his requests were to be kept on hold pending the outcome of the site licence appeal. It also advised that it now considered that an appeal submitted to the First-tier (Information Rights) Tribunal in relation to a decision notice issued by the Commissioner on 28 March 2017 had some relevance to the complainant's requests. The appeal, which related to a request made by a third party for information that concerned the same site, was yet to be decided.

9. The council stated that, as the complainant's requests related to information that could be used in either the site licence appeal, or the Information Rights Tribunal appeal, the release of such information could prejudice the position of the council, or a third party, and therefore could not be disclosed.
10. On 26 March 2018 the First-Tier (Information Rights) Tribunal issued its decision¹. Following this, on 20 April 2018 the complainant advised the council that he was aware that an agreement had now also been reached between relevant parties about the park site licence. He asked that, given this, the council now provide him with a response to each of those requests that it had put on hold.
11. On 15 October 2018 the council issued the complainant with a refusal notice in response to his specific request of 1 December 2016. It advised that it believed the exception at regulation 12(5)(e) was engaged and explained its reasoning for this decision. The council also confirmed that it had considered the public interest test and that this weighed in favour of withholding the information in this instance.
12. On 22 October 2018 the complainant requested an internal review. The council's response of 24 December 2018 upheld the original decision.

Scope of the case

13. The complainant originally contacted the Commissioner on 11 October 2018 to complain about the way his request for information dated 1 December 2016 had been handled by the council. He then submitted a further complaint on 18 March 2019 about the council's internal review decision of 24 December 2018.
14. The council, in response to the Commissioner's initial enquiries, maintained its position that regulation 12(5)(e) was engaged and provided a copy of the withheld information for her consideration.
15. The Commissioner then became aware that some of the information that had been withheld was already in the public domain. This was in response to an information request made in 2016 by a third party to

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)

another public authority. Given this, the Commissioner contacted the council to ask whether, in light of this previous disclosure, it wished to change its position in any way.

16. The council advised the Commissioner that it had not been aware that certain information relevant to the complainant's request of 1 December 2016 was already in the public domain. It went on to confirm that, upon further review, given that the site licence had now been issued and with the '*passage of time*', it would now release some information to the complainant.
17. On 2 November 2019 the complainant contacted the Commissioner to confirm that whilst he had now received copies of information from the council, he remained dissatisfied with its handling of this request.
18. The Commissioner considers the scope of her investigation to be whether the council has now provided all the information held relevant to the complainant's request and, if this is not the case, whether it is correct to withhold any remaining information. In addition, she will consider the council's compliance with the procedural aspects of the EIR, as requested by the complainant.

Reasons for decision

Is the information environmental?

19. 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 following definition set out in regulations 2(1) of the EIR:

'any information in written, visual, aural, electronic or any other material form on-

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*

- (c) *measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;*
 - (d) *reports on the implementation of environmental legislation;*
 - (e) *cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
 - (f) *the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);'*
20. When considering whether the information is environmental in this case, the Commissioner has found it helpful to consider the Court of Appeal's findings in *'Department for Business, Energy and Industrial Strategy v Information Commissioner and Henny [2017] EWCA Civ 88.'*² The Court stated that when considering what constitutes information "on" an environmental measure under regulation 2(1)(c), there should be no restriction placed on what the information is *'specifically, directly or immediately about'*. It went on to say that consideration should be given to the context in which the information was created and used, and its significance to the wider environmental measure.
21. Consultations between the council and the fire service about the conditions of the site licence are likely to relate primarily to the management of the risk of fire at the site. In the Commissioner's opinion such information can be viewed to be a measure likely to affect the elements of the environment, most obviously air and the atmosphere. In addition, the management of the risk of the fire at the site can also be directly related to the protection of human life, eco systems and the landscape.

² <http://www.bailii.org/ew/cases/EWCA/Civ/2017/844.html>

22. The Commissioner, having considered the information that has been withheld and the purpose for which it was produced, is satisfied that, in this particular instance, it is environmental information within the meaning of regulation 2(1) of the EIR.

Regulation 5-Duty to make environmental information available on request

23. Regulation 5(1) states that a public authority that holds environmental information should make it available on request.
24. The complainant had raised a number of concerns with the Commissioner following his recent receipt of the information from the council. This included the following:
- That the council has still failed to address the points he had set out in his internal review request, and that it was wrong to apply an exception to the withheld information.
 - That the council was already aware from its dealings with the other public authority that information relevant to his request had been disclosed in 2016 (the complainant also states he referred to the previous disclosure in his internal review request).
 - That the council's decision that the information can now be released as a result of '*the passage of time*' does not comply with the requirements of the EIR.
25. The Commissioner is satisfied that, based on the information available, the council was made aware in 2016 that a request had been made to another public authority for information relating to the site licence. However, having considered the particular circumstances surrounding the disclosure of information in response to that request, the Commissioner does not agree with the complainant that it can be assumed that, at the time of receiving his request, or subsequently, the council had full knowledge of the extent of the information that was provided by the other public authority.
26. It is not clear from the complainant's most recent representations to the Commissioner whether he believes that there is further information held by the council that is relevant to his request, but which has still not been released.
27. In those cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider any evidence and arguments that are presented by the complainant. She will also consider the actions taken by the authority and any reason why it is inherently likely, or unlikely,

that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information is held; she is only required to make a judgment on whether the information is held on the civil standard of the balance of probabilities.

28. Based on the information that is currently available, it is the Commissioner's view that, on the balance of probabilities, the council has now provided all of that information which it is likely to hold that is relevant to the request. Given this, the Commissioner is satisfied that the council has complied with regulation 5(1) of the EIR.
29. As the complainant has now received the information held that is relevant to his request, the Commissioner does not consider it to be an effective use of resources to carry out a full and detailed investigation into whether the council was correct to have previously applied regulation 12(5)(d) and/or, regulation 12(5)(e) to the information. It is difficult to establish what value this would have to any party and it would not provide the complainant with an opportunity to access any additional information. However, as requested by the complainant, the Commissioner will consider the procedural matter of the timeliness of the council's response.
30. Regulation 5(2) of the EIR states that information shall be made available *'as soon as possible and no later than 20 working days after the date of the request.'*
31. The complainant submitted his request on 1 December 2016 and the council provided him with the information in October 2019. This information was released only upon the council becoming aware that most of the information that it had identified as being relevant to the request was already in the public domain.
32. The council has provided the Commissioner with a number of reasons for the delay in handling both this request, and a number of other requests, that it received from the complainant. It has referred to the difficulties it experienced dealing with the volume of requests that it was receiving at the time about a landslip which had occurred close to the site, and the site itself. It also states that the First-tier (Information Rights) Tribunal appeal was only decided on 26 March 2018, and that negotiations and the appeal about the site licence were ongoing until April 2018. It argued that it could not respond to the complainant's requests that related to either subject because the relevant information was to be used within the appeals.
33. The Commissioner appreciates that to deal with the number of requests received by the council about matters relating to the site and the landslip would place some burden on what are likely to already be

limited resources. She also accepts that the negotiations and appeals referred to by the council may have had a bearing on some of the requests that it had received.

34. However, in this case, it should be noted that had the council provided a response to the complainant within the statutory 20 working day time period, its response would have been issued prior to the submission of either of the appeals it has referred to.
35. In addition, matters relating to both appeals were complete by April 2018. The council then only provided the information to the complainant in October 2019.
36. In this instance, the majority of the information released by the council was already in the public domain and available in a format where it would be reasonably accessible by the complainant. Regulation 6(1)(b) (read by way of Article 3(4) of Directive 2003/4/EC) of the EIR, provides that where an applicant requests environmental information in a specific format (including in the form of copies, as was the case in this instance), if this is already available in another format, and is easily accessible to the applicant, then the public authority is not required to provide such information. Given this, it should be noted that the council's recent revised response could have stated that regulation 6(1)(b) was applicable to the majority of the information that it held. However, instead it chose to disclose all the information that it held that was relevant to the request.
37. In saying the above, it is the case that a small amount of the information that has recently been released by the council was not already in the public domain, nor reasonably accessible to the complainant at the time of his request. Taking all relevant information into account, the Commissioner is not satisfied that there are any mitigating factors which would justify the time that it took the council to provide this information to the complainant in this instance.
38. It is the Commissioner's view that, when considering the statutory obligations as set out by regulation 5 of the EIR, as the council failed to communicate the relevant information to the complainant within 20 working days of his request, she has no alternative but to reach the conclusion that the council has breached regulation 5(2) of the EIR.

Other matters

39. The Commissioner regards it to be necessary to record the fact that, after consideration of the information that was released in 2016, she found that certain information relevant to the request had not been included within the bundle of withheld information that the council had supplied to her at the initial stages of the investigation. Whilst the council apologised to the Commissioner for this oversight, the Commissioner then found that the information subsequently disclosed to the complainant contained copies of further correspondence which the council had also failed to include within the original bundle that it supplied for her consideration (and which did not form part of the information disclosed in 2016).
40. Whilst the Commissioner accepts that the council, on the balance of probabilities, has now provided the information that it holds that is relevant to the request, there is some concern that it failed to provide the Commissioner with a complete set of withheld information at the initial stages of the investigation.
41. She would ask that the council takes appropriate steps to ensure that, in future, the processes and procedures that it has in place are sufficient to identify all that information held that is relevant to any requests that it receives, and that where requested, it provides the Commissioner with all the information held which is relevant to her investigation.
42. The Commissioner also regards it to be appropriate to make reference to the council's general approach of placing a number of information requests, including that request which is the subject of this decision notice, on hold whilst two separate appeal processes were ongoing.
43. The Commissioner appreciates that this was not an easy situation for the council to deal with, and that its resources are likely to be limited. However, she does not regard it to be reasonable in any circumstances for a requester to have to wait for so long to receive a formal decision in response to an information request. In this case the complainant waited two years for the council's response, and nearly three years for the information to be provided to him.
44. There is no provision within the EIR which allows a public authority to put a request 'on hold'. In those cases where the information that was requested was deemed to be relevant to the appeals, and the council was of the view that it had a legitimate reason to withhold such information, it should have notified the complainant accordingly, issuing a refusal notice which complied with the provisions set out in the EIR. Had the council taken such action within 20 working days of receipt of

each request, it is the Commissioner's view that it is likely that most, if not all, of the requests that were put 'on hold', including this request, would have been resolved within much more reasonable timescales. The council's actions led to a number of matters relating to the requests becoming somewhat protracted and convoluted, and it would appear that this could have been avoided.

45. The Commissioner would therefore reiterate that the council should give full and proper consideration to its statutory obligations when dealing with any information request that it now receives, considering each on its own merit, and responding accordingly and within prescribed timescales.

Right of appeal

46. 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

47. 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.
48. 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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