

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 19 May 2021

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

Decision (including any steps ordered)

1. The complainant requested details of three reports which he believed to have been relevant to the content of a July 2019 geotechnical report commissioned by Hastings Borough Council (the council). He also asked for copies of these reports.
2. The Commissioner's decision is that the council does not hold the report described within part 1 and 2 of the complainant's request. She is also satisfied that the council correctly identified the two reports which were relevant to parts 3, 4, 5 and 6 of the request, and that the complainant has already received this information in response to previous requests.
3. However, as the council responded to the complainant's request outside of the statutory timescales, it has breached regulation 5(2) of the EIR. Furthermore, as the council also failed to provide its internal review response within 40 working days, the Commissioner has found there to be a breach of regulation 11(4) of the EIR.
4. The Commissioner does not require the council to take any steps as a result of this decision notice.

Request and response

5. On 10 October 2019, the complainant submitted an information request to the council, the terms of which are set out below. For ease of reference, the Commissioner has also included a summary of the council's initial response of 28 November 2019; this information is set out under each part of the request in bold.

The May 7th Coffey Inspection report [the complainant subsequently confirmed that he was referring to a report which was published in July 2019, and not 7 May 2019, which was when the inspection was carried out] into the landslide in Ecclesbourne Glen (recently provided under EIR) refers to a previous inspection on the 30th November 2017 and to two other reports dated 2016 and 2018. It is unclear what these reports are.

"The aim of the inspection was to identify any signs of change and / or deterioration of the landslide and the adjacent land since the previous inspection by [redacted] on the 30th November 2017.

..... This report should be read in conjunction with the Coffey (2016 and 2018) reports on the site".

<https://www.whatdotheyknow.com/request/6...>

Please provide the following under EIR:

- 1. Details of the 30th November Report including title, author, reference numbers.*

The council provided the complainant with the details, 'Inspection for the legal report, Coffey', no reference number provided'.

- 2. A copy of the 30th November Report.*

The council advised it was refusing to provide this information under regulation 12(5)(b) of the EIR. It went on to advise that the public interest lay in favour of withholding this information.

3. Details of the 2016 Report including title, author, reference numbers and date.

The council confirmed the title to be, 'Hastings Borough Council, Ecclesbourne Glen Footpath Diversions, Options Assessment, Coffey,' and the reference 'ref: 02255AE.'

4. A copy of the 2016 Report.

The council confirmed that part of the report had been provided to the complainant on 16 October 2018, and that part had been refused. It went on to say that this was the subject of a separate complaint to the Commissioner which was, at the time of the response, still under consideration.

5. Details of the 2018 Report including title, author, reference numbers and date.

The council provided the complainant with the following title; 'Hastings Footpath Note and Figures, Coffey.' It stated that there was no reference on the 'briefing note', but listed on the two figures is 02255AG.

6. A copy of the 2018 Report.

The council advised that this information had already been provided to the complainant on 20 July 2019 in response to another request he had made. It provided him with the reference associated with that request.

6. On 20 November 2019, the complainant requested an internal review. He advised that he did not accept the council's response to part 1 of the request, stating that as all previous Coffey reports he had received contained a reference number, he would expect the same to be the case with the report of 30 November 2017.
7. The complainant then made reference to the council's response to part 5 and 6 of his request, where it had stated that a short report (the Coffey March 2018 report) and two associated diagrams, were relevant; this information had previously been released to him in response to another request. The complainant stated that the council had confirmed in its response to that previous request that this information had formed part of a larger report, produced in November 2017 from a draft document for a caravan park site licence appeal. It had also advised it did not hold

this larger draft site licence report (this was a matter that was considered within decision notice FER0790996¹, issued by the Commissioner on 20 August 2019).

8. The complainant went on to say that he believed that the information contained within the Coffey report of July 2019 (the Coffey July 2019 report), now showed that the Coffey March 2018 report, and the two diagrams, had been taken from a larger inspection report into the landslip dated 30 November 2017, and not from a draft licence report as previously claimed by the council. Furthermore, he believed that the council would hold a copy of this larger inspection report.
9. The complainant then asked the council to confirm that the November 2017 draft site licence report, which it had previously stated it did not hold, was not the same as the 30 November 2017 report which was now being refused.
10. The council provided the complainant with its internal review response on 23 January 2020. It advised that *'the 30 November 2017 was an inspection for a legal report'* between the caravan park site owners and the council, the title being *'Rocklands Holiday Park Ecclesbourne Glen License'*. It went on to further describe this report as *'a geotechnical expert report of Coffey for the respondent dated February 2018.'*
11. The council advised the complainant that Coffey (the geotechnical company commissioned by the council to carry out work on its behalf) had confirmed that there was an expectation that the contents of the *'legal report'* dated February 2018 (the Coffey February 2018 report) would be regarded to be legally privileged, and that it had gone on to refuse to disclose this for the reasons already set out in its initial response to the complainant's request of 28 November 2019.
12. The council then went on to advise the complainant that it had now established that it did not hold a copy of the Coffey February 2018 report. It explained that this was because it had been sent directly from Coffey to the barrister who was acting on behalf of the council in relation to the caravan site licence appeal case. However, the council did confirm that it held a copy of a screen shot of its front page, which it provided to the complainant. In addition, it pointed out that there was no visible reference number on this page.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2615709/fer0790996.pdf>

13. The council also confirmed to the complainant that '*the inspection on the 30 November 2017 and subsequent report dated February 2018 is not the same as that you refer to*'.
14. The council concluded its internal review by confirming to the complainant that its original response should have advised that it did not hold a copy of the report relevant to part 2 of the request.

Scope of the case

15. The complainant contacted the Commissioner on 21 April 2020, to complain about the way his request for information had been handled by the council.
16. Firstly, with regards to parts 3 and 4 of the request, the complainant has confirmed that the council's initial response had sufficiently clarified which Coffey report of 2016 was referenced in the Coffey July 2019 report. He also already held a redacted copy of this in response to another request (considered by the Commissioner within decision notice FER0832391², issued on 9 March 2020).
17. The complainant then went on to advise that details of the 2016 report had also been included within a comprehensive list of all Coffey reports provided to him by the council in response to a previous request he had made. However, he stated that he was concerned that the two other Coffey reports he believed to be referenced within the Coffey July 2019 report had not also been included within this comprehensive list.
18. The complainant has also raised concerns that, in response to part 2 of his request, the council initially stated that this information was to be withheld under regulation 12(5)(b) and then, at the internal review stage, claimed that it did not hold a copy of the information requested.
19. With regards to part 5 and 6 of the request, the complainant has referred to the Coffey March 2018 report already in his possession, which the council had advised was relevant to this part of his request. He states that he still believes it is more likely that such information was extracted from a '*geotechnical inspection report*', rather than a licence appeal report as claimed by the council; furthermore, he believes that

² <https://ico.org.uk/media/action-weve-taken/decision-notice/2020/2617494/fer0832391.pdf>

the council must hold a copy of this inspection report. He has specifically asked the Commissioner to investigate whether the council holds a copy of *'the November 2017 inspection report (reference number 02255AG)'*.

20. The complainant has also advised that he is concerned that the council's responses still do not clarify the title of the 2018 report referred to in the Coffey July 2019 report.
21. Finally, the complainant has raised concerns about the general handling of his request by the council.
22. Firstly, the Commissioner does not regard the complainant's concern that any reports held by the council relevant to parts 1, 2, 5, and 6 of his request were not included within a comprehensive list of reports previously released to him to be relevant to her current investigation. However, she is aware that the complainant made the request for the list of reports on 14 October 2017. Whilst the council did not respond to the request until 4 July 2018, it is only required to consider the information held at the time of receipt of the request. It therefore seems unlikely that, aside from the Coffey 2016 report, any other Coffey reports relevant to the request under consideration would have fallen within the scope of the request of October 2017.
23. The Commissioner considers the scope of her investigation to be as follows:
 - To determine whether the council, on the balance of probabilities, holds information relevant to part 1 and, or, part 2 of the complainant's request. If so, she will consider if the council is entitled to withhold this information under the exception cited, that being regulation 12(5)(b).
 - Whether the council holds any additional information relevant to part 5 and 6 of the request.
 - Whether the council has complied with the procedural aspects of the EIR.

Reasons for decision

Is the information environmental information?

24. Information is 'environmental information' and must be considered for disclosure under the terms of the EIR, rather than the FOIA, if it meets the definition set out in regulations 2(1)(a) to 2(1)(f) of the EIR.

25. Regulation 2(1)(c) of the EIR says that any information on measures such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements or factors listed in regulation 2(1)(a) and 2(1)(b) will be environmental information. One of the elements listed under 2(1)(a) is land.
26. The Commissioner is satisfied that the information requested, which relates to reports that have been authored by a geotechnical company (Coffey), can be considered to have an affect on the land and its use, and that it fits squarely into the definition of environmental information set out within regulation 2(1) of the EIR.

Regulation 5(1) - Duty to make environmental information available on request

27. Regulation 5(1) of the EIR states that '*a public authority that holds environmental information shall make it available on request.*' This is subject to any exceptions that may apply.
28. In 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 the complainant's evidence and arguments. She will also consider the actions taken by the authority to establish what information within the scope of the request it held, and any other reasons offered by the public authority to explain why further information is not held. She will also consider any reason why it is inherently likely, or unlikely, that further information is not held.
29. With regards to part 1 and 2 of the request, following receipt of the Commissioner's investigation letter, the council confirmed that it had, as requested, considered the ICO's published guidance '*Information held by a public authority for the purposes of the EIR*'.³ It stated that it now accepted that the Coffey February 2018 report (which it had referred to as the 'legal' report for the site licence appeal) was held by another person (the barrister) on behalf of the council, and was therefore held by the council for the purposes of the EIR.

³ <https://ico.org.uk/media/for-organisations/documents/2614663/information-held-by-a-public-authority-for-purposes-of-eir.pdf>

30. The council went on to say that, as a result, it had obtained a copy of the report from the barrister, and provided a copy of this to the Commissioner. It also explained why it still believed this information should be withheld under regulation 12(5)(b) of the EIR in response to part 2 of the complainant's request.
31. Access to the content of the Coffey February 2018 report, which is dated 7 February 2018, and has the reference 02255AG (it should perhaps be noted that the Coffey July 2019 report has this same reference), has enabled the Commissioner to be much clearer in her determination as to what information is held by the council that is, and is not, relevant to the request.
32. With regard to part 1 and 2 of the request, the complainant asserts that there is sufficient information to indicate that an inspection report dated 30 November 2017 must exist, and that the council would hold this document.
33. The council has confirmed that, as far as it is aware, no specific report was written at the time of the visit carried out by Coffey on 30 November 2017. It states that it would seem likely to be the case that the inspection which was carried out on this date helped inform Coffey when required to produce subsequent documents and reports for the council, including the Coffey February 2018 report which it referred to in its responses to the complainant's request.
34. The Coffey February 2018 report was authored by a geotechnical engineer employed by Coffey; however, the Commissioner is satisfied that it is absolutely clear from its content that the sole purpose of its creation was for the site licence appeal, and not to provide geotechnical advice directly to the council to help with its decisions about how to manage the stability of the land which had previously been affected by landslips.
35. In addition, the council has provided the Commissioner with details of certain email correspondence sent between the council and Coffey. Whilst this information does not fall within the scope of the request, it has been provided in support of the council's representations. In the Commissioner's opinion, it is apparent from such correspondence that the inspection of 30 November 2017 was arranged for the purpose of the site licence appeal, and that a report was to be produced at a later date using data obtained from the inspection, for the appeal.
36. The Commissioner is also of the view that the council did provide some explanation to the complainant as to why a report dated 30 November 2017 was not held. In its internal review response, it explicitly confirmed that *'the 30th November 2017 was an inspection'*. It also confirmed that

the purpose of this inspection was to assist with the compilation of a report for the site licence appeal which was titled '*Rocklands Holiday Park Ecclesbourne Glen License*', dated February 2018 (the Coffey February 2018 report).

37. With regards to the complainant's claim that the information set out within the Coffey July 2019 report shows that a 30 November 2017 report exists, the Commissioner has found that it only ever refers to an inspection of that date. In addition, there is only reference to three Coffey reports within the main content of the Coffey July 2019 report, these being '*Coffey 2014*', '*Coffey 2016*', and '*Coffey 2018*'.
38. The Commissioner has taken into account all the information that has been made available to her in this case, and also that which she holds in respect of a number of other complaints she has received about the council's handling of requests about the Glen, the caravan park site and the landslips which affected land in both areas. She has found no evidence within any source that a Coffey report is held by the council which is dated 30 November 2017.
39. It is the Commissioner's view that, on the balance of probabilities, the Coffey February 2018 report is the main report that was written following Coffey's inspection of 30 November 2017, and that it was the primary purpose for that visit. However, she is also of the opinion that the same inspection assisted in the compilation of the Coffey March 2018 report, which the council had advised the complainant was relevant to part 5 and 6 of his request. She agrees with the council that it may also be the case that the findings of the November 2017 inspection also contributed to other Coffey reports subsequently published.
40. The Commissioner has considered the content of both the Coffey February 2018 report and the Coffey March 2018 report; she believes it is not unreasonable to assume that, as already suggested by the council, the two attached diagrams contained within the latter report were taken directly from the former report (hence why the two diagrams contain the reference 02255AG). Whilst the Commissioner has found that the remaining information set out within the Coffey March 2018 report does not appear to have also been extracted directly from the Coffey February 2018 report, she does not regard it to be appropriate to make any further comment on any possible similarities, or differences, between the content of these two reports.
41. The council appears to have considered both the Coffey February 2018 report, and the Coffey March 2018 report, in response to the complainant's request. However, it is the Commissioner's view that only one of these reports actually falls within the scope of the request.

42. In the council's representations to the Commissioner, it provided arguments to support its application of regulation 12(5)(b) of the EIR to the Coffey February 2018 report. As the Commissioner is satisfied that this was a report which was, in its entirety, created for the sole purpose of the appeal proceedings, despite the passage of time, she finds the council's defence of its position to be perfectly reasonable in the circumstances, and she is therefore amenable to the arguments which it presents against the release of this information.
43. However, the Commissioner does not intend to carry out any formal determination in relation to the content of the Coffey February 2018 report; this is because she is satisfied that this information does not fall within the scope of any part of the complainant's request.
44. In parts 1 and 2 of the request, the complainant explicitly requested a copy of the November 2017 report that was referred to in the Coffey July 2019 report. He went on to say he believed this to be an inspection report. The Commissioner has already determined within this decision notice that there is no 'inspection' report held by the council of this date, nor any other Coffey report.
45. In parts 5 and 6 of the complainant's request, he asked for details, and a copy, of that 2018 report which had been referred to within the Coffey July 2019 report.
46. The Commissioner is satisfied that the Coffey July 2019 report refers to only one 'Coffey 2018' report in the main content. It is then detailed within the reference section as '*Email: "RE: Footpaths through Ecclesbourne Glen". Email message from [redacted] to [redacted] . 7th March 2018. Attachments: 2018_03_07_Hastings Footpath Note and Figures'*. This is the subject heading of an email which was sent by Coffey to the council on 7 March 2018, and attached to this email was the Coffey March 2018 report, and the two diagrams.
47. The Commissioner is satisfied that it is the Coffey March 2018 report, and not the Coffey February 2018 report, that is cited throughout the July 2019 report. Given this, it is the Commissioner's decision that only the former report falls within the scope of the complainant's request.
48. Furthermore, the Commissioner is of the view that the council provided the complainant with sufficient information to enable him to identify the 2018 report referred to in the Coffey July 2019 report, and that all the information relevant to part 5 and 6 of the request is already in his possession.

49. Whilst the Commissioner has determined that the Coffey February 2018 report did not fall within the scope of the complainant's request, having considered the provisions of regulation 9 of the EIR (to provide advice and assistance) she does believe it to have been appropriate for the council to have referred to its existence in its responses to the complainant. This should have provided clarification to the complainant why a November 2017 report was not held, and why the council therefore did not hold any information which was relevant to part 1 and 2 of his request.
50. Unfortunately, it would appear that the way in which the council relayed this information to the complainant, i.e., its failure to simply and clearly say that the information relevant to part 1 and part 2 of the request was not held, has led to some misunderstanding and ambiguity about what was held, and what was being withheld. In addition, the council's inference that the Coffey February 2018 report fell within the scope of the complainant's request further contributed to the confusion that had already arisen.
51. The complainant stated in his request that it was not clear what the reports were that were referred to in the Coffey July 2019 report; he also subsequently complained that, following receipt of the council's responses, the title of the 2018 report remained uncertain.
52. The Commissioner finds that she must disagree with the complainant on this particular point. She is satisfied that not only is there no reference to a November 2017 Coffey report, full details of the Coffey '2014', '2016' and '2018' reports, which are the only Coffey reports cited within the main content of the Coffey July 2019 report, are then clearly set out for the reader within the reference section at the end of the report. The details are as follows:
 - *Coffey. 2014. Ecclesbourne Glen - Landslides – 2014, April 2014. Coffey Geotechnics Ltd. Report No. 02255A.*
 - *Coffey. 2016. Ecclesbourne Glen Footpath Diversions, Options Assessment, June 2016. Coffey Geotechnics Ltd. Report No. 02255AE_R_001B_MH footpath diversions FINAL.*
 - *Coffey. 2018. Email: "RE: Footpaths through Ecclesbourne Glen". Email message from to . 7th March 2018. Attachments: 2018_03_07_Hastings Footpath Note*
53. The Commissioner is aware that the complainant has had access to all three of the above reports.

Summary of decision

54. The Commissioner has determined that, on the balance of probabilities, the council does not hold information that is relevant to part 1, and part 2, of the complainant's request. This is because there is no evidence that a Coffey report dated 30 November 2017, as described by the complainant in his request, is held by, or on behalf of, the council.
55. With regards to part 5 and 6 of the request, the Commissioner is satisfied that the council has provided the complainant with the details of the relevant report, and that a copy of this, and its associated attachments, is already in his possession.

Procedural matters

56. The complainant requested that the Commissioner also consider the general handling of his request by the council.
57. Regulation 5(1) requires a public authority that holds environmental information to make it available on request. Regulation 5(2) requires this information to be provided to the requester within 20 working days following receipt of the request.
58. The complainant submitted his request to the council on 10 October 2019, and the council provided its response on 28 November 2019. The council has therefore failed to meet its obligations under regulation 5(2) of the EIR.
59. Regulation 11(4) of the EIR requires a public authority to complete its internal review as soon as possible, and no later than 40 working days after the internal review is requested.
60. The complainant requested an internal review on 20 November 2019, but as the council did not provide a response until 23 January 2019, the Commissioner finds that the council has also breached regulation 11(4) EIR.

Other matters

61. For the sake of completeness, the Commissioner regards it to be necessary to record that the Coffey March 2018 report contained an additional attachment to the two diagrams that have been referred to within this decision notice. It is her understanding that two photographs were also attached to this report, and that they would therefore also be relevant to part 5 and 6 of the request. It would appear that these photographs were not provided to the complainant by the council at that

time that it released the Coffey March 2018 report, and attached diagrams, to him; however, they were provided to him in response to another request made to a separate public authority (together with 7 March 2018 cover email, and the Coffey March 2018 report).

62. The council has advised the Commissioner that it would be hesitant to release the two photographs as it regards them to be exempt from disclosure. This assertion was made despite the council being aware that this information has been released by another public authority.
63. In the Commissioner's view, as this information is already in the public domain (by virtue of its release in response to another information request made via the 'whatdotheyknow' website), it is unlikely that there can be any substance to any claim made by the council that this information is subject to an exception under the EIR, and can be withheld. It is already readily accessible by virtue of being in the public domain.
64. Furthermore, it should be noted that the dates on both the photographs is 2016; therefore, they were not taken at the site visit carried out in November 2018. They also appear to have been used in other reports; the Commissioner has found that at least one of these photographs has already been released by the council in response to a previous request for a copy of another Coffey report (considered within decision notice FER0832391, issued on 9 March 2020).
65. However, in this particular instance, as the Commissioner has found that the complainant has actually provided copies of the photographs, and the cover email of 7 March 2018 sent from Coffey, directly to the council in support of a previous request he made, she sees no value in now determining that the council should use what are likely to be already severely stretched resources at the present time, to supply this information to the complainant. This is because it is clear it is already in his possession.

Right of appeal

66. 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

67. 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.
68. 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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