

## Freedom of Information Act 2000 (Section 50) The Environmental Information Regulations 2004

### Decision Notice

Date: 10 December 2009

**Public Authority:** Department of the Environment (Northern Ireland)  
**Address:** 10-18 Adelaide Street  
Belfast  
BT2 8GB

### Summary

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The complainant requested from the Environment and Heritage Service, an agency within the Department of the Environment (Northern Ireland), copies of all documentation in respect of the complainant's landfill site. The Commissioner is satisfied that the information which was withheld from disclosure by the Department is environmental information which falls to be considered under the EIR.

The Commissioner's decision is that the Department was entitled to refuse to provide the withheld information on the basis that the withheld information was exempt under regulation 12(4)(e) of the EIR as the information is comprised of internal communications and the public interest in maintaining the exception under regulation 12(4)(e) outweighs the public interest in disclosing the information.

In failing to provide the complainant with notice of its decision in response to the representations of the complainant under regulation 11(1) of the EIR, within the appropriate time period, that is no later than forty days after the date of receipt of those representations, the Department has failed to comply with regulation 11(4) of the EIR.

### The Commissioner's Role

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1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the Commissioner). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the Act) are imported into the EIR.
2. This Notice sets out the Commissioner's decision in respect of the complainant's request of 14 October 2005.

## The Request

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3. The complainant's request was made to the public authority, the Environment and Heritage Service, an agency within the Department of the Environment (Northern Ireland), (the Department), on 1 March 2006.
4. The complainant wrote:

*"We should be most grateful if you would provide us with all documentation correspondence, minutes, attendance notes and memos in respect of our client's site... We are specifically interested in our client's IPPC and waste management licence applications for this site. We also understand that [name] of EHS sent a letter to Planning service in respect of our client's site on or about 26 October 2005 and we require copy of this correspondence."*
5. The Department wrote to the complainant on 1 March 2006 acknowledging receipt of that letter.
6. On 29 March 2006 the Department wrote to the complainant advising that some of the requested information was accessible to the complainant by other means and providing details as to how that information could be accessed.
7. The Department also advised that the remainder of the requested information was withheld on the basis that it fell within the terms of the exceptions to disclosure under regulations 12(4)(e) and 12(5)(b) of the EIR.
8. On 24 May 2006 the complainant wrote to the Department seeking an internal review of its decision to withhold this information.
9. On 26 May 2006 the Department acknowledged this request for an internal review advising that it hoped to provide a substantive response as soon as possible and in any event within 40 working days after receipt of the request for review.
10. On 11 December 2006 the Commissioner wrote to the Department requesting that the Department carry out an internal review of its decision of 29 March 2006.
11. The complainant wrote to the Commissioner on 9 October 2006 requesting that he investigate the Department's handling of the complainant's request of 1 March 2006.
12. On 10 May 2007, following intervention by the Commissioner, the Department provided the complainant with its internal review of its decision of 29 March 2006. The Department advised the complainant that upon internal review it confirmed its decision to refuse to disclose the withheld information as it considered that the withheld information fell within the terms of the exceptions under regulations 12(4)(e) and 12(5)(b) of the EIR.

## The Investigation

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### Scope of the case

13. The complainant advised the Commissioner that he remained dissatisfied with the way the Department had handled his request.
14. The Commissioner has identified as the subject of this complaint that information relating to the enforcement activities of the Department which consists of internal communications including legal advice and other documents relating to the exercise of the Department's statutory enforcement functions ('the withheld information').
15. The Commissioner has been assisted in his investigation by the complainant and the Department who have each provided considered submissions in support of their respective positions.

### Chronology

16. On 12 April 2007 the Commissioner advised the Department that he would be proceeding to an investigation of the complaint.
17. On 11 May 2007 the Department provided the Commissioner with a copy of its internal review notice together with submissions in support of that decision and a copy of the withheld information.
18. On 28 August 2007 the Department provided the Commissioner with further details of its consideration of the application of the exceptions under regulations 12(4)(e) and 12(5)(b) of the EIR and of its consideration of the public interest in maintaining the exceptions and the public interest in disclosing the information.

### Analysis

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#### Is the information environmental?

19. Section 39 of the Act states that information is exempt information if the public authority holding it is obliged, by regulations under section 74 of the Act, to make the information available to the public in accordance with those regulations or would be so obliged but for any exemption under those regulations. The regulations under section 74 of the Act are the EIR. Information falls to be considered under the EIR if that information is environmental information. Environmental information is defined in regulation 2 of the EIR.

20. Regulation 2 of the EIR states:

*“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –*

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;*
- (d) reports on the implementation of environmental legislation;*
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and*
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);*

21. The Commissioner is satisfied that the withheld information is environmental information under regulation 2(1)(c) of the EIR, in that it is information on measures and activities affecting or likely to affect the elements of the environment and factors likely to affect those elements referred to in regulations 2(1)(a) and (b) of the EIR.

## **Procedural matters**

### **Internal review – regulation 11**

22. Regulation 11(1) of the EIR provides that an applicant may make representations to a public authority, in relation to the applicant's request for information, that the authority has failed to comply with the requirements of the EIR in relation to that request. The complainant in this case made such representations and request for review on 24 May 2006.

23. Following the intervention of the Commissioner, the Department provided the complainant with notice of its decision on internal review on 10 May 2007.
24. Regulation 11(4) of the EIR requires that the authority notify the applicant of its decision in relation to the applicants representations no later than forty working days after receipt of those representations.
25. In failing to provide the complainant with notice of its decision, in response to the representations of the complainant under regulation 11(1) of the EIR, within the appropriate time period the Department failed to comply with regulation 11(4) of the EIR.

### **Exceptions**

26. Regulation 12(1) of the EIR states that a public authority may refuse to disclose requested environmental information if an exception to disclosure under regulations 12(4) or 12(5) is engaged and, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
27. Regulation 12(2) of the EIR requires that a public authority apply a presumption in favour of disclosure.

### **Regulation 12(4)(e) - internal communications**

28. The Department has refused to disclose the withheld information on the basis of its application of the exception under regulation 12(4)(e) of the EIR. The Commissioner has considered whether the Department correctly applied the exception under regulation 12(4)(e).
29. Regulation 12(4)(e) states:

*“ For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that ...*

*(e) the request involves the disclosure of internal communications.”*
30. The Commissioner has considered the withheld information and notes that it is comprised of internal communication relating to the exercise of the Departments statutory functions in relation to enforcement.
31. Accordingly, the Commissioner is satisfied that the withheld information is comprised of internal communications and that the exception under regulation 12(4)(e) of the EIR is engaged.

## Public interest test

### Public interest factors favouring the release of the information

32. The Commissioner considers that there is a public interest in transparency in decision making by a public authority. Public confidence is necessarily dependent on such transparency and on the demonstration by a public authority that it has satisfied all applicable laws and acted with clear probity.
33. Further, the Commissioner recognises the presumption in favour of disclosure under regulation 12(3) and notes the importance of access to environmental information as a prerequisite to participation in environmental decision making and access to environmental justice.
34. The Commissioner believes that there is a strong public interest in improving the public's understanding of decisions made by public authorities, particularly, as in this instance, decisions that may have a significant impact on the environment.
35. The Commissioner also believes that disclosure of these internal communications may serve to increase public confidence in the robustness and efficacy of the Department's exercise of its statutory duties in relation to enforcement.
36. The Commissioner notes that the information which comprises the internal communications was requested by the complainant over three years ago. The Commissioner has considered whether the balance of the public interest may be affected by the age of the information.
37. The Commissioner notes Mr Justice Burnton's consideration of the question of the timing of disclosures and the public interest test in the 2007 High Court case of *The Office of Government Commerce v ICO and the AG*<sup>1</sup>. In relation to the application of the exemption under section 35 of the Act, commenting on the position taken by the Information Tribunal at first instance, he stated that:

*“the Tribunal did not find that there was no public interest in maintaining the exemptions from disclosure once the Government had decided to introduce the Bill, but only that the importance of maintaining the exemption was diminished.*

*I accept that the Bill was an enabling measure, which left questions of Government policy yet to be decided. Nonetheless, an important policy had been decided, namely to introduce the enabling measure, and as a result I see no error of law in finding that the importance of preserving the safe space had diminished.”*

### Public interest factors favouring withholding the information

38. The internal communications relate to the Department's statutory functions in relation to enforcement.

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<sup>1</sup> Case Nos: CO/5491/2007, CO/4438/2007

39. The Commissioner recognises that there is a strong public interest in the Department being able to conduct investigations into alleged or actual breaches of the law and to collect such evidence as may be necessary or relevant in the exercise of its enforcement functions.
40. The Commissioner recognises the strong public interest in maintaining a private thinking space for Departmental staff in which investigations may be considered and carried out, advice from colleagues may be sought and freely given and ideas may be tested, explored and recorded without inhibition.
41. Further, the Commissioner recognises that public authorities often require a safe space in which to debate issues without the hindrance of external comment or media attention. The Commissioner is satisfied that in this case the importance of preserving the safe space has not been diminished by the passage of time and that there was a continuing and strong public interest in maintaining the exception.
42. Disclosure of such internal communications may inhibit the candid expression of views and diminish the Department's ability to execute its enforcement obligations. The Commissioner recognises that disclosures of internal communications relating to the Department's enforcement functions may result in a loss of frankness in internal debate and to a diminution in the quality of internal advice and in the rigour of investigations.
43. Further, the Commissioner is satisfied that that disclosure of internal communications in relation to investigations could well compromise the Department's ability to take enforcement action. This would not be in the public interest or in the interest of the environment which the Department's statutory functions are designed to protect.

### **The balance of the public interest**

44. The Commissioner is mindful of the significant amount of information on this issue which has been made available to the complainant by the Department under the EIR.
45. The Commissioner is satisfied that a free and private space is essential to the Department's investigation of actual and alleged criminal activity. The Commissioner is satisfied that disclosure of the withheld information would have a real and detrimental impact of the Department's ability to exercise its statutory enforcement functions in protection of the environment.
46. In light of the foregoing, the Commissioner is satisfied that, in respect of the internal communications contained within the withheld information now before him, the balance of the public interest in maintaining the exception outweighs the public interest in disclosing the information.

## **Regulation 12(5)(b) – course of justice**

47. The Commissioner is satisfied that all of the withheld information is comprised of internal communications and that the exception under regulation 12(4)(e) of the EIR is engaged. Further, the Commissioner is satisfied that the balance of the public interest in maintaining the exception outweighs the public interest in disclosing the information. Therefore, the Commissioner is satisfied that all of the withheld information is excepted from disclosure under regulation 12(4)(e).
48. Accordingly, the Commissioner has not considered whether the withheld information is also excepted from disclosure under regulation 12(5)(b) of the EIR.

## **The Decision**

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49. The Commissioner's decision is that the public authority dealt with the following elements of the request for information in accordance with the Act:
- the Department correctly refused the request under regulation 12(4)(e) of the EIR.
50. However, the Commissioner has also decided that the following element of the request was not dealt with in accordance with the Act:
- the Department failed to comply with regulation 11(4) of the EIR as it failed to provide the complainant, within the appropriate time period, with notice of its decision in response to the representations of the complainant under regulation 11(1) of the EIR.

## **Steps required**

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51. The Commissioner requires no steps to be taken.



## Right of Appeal

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52. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 10<sup>th</sup> day of December 2009**

**Signed .....**

**Gerrard Tracey  
Assistant Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex: Relevant statutory obligations

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### Regulation 2 - Interpretation

#### Regulation 2(1) In these Regulations –

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

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- (g) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (h) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (i) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (j) reports on the implementation of environmental legislation;
- (k) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (l) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

“historical record” has the same meaning as in section 62(1) of the Act;

“public authority” has the meaning given in paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

“responsible authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“Scottish public authority” means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act; and “working day” has the same meaning as in section 10(6) of the Act.

## **Regulation 5 - Duty to make available environmental information on request**

**Regulation 5(1)** Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

**Regulation 5(2)** Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

**Regulation 5(3)** To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

**Regulation 5(4)** For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

**Regulation 5(5)** Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to the standardised procedure used.

**Regulation 5(6)** Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

## **Regulation 12 - Exceptions to the duty to disclose environmental information**

**Regulation 12(1)** Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

**Regulation 12(2)** A public authority shall apply a presumption in favour of disclosure.

**Regulation 12(3)** To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

**Regulation 12(4)** For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (a) it does not hold that information when an applicant’s request is received;
- (b) the request for information is manifestly unreasonable;

- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

**Regulation 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 –

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –
  - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
  - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from the Regulations to disclose it; and
  - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

**Regulation 12 (6)** For the purpose of paragraph (1), a public authority may respond to a request by neither confirming or denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).

**Regulation 12(7)** For the purposes of a response under paragraph (6), whether information exists and is held by the public authority is itself the disclosure of information.

**Regulation 12(8)** For the purposes of paragraph (4)(e), internal communications includes communications between government departments.

**Regulation 12(9)** To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).

**Regulation 12(10)** For the purpose of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.

**Regulation 12(11)** Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.

## Regulation 13 - Personal data

**Regulation 13(1)** To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

**Regulation 13(2)** The first condition is –

- (a) in a case where the information falls within any paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene –
  - (i) any of the data protection principles; or
  - (ii) section 10 of the Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998(a) (which relates to manual data held by public authorities) were disregarded.

**Regulation 13(3)** The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of the Act and, in all circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

**Regulation 13(4)** In determining whether anything done before 24<sup>th</sup> October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

**Regulation 13(5)** For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that –

- (a) the giving to a member of the public of the confirmation or denial would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded; or
- (b) by virtue of any provision of Part IV of the Data Protection Act 1998, the information is exempt from section 7(1)(a) of the Act.