

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 12 February 2024

Public Authority: Hastings Borough Council
Address: Aquila House
Breeds Place
Hastings TN34 3UY

Decision (including any steps ordered)

1. The complainant has asked about the use of grazing cattle to manage land on an area known as the Firehills, located within Hastings Country Park Nature Reserve. The above public authority ("the Council") stated that the information was not held.
2. The Commissioner proactively applied regulation 12(4)(a) (information not held) in this case and considers that, on the balance of probabilities, the Council does not hold the information requested and regulation 12(4)(a) is engaged.
3. The Commissioner does not require the Council to take any further steps.

Request and response

4. On 28 August 2023, the complainant wrote to the Council and requested information in the following terms:

"In 2016, the plan was to place five Belted Galloway cattle on the Firehills during the winter months (FOIR-533885462). The plan remained the same until recently, except there would be fewer cows involved due to deaths.

I understand that it is now proposed that, instead of using the Belted Galloways, a much larger herd of 12 - 20 cattle of the Sussex breed will be placed on the Firehills during the Winter months.

Please provide under the FOIA and the EIR the following information:

1. Is this just a proposal or has the decision already been made to place the larger herd on the Firehills? Who has been consulted about this? Please provide all reports, assessments, emails, correspondence, minutes of meetings, and any other related information (in any form).
2. If it is still at the proposal stage, will there be a public consultation before a final decision is made?
3. If there is to be public consultation, what form will it take? Please provide all consultations, assessments, reports, emails, correspondence, minutes of meetings, and any other related information.
4. Please provide all information you have relating to the Sussex herd, including, age, sex, and temperament. Please include all consultations, assessments, reports, emails, correspondence, minutes of meetings, and any other related information.
5. The plan was to use the 'Nofence' invisible fence system to define the areas where the cattle would graze. This system has been found to be ineffective with the Belted Galloways as they've learnt to ignore it. How will the large herd of Sussex cattle be controlled while on the Firehills? Will more fencing have to be erected in other parts of the Firehills to keep the herd in particular areas? Please provide all relevant documentation on this, including consultations, assessments, reports, emails, correspondence, minutes of meetings, and any other related information.
6. Will the recently erected fencing and gates have to be replaced? They were built with the intention to stop a cow from escaping should the battery fail on their GPS collar, not to confine a herd of 12 - 20 cattle. Please provide all relevant documentation on this, including consultations, assessments, reports, emails, correspondence, minutes of meetings, and any other related information.
7. I understand that the Environment and Natural Resources Manager has recently said that the area where the cattle will be placed will now still have to be mown because it's largely gorse. In 2016, the reason given for introducing the Belted Galloway cattle to the Firehills was that "We are currently cutting the Firehills mechanically and removing the arisings. This, however, is not financially or practically sustainable in the long term" (FOIR-533885462). If mowing must continue, why are cattle being placed there? Please provide all relevant documentation on this, including consultations, assessments, reports, emails,

correspondence, minutes of meetings, and any other related information.

8. Are there any proposals or plans to place cattle on the Firehills at other times of the year, besides the winter months? Please provide all relevant documentation on this, including consultations, assessments, reports, emails, correspondence, minutes of meetings, and any other related information.”

5. The Council responded on 12 September 2023, stating that part 2 of the request was a question and was therefore not a valid request under the EIR. In respect of the other parts of the request, the Council stated that no information was held but did not specifically cite regulation 12(4)(a) of the EIR.

6. On 26 September 2023, the Council provided an internal review response in which it provided further explanation to the complainant as follows:

“1. Information not held – We do not recognise where the 12 - 20 cattle figure has come from. It has never been our intention to put large numbers of cattle on the Firehills. Hastings Borough Council has no plans to undertake a public consultation on operational matters pertaining to the management of Hastings County Park Nature Reserve.

2. Hastings Borough Council has no plans to undertake a public consultation on operational matters pertaining to the management of Hastings County Park Nature Reserve.

3. Information not held - Hastings Borough Council has no plans to undertake a public consultation on operational matters pertaining to the management of Hastings Country Park Nature Reserve.

4. Information not held - The cattle belong to a local farmer, we do not hold the specific details requested.

5. Information not held - The Nofence system has never been found to be ineffective. There will not be a large herd of cattle on the Firehills. No additional physical fencing is planned.

6. Information not held - No replacement is intended.

7. Information not held – Mowing will continue in part until the gorse is under control and the habitat can be maintained by grazing. The council

are managing and restoring a nationally scarce habitat. We will deploy the most appropriate management for the habitat, in any given year.”

Background

7. Habitat management is part of the Council's Higher Level Stewardship 2013-2023 grant aid and legal agreement from Natural England/DEFRA. To comply with the terms of the agreement and correspondingly implement the most effective ways to manage habitats, the Council seeks advice from Natural England and retains a countryside stewardship land management consultant. Advice relating to stocking densities to manage areas of land is part of the Council's business purpose of discharging their management responsibilities and complying with the terms of the legal agreement.
8. Since 2016, the Council has indicated its intention to manage the nationally scarce habitat of lowland heath on the Firehills part of Hastings Country Park Nature Reserve (the "Reserve") by grazing the area with a small number of cattle in the autumn/winter months. The exact number is dependent on environmental and ground conditions in any year, but their numbers will be low – around 3 to 6 cattle.
9. The premise of using a small number of cattle to graze the Firehills is based on an estimate of the number of animals required to ensure the best habitat and biodiversity outcomes on that part of the Reserve. The number of cattle on specific areas of the Reserve is not fixed or prescribed, and the number of cattle used in any given area of the Reserve will be dependent on ground and environmental conditions, grass and vegetation availability and the sensitivity and size of the habitats to be managed. The number of cattle in any grazed pasture or habitat area will be continually assessed in relation to animal welfare and habitat/biodiversity outcomes by both the farmer and the Council's countryside stewardship adviser.
10. At a talk on the future management of the Reserve given by the Council's Environment and Natural Resources Manager to the Friends of Hastings Country Park Nature Reserve on 15 July 2023, it was explained that the Council-owned elderly Belted Galloway cattle would be removed from the Reserve due to their age and replaced with a herd of native Sussex breed cattle, owned by, and be the responsibility of, the Council's farmer partner. The herd would be large enough to graze the 345 hectare Reserve.
11. In the case of the Firehills part of the Reserve, the Council stated that it and its advisers have always been clear that only a low number of cattle

would be used to manage that part of the Reserve because of its nationally scarce habitat.

Scope of the complaint

12. On 19 October 2023, the complainant contacted the Commissioner to raise a complaint about the Council's response. The complainant is convinced that the Council holds further information in scope of the request.
13. Whilst the Council did not cite regulation 12(4)(a) of the EIR, the Commissioner has proactively applied the regulation and, accordingly, the scope of this decision notice is to determine whether regulation 12(4)(a) of the EIR applies in this case.

Reasons for decision

Is the requested information be environmental?

14. Regulation 2(1) of the EIR defines environmental information as being information 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)...as well as measures or activities designed to protect those elements;
15. The request seeks information about the use of cattle for grazing which is a measure designed to have an environmental impact (i.e. on soil, land, landscape, and natural sites) and the requested information would be information on that measure. It is therefore environmental information.

Are all parts of the request valid?

16. To be a valid request under the EIR, a request must seek information that if it were held, would be held in recorded form.

17. The Commissioner notes that each part of the request contains questions and then a request for documentation, except part 2 of the request which is simply a question:

“If it is still at the proposal stage, will there be a public consultation before a final decision is made?”

18. This is not a valid request under the EIR but the Commissioner notes that the Council has replied to this in its internal review response.

19. The Commissioner will not be considering part 2 of the request in this Decision Notice.

Regulation 12(4)(a) – information not held

20. Regulation 5 of the EIR requires that a public authority that holds environmental information shall make it available on request. This is subject to any exclusions or exceptions that may apply.

21. Regulation 12(4)(a) of the EIR says 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.

22. In scenarios where there is some dispute about whether a public authority holds relevant information, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.

23. The Commissioner will consider the complainant’s evidence and arguments. He will also consider the actions taken by the Council to check that the information is not held, and he will consider any other reasons offered by the Council to explain why the information is not held. The Commissioner will also consider any reason why it is inherently likely or unlikely that information is not held.

24. In its internal review response to the complainant, the Council explained to the complainant that it had no intention of putting large numbers of cattle on the Firehills area of the Reserve and that it had no plans to undertake a public consultation on operational matters pertaining to the management of the Reserve. It also explained that it did not own the new cattle and, accordingly, it did not hold the information the complainant was requesting in respect of the cattle in part 4 of the request.

25. The complainant is convinced that the Council holds further information in respect of their request, and in their complaint to the Commissioner pointed out the agenda of a Council cabinet meeting dated 2 October 2023 in which agenda item 8 contained a report to outline the process for transferring to a new 10-year Countryside Stewardship grant for Hastings Country Park Nature Reserve from 1st January 2024¹. On this basis, the complainant believes that discussions about the use of cattle on the Firehills must have taken place prior to 2 October 2023 and must have existed at the date of their request on 28 August 2023.
26. The Commissioner notes that, pursuant to a previous request by the complainant to the Council dated 24 July 2023 for "all information regarding the placing of cattle on the Firehills" (FOIR - 533885462), the Council has already provided the complainant with a substantial amount of information about the management of grazing on the Firehills and the Reserve as a whole.
27. Following contact from the Commissioner, the Council explained that the complainant's request appeared to be based on misinformation either discussed with the complainant by attendees or posted on Facebook on 22 July 2023² following the talk referred to in paragraph 10 above. It is the Council's understanding that the complainant did not attend the talk.
28. The Council also stated categorically to the Commissioner that the Council has no plans (and has never had any plans) to graze a large herd of cattle on the Firehills, and that the Council has confirmed this to the complainant.
29. The Council confirmed to the Commissioner that it has searched its records and can find no information whatsoever which indicates an intention to graze 12 to 20 cattle on the Firehills.
30. The Council asserted to the Commissioner:

"The council has undertaken to respond the ICO's questions in good faith and to the best of its ability to explain as fully as possible the management of the reserve and where we believe the misinformation has arisen. The council further requests the commissioner's office recognise that since fundamental premise of the FOI is false, the council cannot seek or present information that does not exist."

¹ [\(Public Pack\)Agenda Document for Cabinet, 02/10/2023 18:00 \(moderngov.co.uk\)](#)

² [Save Ecclesbourne Glen | Facebook](#)

31. The Commissioner understands that the complainant is not convinced that they have been provided with all the information falling within the scope of their request. It is not the Commissioner's role to establish what information a public authority should hold, or whether it has a requirement, statutory or otherwise to hold certain information. Nor will the Commissioner undertake a forensic examination of all records held by a public authority if it is not proportionate to do so. The Commissioner's role is to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
32. It appears to the Commissioner that the basis of this request is what was, or was not, said by the Council's Environment and Natural Resources Manager to the Friends of Hastings Country Park Nature Reserve during his talk on 15 July 2023 as regards the grazing of 12 to 20 cattle on the Firehills. Even if what the complainant believes was said was in fact said, the Council has categorically denied any plan to graze a large herd of cattle on the Firehills and the request is, therefore, for information in respect of a plan which the Council asserts does not exist.
33. Based on the evidence made available to him, the Commissioner is satisfied that the Council has carried out adequate searches, which would have been likely to locate information falling within the scope of the request.
34. Based on the searches undertaken and the other explanations provided, the Commissioner is satisfied that, on the balance of probabilities, the Council does not hold any information falling within the scope of the request.

Public interest test

35. Technically, regulation 12(4)(a) contains a public interest test. However, the Commissioner cannot conceive of a public interest argument that would require a public authority to disclose information that it did not hold.

Right of appeal

36. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

37. 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.
38. 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

Michael Lea
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF