

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 3 August 2020

Public Authority: Department for Education
Address: Sanctuary Buildings
Great Smith Street
London
SW1P 3BT

Decision (including any steps ordered)

1. The complainant has requested ecological information relating to Claverham Community College from the Department for Education (the "DfE"). The DfE initially refused to provide the information under Regulation 12(5)(g) – protection of the environment. During the Commissioner's investigation the DfE reconsidered the request and disclosed the information because it believed the public interest was, by that time, weighted in favour of disclosure.
2. Having been asked by the complainant to investigate the position at the time of the request, the Commissioner has determined that the DfE correctly cited Regulation 12(5)(g) and that the public interest then favoured maintaining the exception. Consequently, the Commissioner has concluded that the DfE did not breach Regulation 5(2).
3. The Commissioner requires no steps to be taken.

Request and response

4. On 20 August 2019, the complainant wrote to the DfE and requested information in the following terms:

"I would like details of ecological information you hold for Claverham Community College, Battle, East Sussex, especially survey methodology and results for habitat and species collected in the last three years. DfE is responsible for the work to provide school redevelopment and I understand locally that ecologists have been employed for surveys on your behalf. This means that the data is public data and must be shared even though no planning application has yet been made.

Your responsibility for the work is described in the website [complainant provided link]

Please note that this request is made under the Environmental Information Regulations."

5. The DfE responded on 6 September 2019 and refused to provide the requested information, citing the following – regulation 12(5)(g)(protection of the environment).
6. The complainant made an internal review request on 10 September 2019.
7. The DfE provided an internal review on 27 September 2019 in which it maintained its original position.

Scope of the case

8. The complainant contacted the Commissioner on 10 November 2019 to complain about the way his request for information had been handled.
9. The Commissioner wrote to the DfE on 17 March 2020 explaining that she was beginning her investigation into the withholding of the requested information under Regulation 12(5)(g).
10. After further consideration of the public interest, the DfE released the information it had been withholding on 16 April 2020 with some minor redactions for personal data.

11. On 20 April 2020, the Commissioner wrote to the complainant to ask if he was content that his complaint be closed, having now received the information from the public authority.
12. The complainant responded on 21 April 2020 and stressed that he was not content to close his complaint. He argued that the information should have been released when he had requested it and that the fact that secondary surveys had now started had no relevance to the public interest. He also expressed a doubt that all the information within scope had been provided. He put forward the view that there had been surveys done in 2019 prior to his request, including great crested newt surveys to look for the presence of this species in ponds by sampling water for its DNA.
13. The Commissioner responded to the complainant on 22 April 2020 explaining that she did not propose to look at the exception that was used by the DfE or the public interest at the time of the original request because this was an academic point now that the information had been disclosed. However, she did agree to look further into whether the DfE had disclosed all the information that fell within the scope of the request.
14. On 23 April 2020 the Commissioner asked the DfE to provide details of the searches it had undertaken and related matters concerning how information relevant to the request is held, in order to establish whether all the relevant information had been disclosed.
15. The DfE responded on 18 May 2020 with details of how the information was held and explained to the Commissioner that it had located some additional information - a habitat plan of the college site and associated emails that it subsequently disclosed to the complainant on 15 May 2020. The DfE stated that it did not hold a copy of the DNA survey.
16. On 18 May 2020, the complainant was asked if the disclosure had informally resolved his complaint but he requested that a formal decision be made regarding late disclosure. However, the Commissioner decided that she would, after all, need to consider what the public interest had been at the time of the request as she was unable to reach the conclusion that the DfE had breached Regulation 5(2) or otherwise without doing so.
17. Consequently, the scope of this case is whether the DfE appropriately cited Regulation 12(5)(g). She does not intend to consider any further the matter of what is held by the DfE because, after the second search and additional disclosure, the complainant has not informed the Commissioner that he believes anything further is held and the

Commissioner is satisfied that the DfE holds nothing beyond what has been disclosed.

Reasons for decision

Regulation 12(5)(g) – Protection of the environment

18. The legislation states the following -

*12.—(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—
(g) the protection of the environment to which the information relates.*

19. To refuse a request for environmental information under the exception in Regulation 12(5)(g), public authorities will need to establish:

- that the information in question relates to the aspect of the environment that is being protected;
- how and to what extent the protection of the environment would be affected;
- and that the information is not on emissions.

20. In general terms, making environmental information available to the public ultimately contributes to a better environment, by increasing people's awareness and understanding of environmental issues. This principle is recognised in EU Directive 2003/4/EC on Protection of the environment (regulation 12(5)(g)) – EIR guidance 20120516 public access to environmental information, which the EIR implement.

21. However, there may be situations when disclosing the information would actually have an adverse effect on the environment. The Directive says that a request may be refused if disclosure would adversely affect "*the protection of the environment to which such information relates, such as the location of rare species*" (Article 4(2)(h)). So if, for example, a public authority holds information about the breeding site of a rare bird species and disclosing the location of the site would expose the site to interference or damage, then the exception may be relevant because disclosure could adversely affect the protection of the environment.

22. The exception is concerned with an adverse effect on the "*protection*" of the environment, which means maintaining the quality of the environment. Furthermore, the adverse effect must be on the protection

of the environment "*to which the information relates*". Therefore, the information in question must relate to the element of the environment that is being protected; it cannot simply be any information that would have some effect on environmental protection if a public authority disclosed it. If, for example, the exception is used to withhold information because disclosure would adversely affect the protection of the breeding site of a protected species, the information must itself relate to that breeding site.

23. Harm could result, for example, simply from the effect of a large number of people going to look at a sensitive site, or alternatively from an individual deliberately stealing or interfering with a protected species. Disclosing the exact location, with a full grid reference, of a rare plant may enable someone to steal or damage it. However, if the actual information held by the authority is at such a general level that it is not possible to pinpoint the exact location, it may be that disclosure would not adversely affect the protection of the plant.

The complainant's view

24. The complainant suggests that the reason for refusing his information request until such time as further surveys could be undertaken is "*daft*" as he considers that carrying out further surveys cannot change the risk of harm from the public to the environment. He states that it is unlikely that there are species sensitive to disturbance in a school. His view is that as the school is not open to the public there is no risk from the public. The complainant suggested that data that was not sensitive and should be released.
25. He says that the test of risk was 'could' rather than 'would' which is a lesser test. The complainant then goes on to assert that the idea that the information could motivate members of the public to seek to gain access to the site which could adversely affect the environment is spurious because the site is not open to members of the public. He has been told by college staff that great crested newts have been identified on the school grounds but that they are not at risk from the public. He cannot think of a rare species at risk from the public that could survive in a busy school. Even if this were the case, it would not be a reason to deny all other information. The complainant provided the example of Sussex Biodiversity Records Centre that restricts its information supply for records of certain species.

The DfE's view

26. The DfE provided some background and context as to why the information was created. It explained that the government is rebuilding and refurbishing school buildings in the worst condition in the country

through the Priority School Building Programme ("PSBP"). There has already been one phase of rebuilding/refurbishing (PSBP1). Under the second phase individual blocks at 277 schools will be rebuilt and refurbished using capital grant. The DfE plans for all the PSBP2 schools to open their new or refurbished buildings by the end of 2021. The proposed development of the Claverham Community College site in East Sussex is part of the PSBP.

27. Feasibility work for every new build project includes a preliminary ecological appraisal survey commissioned by the DfE. This was provided to the complainant in April 2020. Further survey work is then undertaken as part of the design development, depending on the outcome of the initial desktop survey.
28. The DfE went on to explain that the contractor chose to undertake an independent DNA survey to inform them in relation to their tender submission. This information was never submitted as part of the tender package and the survey was not instructed or funded by the DfE. The PDF map '18-0748.02 GIS CLAVERHAM EPH1 ECO FIG2 V2 190715 (002)' was shared with the complainant with the permission of the contractor.
29. Subsequently, as part of the survey process, seven 'overnight trap and release' surveys, were undertaken by the contractor as recommended within the 'Claverham Community College Preliminary Ecological Appraisal Survey Report'.
30. The DfE then set out the three key elements in the ICO's guidance¹ which public authorities are required to establish in order to engage Regulation 12(5)(g) -

The information in question relates to the aspect of the environment that is being protected:

- a) It is clear that the information in scope of this request falls firmly within this criterion, as it all relates to the potential impact on great crested newts (GCNs), which are a protected species, including their habitat and environment;

¹ https://ico.org.uk/media/for-organisations/documents/1630/eir_guidance_protection_of_the_environment_regulation.pdf

b) Regarding this species, and their habitat and environment, Natural England states the following:

- i. *Great crested newts are a European protected species. The animals and their eggs, breeding sites and resting places are protected by law.*
- ii. *You may be able to get a licence from Natural England if you're planning an activity and can't avoid disturbing them or damaging their habitats (ponds and the land around ponds)."²*

31. The DfE then went on to consider how, and to what extent, the protection of the environment would be affected. The DfE argues that it was concerned that release of the information it has now disclosed at the time of the initial request and prior to a final decision being made on whether the site could be used for development, may have attracted the interest and attention of members of the public and given rise to visitors to the site wanting to view the great crested newts who are a protected species.
32. The public authority contends that this concern is validated by anecdotal evidence that it has regarding previous development sites that potentially contained endangered/protected species. The DfE has been informed that when information concerning the presence of these species has found its way into the public domain, members of the public have visited such sites to view the species.
33. The DfE acknowledges that no malice was generally intended by the public because they are mainly undertaken out of an interest in the environment but visits have, on occasion, resulted in the habitats being inadvertently disturbed or accidentally destroyed.
34. The DfE explains that at the time of the original information request the initial DNA surveys of the pond to the north west of the school identified a high DNA concentration (a score of 10/12) in relation to the presence of great crested newts. It was for this reason that the information was withheld.
35. Following the commencement of 'overnight newt trap and release' surveys, two of which the DfE explains had been undertaken and

² <https://www.gov.uk/guidance/great-crested-newts-protection-surveys-and-licences>

completed prior to the information being released to the complainant. In April 2020 it was deemed acceptable to release the information due to the early indications being that the great crested newt presence was lower than the initial DNA surveys had indicated. Seven 'overnight trap and release' surveys in total were completed by the end of May 2020 and the final report has now been published, forming part of the application package. The full survey is now in the public domain and is available through the East Sussex County Council planning portal.³

36. The DfE states that it is clear from the information released to the complainant, that this information did not cover emissions.
37. The Commissioner accepts that the information in question relates to the aspect of the environment that is being protected and that it is not on emissions. Given the fact that the surveys had not been completed at the time of the request, it was quite possible that the release of the information would affect the protection of the environment. Calculating what adverse effect would occur cannot ultimately be proven because the information would have had to be released to see if the habitat was subsequently disturbed. The indication at the time was that the extent of the effect was likely to be greater than proved to be the case. Therefore she accepts that the exception was engaged at the time of the request.
38. Even where the exception is engaged, the Commissioner needs to consider the public interest as it was at the time of the request in order to determine whether it favoured release and was weightier than the public interest in favour of maintaining the exception.

Public interest

39. There is a public interest in avoiding harm to the environment, but the weight of this argument will depend on the nature of the harm. There is a general public interest in making environmental information available. The balance of the public interest will depend on the circumstances of the case. Public authorities can only withhold the information if the public interest in maintaining the exception outweighs the public interest in disclosure.

³ www.eastsussex.gov.uk/environment/planning/applications - reference number RR/3420/CC.

Public interest in favour of disclosing the withheld information

40. The DfE acknowledges that more openness about the environmental reporting and processes relating to such projects would result in greater accountability, an improved standard of public debate, and improved trust.
41. It also recognises the public interest in releasing the information to be open and transparent, and to establish the public understanding of the use/potential use of land and its possible impact on the environment.
42. The complainant argues that just because the DfE says that secondary surveys have been started has no relevance to the public interest test. He states that there is no reason why the information should not have been released when he asked for it last year.
43. He further contends that the case sets an important precedent because it could form a reason for the DfE and other public bodies to withhold information in future, should they have a programme or even an intention to do further surveys.

Public interest in favour of maintaining the exception

44. The DfE argues that it is essential, when assessing potential sites for development under PSBP, that the environmental impact of such development is given full consideration.
45. At the time of the request and at the time of the internal review of this case, site assessments were still ongoing without a final decision being made as to future builds on the site.
46. Great crested newts which are a protected species had been found on the site. It was essential to ensure that the relevant protections were in place to minimise disturbances to this species.
47. The DfE quotes from 'Guidelines from Natural England' regarding the protection of this species. To protect great crested newts and to prevent members of the public breaking the law, inadvertently or otherwise, it is important to avoid:
 - capturing, killing, disturbing or injuring great crested newts deliberately;
 - damaging or destroying a breeding or resting place;
 - obstructing access to their resting or sheltering places (deliberately or by not taking enough care);

- possessing, selling, controlling or transporting live or dead newts, or parts of them; and
- taking GCN eggs.

48. The DfE reiterates that where such information has previously found its way into the public domain, it has occasionally led to the environment and habitat of such protected/endangered species being disturbed and occasionally destroyed. It asserts that withholding this information was specifically to protect the environment of great crested newts. This falls firmly within the ICO's scope for withholding such requested information. The ICO's guidance states the following -

"The purpose of the exception is to allow a public authority to refuse to disclose environmental information if it would harm the protection of the environment to do so."

49. The DfE again quotes from the ICO's guidance in relation to rare bird species rather than the great crested newt -

"However, there may be situations when disclosing the information would actually have an adverse effect on the environment. The Directive says that a request may be refused if disclosure would adversely affect 'protection of the environment to which such information relates, such as the location of rare species' (Article 4(2)(h))."

50. Finally the DfE, when considering the balance of public interest, suggested that the following paragraph from the ICO guidance is relevant -

"Harm could result, for example, simply from the effect of a large number of people going to look at a sensitive site, or alternatively from an individual deliberately stealing or interfering with a protected species. Disclosing the exact location, with a full grid reference, of a rare plant may enable someone to steal or damage it."

As has already been pointed out, there was the possibility of such an event occurring and therefore the DfE was clear at the time of the request that there was a greater public interest in withholding the information to protect the endangered species than there was in releasing the information.

The balance of the public interest

51. The information that has now been disclosed is an ecological appraisal survey report, appendices and a habitat plan. The point of this information is clearly, primarily ecological. In this case it is necessary to

balance the public's right to know at the time of the request against the protection of the habitat of a protected species. Other than an interest in seeing the ecological survey, it remains unclear why it would be in the public interest to do so other than the general interest that exists amongst the public regarding environmental or ecological matters. It does not appear that there was any suspicion of wrongdoing or lack of accountability regarding public money. Although the Commissioner understands the complainant's point that it is in the public interest for public authorities not to be able to hide behind future surveys for non-disclosure of requested information, she does not agree that it applies here or that decision notices set a precedent. She accepts that, in this context, the public interest lies in protecting the environment and the potential harm that could occur to that environment had the information been released too early.

Regulation 5(2)

52. Regulation 5(2) of the EIR states that, subject to exceptions, a public authority is required to make environmental information available no later than 20 working days after the date the request is received.
53. As the Commissioner does not agree that Regulation 12(5)(g) was cited inappropriately at the time of the request, there has consequently been no breach of Regulation 5(2).

Other matters

54. The Commissioner is disappointed that this matter has had to be concluded by way of a decision notice, given that the information was provided by the public authority at the start of the investigation. The circumstances here are unusual and the Commissioner would not normally expect to write a decision notice where she was required to consider the public interest retrospectively. She considers doing so to be a waste of resources that will not necessarily be repeated. Her position is supported, to some extent, by the recent IT decision of *Sarah Linton v Information Commissioner, EA/2020/0160, 10 June 2020*. In that case the public authority originally withheld the information under a number of exemptions. However, during the course of the investigation it changed its position and disclosed the requested information. In that case the Commissioner's Decision Notice did not consider the engagement of those exemptions and simply recorded a breach of regulation 5. The Appellant appealed on the basis that the Commissioner ought to have considered whether the Council was correct to have applied the exemptions originally. The Commissioner applied for a strike out on the grounds that the Council had changed its position and it was

Reference: FER0889420



academic to consider these matters further and the Tribunal did strike out the appeal.

Right of appeal

55. 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

56. 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.
57. 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

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