

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 26 March 2021

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

#### **Decision (including any steps ordered)**

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1. The complainant submitted a two-part request to Hastings Borough Council (the council) for certain information which it had received from a particular geotechnical company.
2. The council confirmed that it did not hold information relevant to part 1 of the complainant's request. It then went on to refuse part 2 of the request, referring to a letter which had previously been sent to the complainant by its legal department.
3. At the internal review stage, the council maintained its previous position in relation to part 1 of the request. Whilst it now referred to section 12 of the Freedom of Information Act 2000 as its basis for refusing part 2 of the request, it then went on to release the details of two reports to the complainant.
4. During the course of the Commissioner's investigation, the council then confirmed that it wished to rely on regulation 12(4)(b) when refusing to comply with part 2 of the request.
5. The Commissioner is satisfied that, on the balance of probabilities, the council was correct when it said that it did not hold any information relevant to part 1 of the request.
6. With regard to part 2 of the request in its entirety, the Commissioner has determined that the council is entitled to rely on the exception at regulation 12(4)(b) of the EIR, and that the public interest rests in favour of maintaining this exception.

7. However, the Commissioner finds that the council has breached regulation 14(3) of the EIR. This is because, in its internal review, it incorrectly referred to an exemption under the FOIA when responding to part 2 of the request. The council also failed to cite an exception when stating that it did not hold information relevant to part 1 of the request.
8. Furthermore, as the council failed to provide its internal review response within the prescribed 40 day time period, it has also breached regulation 11(4) of the EIR.
9. The Commissioner does not require the council to take any steps as a result of this decision notice.

## Request and response

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10. On 2 April 2020, the complainant, acting on behalf of a local campaign group, Save Ecclesbourne Glen (SEG), wrote to the council and requested information in the following terms:

*The Coffey June 2015 Proposal for Investigation and Assessment Report recently released by HBC refers to a Coffey December 2014 Draft Letter Report.*

*This Coffey December 2014 Draft Letter Report has not been listed by HBC as a Coffey document that they hold. FOI-79508996 requested " a list of all reports produced by Coffey for HBC from 2010 to date concerning Ecclesbourne Glen, Rocklands or the Hastings Country Park". The Coffey December 2014 Draft Letter Report was not on the list provided by HBC in response to this request. <https://www.whatdotheyknow.com/request/l...>*

*Please provide me with:*

- 1. a copy of the Coffey December 2014 Draft Letter Report*
  - 2. a comprehensive list of ALL Coffey documents/reports/letters that HBC holds concerning Ecclesbourne Glen, Rocklands or the Hastings Country Park from 2010 to date.*
11. On 9 April 2020, the council provided its response. With regard to part 1 of the request, the council confirmed that it did not hold a copy of the 'Coffey December 2014 Draft Letter Report' referred to by the complainant. It advised that this would have been sent to the Head of Service at that time who had since left the council, and that it no longer had access to their computer and files.

12. With regard to point 2 of the request, the council advised that it would not be responding to issues that had previously *'been asked and responded to.'* It referred to a letter sent to the complainant on 24 October 2019, by the council's Chief Legal Officer. In this letter the council advised that it was:

*'writing to give notice under Section 12(4)(1)(a) and (b) Environmental Regulations which states that "a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable." The exception can be used when the local authority considers the request is vexatious.'*

13. The Chief Legal Officer had also advised that the council would no longer be responding to information requests *'regarding Rocklands Caravan Park and Ecclesbourne Glen where a question or subject matter has previously been asked and responded to'*, and that it would not *'re-visit subjects that have previously been answered.'*
14. On 9 April 2020, the complainant requested an internal review and on 29 June 2020, the council provided its response.
15. The council confirmed that its *'server'* had been checked by the IT department and that it had failed to identify any information that was relevant to part 1 of the request.
16. In response to part 2 of the request, the council again advised that it would not revisit requests that had already been dealt with in the past. It referred to a *'comprehensive list'* of reports which it advised had already been provided to the complainant in response to a request he had made in 2017.
17. However, the council did then go on to confirm that it had identified two reports which were produced after the date of the complainant's request of 2017, and it provided him with the title and date of both these reports.
18. The council stated that to deal with part 2 of the request in its entirety would *'require many officers at the council'* to check their records for the past 10 years, and that this would exceed the appropriate cost limits set out by section 12 of the Freedom of Information Act 2000 (the FOIA) *'by a significant amount'*.
19. The council concluded its internal review response by saying the following:

*'This internal review has taken a further 4 hours to respond to and given these unprecedented times with COVID-19 our focus should be on*

*dealing with helping the residents of our town. It is felt that constant requests are a further waste of public funds.'*

## Scope of the case

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20. The complainant contacted the Commissioner on 21 August 2020 to complain about the way his request for information had been handled.
21. He raised a number of concerns about the way in which his request had been handled by the council which have been summarised below:
  - That the council advised that it does not hold the information relevant to part 1 of the request.
  - That the council failed to provide the correct response to part 2 of the request.
  - That the council failed to cite either the FOIA, or EIR, or an exemption/exception in its original response, and instead relied on the content of a letter which had been sent to him on 24 October 2019.
  - That the council only introduced costs and section 12 of the FOIA as a reason for refusing part 2 of the request at the internal review stage (and that it should not have considered the request under the FOIA), and that it did not give proper consideration to his representations.
  - That the response to his request of 14 October 2017 (which had then resulted in what the complainant regards to have been an incomplete list of reports being released to him in response in 2018) was '*flawed*'.
22. Firstly, in response to the final bullet point set out above, the Commissioner must confirm that she only intends to consider the council's handling of the complainant's request of 2 April 2020; she will not go on to make any formal decision in relation to how the council may have dealt with any previous requests that the complainant has made.
23. The council has also confirmed during the course of the Commissioner's investigation that it wished to rely on regulation 12(4)(b) of the EIR when refusing to deal with part 2 of the complainant's request. It advised that not only did it believe it to be the case that to deal with the request would incur unreasonable costs, but that it was also vexatious.

24. The Commissioner considers the scope of her investigation to be:
- Whether the council is correct to say that it does not hold any information that is relevant to part 1 of the request.
  - Whether the council is entitled to rely on regulation 12(4)(b) of the EIR when refusing to deal with part 2 of the request.
  - Whether the council has complied with the procedural aspects of the EIR.

## **Reasons for decision**

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### **Is the information environmental information?**

25. 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.
26. 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.
27. The Commissioner is satisfied that the information requested 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**

28. 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.
29. 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.

30. The complainant has questioned the council's assertion that a copy of the report relevant to part 1 of his request would not have been retained following the departure of the Head of Service; he states that the report/email would be stored on a server, and not on any one individual's personal computer. He also believes that the report would have been sent to, and still held by, other officers within the council, and other interested parties.
31. The council confirmed it had carried out an 'e-discovery' of its entire email system using the search terms provided by the complainant, and that this had failed to identify any information that was relevant to part 1 of the request.
32. The Commissioner has received a number of complaints about the council's handling of requests that relate to Ecclesbourne Glen (the Glen), the landslips that affected the Glen, and a neighbouring caravan park (the site). Her investigations into such complaints have provided her with access to a considerable amount of information. She has found this to be useful in her consideration of the council's response to both part 1, and part 2, of the complainant's request. She would also add that the information that she has found to be most pertinent to this case has been released by the council in response to other requests, and is therefore in the public domain.
33. Within his request, the complainant refers to a document '*Proposal for Investigation and Assessment*', (the Proposal report) dated 23 June 2015. He states that within the Proposal report, reference is made to a previous '(draft) letter report' issued by Coffey dated 23 December 2014 entitled '*Desk Study and Inspection.*' (Desk Study Report). It is this document dated 23 December 2014 which is relevant to part 1 of the complainant's request.
34. The Proposal Report contains extracts which it states are taken from the 'Recommendations' section of the Desk Study Report dated 23 December 2014. The Commissioner regards it to be important to note that the exact same information can be found under the 'Recommendations' section of another 'draft' document held by the council; '*Ecclesbourne Glen: Additional Data Review and further Technical Advice*' (Coffey 2 report), dated 23 January 2015.
35. Furthermore, the 'Recommendations' section of the '*Desk Study and Inspection Report*' (the Coffey Report), dated May 2014, also contains very similar statements to those contained within the 'Recommendations' section of the Proposal Report.

36. The Coffey 2 report also refers to the previous documents which had been issued by Coffey to HBC about the landslips as *'the "Desk study and Inspection" report of May 2014 (issued in draft), and subsequent letter of 25 September 2014.'* There is no reference to a previous document dated 23 December 2014, therefore suggesting that at the time that the Coffey 2 report was produced on 23 January 2015, only two other reports produced by Coffey about the Glen and the landslips existed, and neither were dated 23 December 2014.
37. Having inspected the information the Commissioner holds in relation to both this request, and other requests which she has investigated that also relate to the Glen, the landslips and the site, as far as she can see, the only Coffey 2014 report ever referred to is the Coffey report dated May 2014.
38. The Commissioner is therefore mindful that it is possible that there was an error in the reference to the existence of a further *'Desk Study and Inspection'* report dated 23 December 2014 within the Proposal Report. Alternatively, it may also be possible that there was a previous draft version of the existing *'draft'* Coffey 2 Report dated 23 January 2015, and that this is no longer held on the council's systems.
39. In any event, the Commissioner is satisfied that the searches which have been carried out by the council were sufficient to have identified the existence of such a report, should it still be held on their electronic system. Furthermore, she is of the view that there is no indication from the information that is available that such a report should be held.
40. Taking all the above factors into account, the Commissioner is satisfied that, on the balance of probabilities, the council was correct when it stated that it held no information relevant to part 1 of the request.

**Regulation 12(4)(b)- manifestly unreasonable requests**

41. The complainant, in his internal review request, advised the council that he was aware that there were additional documents that existed which he believed should have been released in response to his October 2017 request for a list of Coffey reports. He also confirmed he still required all the documents that had been produced since he submitted his request in 2017.
42. The complainant referred to the existence of a '2015' report on drainage that had been mentioned in an email sent between the council and Natural England on 1 September 2015, but which was not included in the previous list of reports supplied to him by the council; he also mentioned that the Commissioner had referred to this same email in



paragraph 35 of decision notice FER0832391<sup>1</sup>. In addition, the complainant referred to some inspection reports that he believed to have been produced by Coffey in 2018/19 which would also be relevant to his request.

43. Whilst the council advised the complainant in its internal review response that it was still refusing to comply with part 2 of his request, it confirmed that it had identified the existence of two reports which post-dated his request of 2017; it then went on to provide him with the details of both these reports.
44. With regard to the complainant's reference to a '2015' report on drainage, the council advised that decision notice FER0832391 was about *'the Options Assessment report dated June 2016'* and that this report had already been released to SEG in a redacted format.
45. As the complainant has pointed out to the Commissioner, one of the two reports listed by the council in its internal review response is actually dated 11 September 2015, and therefore does not post-date his request of 2017.
46. Furthermore, the Commissioner is of the view that the complainant made it sufficiently clear in his internal review request that he was referring to the existence of a '2015' report, and not the June 2016 report referred to by the council in its subsequent response.
47. At this point, the Commissioner regards it to be relevant to add that she believes it to be the case that decision notice FS50819028<sup>2</sup>, issued on 22 April 2020, subsequently addressed matters concerning the possible existence of a '2015' drainage report. She notes that this decision notice was issued after the complainant's internal review request for this case, but before the council had sent its internal review response.
48. With regard to the council's decision to release some information in response to part 2 of the request, whilst its intention may have been to help promote openness and transparency, it has somewhat complicated matters by taking such action. This is even more so the case, given that the complainant does not accept the council's claim that it has provided

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617494/fer0832391.pdf>

<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617664/fs50819028.pdf>



all the relevant information produced by Coffey since his request of October 2017.

49. It is clear to the Commissioner that part 2 of the complainant's request is for a set of information that covers a specified time period; it was therefore perhaps not appropriate for the council to have 'split' this request into different time periods without prior discussion and agreement with the complainant.
50. Having given the matter careful consideration, and after taking into account all the information available, the Commissioner has decided that it is right that her investigation should focus solely on whether the council is entitled to rely on the exception at regulation 12(4)(b) of the EIR in relation to part 2 of the request in its entirety. If it is found that regulation 12(4)(b) is not engaged, or that the public interest rests in favour of compliance with the request, then the council would be required to reconsider all the information it holds which covers the full timeframe specified by the complainant.
51. Given the above, the Commissioner does not intend to consider further any concerns raised by the complainant about the information which was released by the council in response to part 2 of his request in this decision notice.
52. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable. A request can be refused as manifestly unreasonable either on the basis of the burden that it would cause to the public authority, or because it is considered to be vexatious.
53. The Commissioner considers that public authorities may be required to accept a greater burden in providing environmental information than other information. Where it is found to be engaged, regulation 12(4)(b) of the EIR is also qualified by the public interest test. Any exercise carried out to determine whether an exception applies must take into account the EIR's express presumption in favour of disclosure under regulation 12(2).
54. In this case, the council has argued that part 2 of the complainant's request is manifestly unreasonable on the grounds that to deal with it would impose a significant burden in terms of both cost and use of resources, and that it is also vexatious.
55. Therefore, the Commissioner intends to look firstly at whether the council is correct to state that the request is manifestly unreasonable on the basis that it would impose a significant burden in terms of cost and

use of resources. If necessary, she will then go on to consider whether the request is vexatious.

**Will the request impose a significant burden on the council in terms of cost and use of resources?**

56. There are no appropriate cost limits under the EIR; however, the exception at regulation 12(4)(b) of the EIR can apply if the cost or burden of dealing with a request is 'too great'. A public authority must consider the proportionality of the burden or costs involved, and decide whether they are clearly and obviously unreasonable.
57. The considerations which are associated with the application of 12(4)(b) of the EIR on the grounds of cost are broader than those relevant to section 12 of the FOIA, which applies where the 'cost of compliance exceeds the appropriate limit.' However, whilst recognising the difference between section 12 of the FOIA and regulation 12(4)(b), the Commissioner considers that the 'appropriate limit' relevant to section 12 may serve as a useful guide when considering whether a request is manifestly unreasonable on the basis of costs. This is because the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations), are taken to give a clear indication of what Parliament considers to be a reasonable charge for staff time.
58. Given that the council had referred to section 12 of the FOIA in its response to the complainant and advised that the cost of complying with the request '*would exceed the appropriate limit by a significant amount*', the Commissioner asked the council to provide further details of the time and costs which it had estimated would be required.
59. The council's subsequent response failed to include an answer to the Commissioner's specific questions; instead, the council advised that compliance would put an extreme amount of pressure on many officers within the council, including senior managers and Assistant Directors. It went on to reiterate what it had said to the complainant that the cost of dealing with the request would be disproportionate and '*would far exceed the appropriate limit by a significant amount*'.
60. In assessing whether the cost, or amount of staff time involved in responding to a request, is sufficient to render a request manifestly unreasonable, whilst the FOIA fees are a useful starting point, they are not determinative in any way. However, in this instance, given the council's response to the complainant, the Commissioner would have expected to receive some evidence of the estimated costs it believed would be incurred in order to deal with the request.

61. Whilst there may be some merit to the council's claim that dealing with the request would cause an unreasonable burden in terms of cost, it is the Commissioner's view that it has failed to provide any substantive evidence to support such a claim. There is no indication of the estimated timescales and use of staff time which would be required, or the amount of information that is likely to be identified as being potentially relevant, nor any estimated costs of conducting such an exercise.
62. Therefore, the Commissioner is unable to conclude with any certainty that dealing with the request would cause an unreasonable burden in terms of costs.
63. Given the above, the Commissioner has no alternative but to conclude that the council has failed to provide sufficient evidence that regulation 12(4)(b) is engaged on the basis of an unreasonable burden on costs and resources.
64. Therefore, she will now go on to consider whether the council has provided sufficient evidence to substantiate its claim that the request is vexatious.

### **Is the request vexatious?**

65. The Commissioner's guidance on regulation 12(4)(b) of the EIR confirms that, in practice, there is no material difference between a request that is vexatious under section 14(1) of the FOIA, and a request that is manifestly unreasonable on vexatious grounds under the EIR.
66. The Commissioner's guidance on vexatious requests<sup>3</sup> confirms that the relevant consideration is whether the request itself is vexatious, rather than the individual submitting it. Sometimes, it will be obvious when requests are vexatious, but sometimes it may not. In such cases, it should be considered whether the request would be likely to cause a disproportionate or unjustified level of disruption, irritation or distress to the public authority. This negative impact must then be considered against the purpose and value of the request.

#### *The complainant's position*

67. The complainant is concerned that SEG has been unable to obtain a comprehensive list of reports that were produced for the council by

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<sup>3</sup> <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

Coffey. He refers to the two requests which SEG submitted in March and October 2017 for a list of Coffey reports received by the council since 2010. He states that SEG did not get a response to the March 2017 request but, in 2018, it did get a response to the October 2017 request; he has confirmed that the council provided SEG with a list of five reports.

68. The complainant states that SEG subsequently found that the list of reports provided by the council was not complete. Information SEG had subsequently received from the council in response to other requests, and from other authorities, confirmed that other reports existed. The complainant has argued that there were at least four further reports which have since been identified by SEG that should have been included in the council's response to the 2017 request.
69. The complainant states that SEG has valid concerns about the way in which the council is handling the requests that it has received about the Glen, the landslips and the site, as it is not releasing all the information that it is obliged to in response to its requests. He argues that a new request for the reports should have been allowed not only because additional reports have been produced since the previous requests were made, but also because of the council's failure to provide a full list of the reports in its response to the previous requests.

*The council's position*

70. When considering whether a request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress, it will usually mean weighing the evidence about the impact on the authority and balancing this against the purpose and value of the request. Where relevant, the Commissioner accepts that the authority should take into account wider factors such as the background and history of the request.
71. In this instance, the council has stated that the subject of the park site, the Glen and the landslips have been a contentious issue since the landslips were first identified in 2013/14.
72. It goes on to say that the complainant has submitted approximately 250 information requests on behalf of SEG since 2014, the majority of which relate to the park site and to the Glen, and concern matters including licensing, planning, enforcement, trees, drainage and fencing.
73. The council goes on to say that dealing with these requests has '*put a considerable strain and stress on the council's resources which are stretched to capacity already leading to HBC having to appeal an ICO*

*decision which we won - EA/2017/0084 - Hastings Borough Council vs Information Commissioner.*<sup>4</sup>

74. The council also refers to the distress, harassment and anxiety which it claims has been caused to staff who have had to deal with both the requests, and other associated matters.
75. The council argues that many of the requests that it has received from SEG are on the same subject, and have been repeated numerous times; it refers to the request that is under consideration in support of this argument.
76. The council also states it questions whether there is still a serious purpose or value to the requests that are now being made, and if there is still a public interest in such requests. Furthermore, the council has emphasised the importance of deciding how to best use its limited resources, stating that these are unprecedented times and that officers are currently having to work at pace on a big range of issues, deciding how best to protect the community and staff by reducing COVID-19 transmission, and delivering essential services.

*The Commissioner's view*

77. Firstly, the Commissioner believes it pertinent to note that there are many different reasons why a request may be vexatious. There are no prescriptive 'rules', although there are generally typical characteristics and circumstances that assist in making a judgement about whether a request is vexatious. A request does not necessarily have to be about the same issue as previous correspondence to be classed as vexatious, but equally, the request may be connected to others by a broad or narrow theme that relates them. A commonly identified feature of vexatious requests is that they can emanate from some sense of grievance or alleged wrongdoing on the part of the public authority.
78. It is also important to consider the circumstances that are relevant to any one particular case. For example, an individual who submits frequent requests may be proven in one case scenario to be doing so in order to deliberately cause annoyance, whereas in another circumstance it may be found that further clarification is being sought because the

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[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2167/Hastings%20Borough%20Council%20EA.2017.0084%20\(26.03.18\).pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2167/Hastings%20Borough%20Council%20EA.2017.0084%20(26.03.18).pdf)

public authority's previous responses have been so unclear or ambiguous.

79. As already stated, the Commissioner does not intend to investigate in any detail the concerns raised about the council's handling of any previous requests that have been made by the complainant. However, she does acknowledge that the information which he has provided indicates that the council may have failed to provide a comprehensive list of reports previously; she accepts that this adds some weight to the complainant's argument that it was not unreasonable for SEG to have felt it necessary to submit a further request.
80. It is the Commissioner's view that serious purpose and value will often be the strongest argument in favour of the requester when a public authority is deliberating whether to refuse a request on the grounds that it is vexatious.
81. The complainant's request is for information that relates to the land within, and directly surrounding, a country park. It therefore concerns matters that not only have an impact on the environment, but also the local residents. Given this, the Commissioner accepts that there would be an inherent expectation of transparency in how the council has handled such matters, and that some value can be attached to this.
82. Furthermore, the Commissioner has had regard to the following comments in her guidance on vexatious requests:

*'if the problems which the authority now faces in dealing with the request have, to some degree, resulted from deficiencies in its handling of previous enquiries by the same requester, then this will weaken the argument that the request, or its impact upon the public authority, is disproportionate or unjustified.'*
83. In this instance, the above has some relevance given that it would appear from the evidence presented by the complainant that the council may not have dealt with previous requests that he has made appropriately.
84. However, in saying the above, the Commissioner is mindful of the fact that even if it were proven to be the case that there were 'deficiencies' in the council's previous responses to SEG (and it must be noted that the council has not been given the opportunity to defend its approach to the 2017 requests), the Commissioner still must consider whether compliance with this particular request would be of wider benefit to the public. If she finds that this is not the case, then this will then restrict its value, even if there is serious purpose behind the request.

85. The Commissioner is aware that a considerable amount of information has already been published about the landslips, the Glen and the site. She also believes it to be of some relevance to her consideration of matters that there is a notable difference between the two requests that were submitted by the complainant in 2017, and that which is under consideration.
86. The previous requests were for a list of reports (including date, title and a brief description) received by the council from Coffey since 2010. Part 2 of the current request asks for copies of all letters, reports and documents from Coffey about the Glen, the landslips and the park site since 2010. Given this, whilst the complainant has advised that the purpose of the request is to obtain a complete list of all reports that are held by the council, the scope of this request is clearly much wider than the previous requests for the reports submitted in 2017. The Commissioner appreciates that it is likely that the complainant would argue that SEG were keen to ensure that no important documents were missed because the council defined them to be a letter, an email, etc, rather than a report. However, the Commissioner does not regard it to be unreasonable to conclude that the change to the terms of the current request, and the time period which it covers, will create a much a greater burden to the council than that which resulted from compliance with the request of October 2017.
87. Furthermore, the Commissioner is of the view that the terms of part 2 of the complainant's request not only 'overlap' with those of the two previous requests he submitted in March and October 2017, but also 'overlap' with a number of other requests that have been considered by the Commissioner since 2017 (and, most likely, other requests that have not been the subject of a decision notice).
88. For example, decision notices FS50830244<sup>5</sup> (issued after the complainant's request but prior to his internal review request), FER0832391<sup>6</sup>, FS50817223<sup>7</sup> and FER0826308<sup>8</sup> all seem to have

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<sup>5</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617616/fs50830244.pdf>

<sup>6</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617494/fer0832391.pdf>

<sup>7</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617390/fs50817223.pdf>

<sup>8</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617318/fer0826308.pdf>



considered information which would, in part, be relevant to this request. There are also a number of additional decision notices that have been issued since the complainant's internal review request that the Commissioner regards to have some relevance.

89. The Commissioner fully appreciates why SEG may have lost some confidence in the council following its handling of some of its previous information requests. However, she has found some difficulty identifying what value compliance with this particular request would bring to the public at large.
90. Furthermore, it is evident to the Commissioner that the council has, for some considerable time, expended substantial resources in managing the requests it has received about the Glen, the landslips and the site, as well as handling other concerns about related matters. In this instance, the council has not proven its case in terms of the burden of cost which would be incurred when complying with the request. However, the Commissioner is satisfied that there is sufficient evidence to show that compliance with the request would still have a real and significantly detrimental impact on the council and its resources, and it would also cause a distraction to its ability to perform its statutory functions.
91. Given the above, whilst the Commissioner accepts that, to some degree, the specific history behind this request supports an argument for compliance, after taking into account the wider history and context of the request, including the information which was in the public domain at the time that the request was received by the council, she finds that the unnecessary and disproportionate burden that compliance would have on the council's resources outweighs the limited value of the request.
92. As a result, the Commissioner concludes that the request is manifestly unreasonable on the grounds that it is vexatious, and that regulation 12(4)(b) is engaged.

### **The public interest test**

93. Regulation 12(1)(b) provides that:

*'..... a public authority may refuse to disclose environmental information requested if –*

*(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.'*

94. The Commissioner accepts that public interest factors, such as proportionality and the value of the request, will have already been considered by a public authority in deciding whether to engage the exception, and that a public authority is likely to be able to 'carry through' the relevant considerations into the public interest test. This is indeed the case in this instance. However, regulation 12(2) of the EIR specifically states that a public authority must apply a presumption in favour of disclosure. In effect, this means that the exception can only be maintained if the public interest in refusing the request outweighs the public interest in responding.
95. The Commissioner recognises that the complainant's concern that the council may not have released all the relevant information in response to previous requests does carry some weight in support of the argument that the request should not be seen to be vexatious. Openness, transparency and accountability also carry some weight in support of the public interest in disclosure.
96. However, the Commissioner also regards the council's assertion that it has dealt with some 250 requests about the Glen, the landslips and the site since 2014 to carry considerable weight. Furthermore, she also believes it to be significant to her consideration of this case that there is a substantive amount of information which is already in the public domain, some of which consists of emails, letters, documents, reports from Coffey to the council, and she is satisfied that this has some relevance to part 2 of the complainant's request.
97. The Commissioner does have some sympathy with SEG with regard to the way in which the council has handled some of its information requests. However, having taken all factors into account, she has had some difficulty establishing what public interest would be served from the council complying with this particular request.
98. Whilst it has not been the determining factor, when making her decision, the Commissioner has also taken into account the council's additional arguments relating to the additional burden on its limited resources in the last twelve months caused by the COVID-19 pandemic.
99. It is the Commissioner's decision that the public interest in this case lies in ensuring that the council's resources are used effectively. She considers that dealing with the request does not best serve the public interest and that therefore, the balance of the public interest weighs in

favour of maintaining the exception at regulation 12(4)(b) of the EIR in this particular instance.

### **Procedural matters**

100. The complainant has requested that the Commissioner also consider the general handling of his request by the council.
101. Regulation 14(3) requires a public authority to provide the requester with a refusal notice specifying the exceptions upon which it is relying, and to then set out its consideration of the public interest test.
102. The complainant has raised concerns about the council's decision to refer to a letter dated 24 October 2019 in its initial refusal notice. The Commissioner has already made some comment about this letter in decision notice IC-39332-R8Q8.
103. Whilst there is no provision within the FOIA, or EIR, which would prohibit the council from writing such correspondence to a requester, the Commissioner does not regard it to have been appropriate for the council to have referred solely to this correspondence when initially refusing to deal with part 2 of the complainant's request. This was not an adequate refusal notice and it did not conform with the provisions set out within the EIR.
104. In addition, the internal review provides a public authority with an opportunity to review its handling of a request and revise and, or, correct its previous response. However, in this instance, the council went on to incorrectly cite section 12 of the FOIA as its basis for refusing part 2 of the request. It only then confirmed that it had considered the request under EIR in its subsequent representations to the Commissioner.
105. The Commissioner also notes that at no stage of the process has the council specified that it was applying the exception at regulation 12(4)(a) to part 1 of this request, as this information was not held.
106. Given the above, it is the Commissioner's decision that the council has breached regulation 14(3) of the EIR.
107. Furthermore, as the council failed to provide its internal review response to the complainant within the required 40 working days, she must also find that the council has breached regulation 11(4) of the EIR.

## Right of appeal

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108. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

109. 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.

110. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**