

**Freedom of Information Act 2000 (FOIA)  
Environmental Information Regulations 2004 (EIR)**

**Decision Notice**

**Date:** 28 January 2016

**Public Authority:** Department of Finance and Personnel for Northern Ireland

**Address:** Dundonald House  
Upper Newtownards Road  
Belfast  
BT4 3SB

**Decision (including any steps ordered)**

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1. The complainant requested information held by the Department of Finance and Personnel relating to the redevelopment of Casement Park. The Department provided some information but refused the remainder under regulation 12(5)(e) of the EIR. The Commissioner's decision is that the Department was entitled to rely on the exception cited. No steps are required.

**Request and response**

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2. On 11 June 2014 the complainant requested the following information from the Department:
  - 1) *The outline business case/economic appraisal which formed the basis for the Programme for Government 2011-15 allocation to the sports stadia programme.*
  - 2) *The comments of DFP economists on the first and all subsequent drafts of the sports stadia outline business case/economic appraisal.*
  - 3) *The minutes of meetings in which the sports stadia programme was considered for an allocation of funding under the PfG 2011-15.*
  - 4) *Papers submitted by your Departmental economists and policymakers in relation to any such meetings.*

3. The outline business case related to the proposed redevelopment of Casement Park by the Gaelic Athletic Association (the GAA). This project was part of the Regional Stadia Programme, which provided public funding for the development of Gaelic games, soccer and rugby stadia in Northern Ireland.
4. The Department responded to the complainant on 11 July 2014. The Department refused parts 1 and 2 of the request in reliance on the exception at regulation 12(5)(e) of the EIR. The Department advised that it did not hold the information requested at part 3 of the request, and disclosed the information requested at part 4.
5. The complainant requested an internal review on 11 July 2014, and the Department provided him with the outcome on 26 August 2014. The outcome of the internal review was that the Department upheld its decision to refuse the request.

### Scope of the case

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6. On 27 October 2014 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant confirmed to the Commissioner that he was content to restrict the scope of his request to information relating only to Gaelic football (ie the proposed redevelopment of Casement Park). The complainant did not raise any concern about the Department's statement that it did not hold some of the requested information.
7. The complainant set out a number of grounds for appeal, including the following points. The Commissioner has considered all the information provided by the complainant in support of his position.
  - The request was made on behalf of a residents' group opposing the scale of the proposed redevelopment of Casement Park. The group wished to ensure that *"those most directly affected are able to participate effectively in discussions about their own neighbourhood"*. The complainant argued that the Department's refusal to disclose the withheld information *"severely constrained... our ability to challenge the robustness of the GAA's proposals for a 38,000 capacity stadium"*. The complainant contended that *"we lack awareness of key information around the Casement Park redevelopment which serves to restrict our ability to participate in decision-making; to hold public bodies to account; and to make decision-making more transparent."*
  - The complainant argued that part 2 of the request ought to have been considered under the FOIA rather than the EIR. The

complainant was concerned that the Department had chosen to consider the request under the EIR as he thought it may be easier to withhold information on the basis of commercial confidentiality.

- Notwithstanding the above, the complainant asked the Commissioner to bear in mind *“the linkage, both in Aarhus and the EIR, between increasing awareness and increasing public participation”*.
- The complainant was also concerned that the Department had relied on arguments relating to a previous request made by the complainant to the Department for Culture, Arts and Leisure (DCAL), which had been considered by the Commissioner in a previous decision notice.<sup>1</sup> Although the complainant did not appeal that decision notice he was of the view that the Commissioner should take his grounds for disagreeing with that decision into account when making his decision in this case.

8. The Commissioner understands and acknowledges the complainant's reasons for making the request on behalf of the residents' group. The Commissioner is also mindful of the Aarhus Convention (the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters)<sup>2</sup>. However the Commissioner's role is to make decisions under regulation 18 of the EIR. He is the independent decision maker and the EIR is both applicant and motive blind. The Commissioner cannot require the disclosure of information into the public domain solely to satisfy the requirements of the requester or the residents' group. The Commissioner has considered the public interest in disclosure in his analysis below.
9. Following the Commissioner's intervention, the Department reconsidered the request and disclosed some further information to the complainant. Therefore, the scope of the Commissioner's investigation in this case was to determine whether the Department was correct to deal with part 2 of the request under the EIR, and to decide whether the Department was entitled to withhold the outstanding requested information on the basis of regulation 12(5)(e).
10. As pointed out by the complainant, the Commissioner issued a decision notice in September 2015 in respect of another, similar, request made

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<sup>1</sup> Decision notice FER0507182, issued 31 March 2014.

<sup>2</sup> <http://ec.europa.eu/environment/aarhus/>

by the complainant to DCAL on 11 June 2014.<sup>3</sup> In that case the Commissioner considered the application of regulation 12(5)(e), and he has been mindful of his findings when considering this case. However the Commissioner would stress that the Department and DCAL are separate public authorities, and the Department was required to provide its own arguments in relation to the complainant's request.

11. As set out in the DCAL decision notice, the Commissioner is aware that the Casement Park redevelopment proposal has been the subject of extensive legal challenge. In December 2014 the High Court in Northern Ireland partially upheld an application for judicial review of the planning permission granted in respect of the redevelopment.<sup>4</sup> However the Commissioner is mindful that his decision must be based on the circumstances at the time the request was refused, rather than the time the complaint was made to him. This follows the Supreme Court's reasoning in *R (Evans) v Attorney General*<sup>5</sup> that the time for the application of the public interest test was at the point of the authority's refusal.

## Reasons for decision

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### Access regime

12. The complainant has asked the Commissioner to consider whether the Department was correct in dealing with part 2 of the request under the EIR rather than the FOIA.
13. Regulation 2 of the EIR provides the following definition of environmental information:

*"...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;*

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<sup>3</sup> Decision notice FER0569788, issued 29 September 2015

<sup>4</sup> [2014] NIQB 130, delivered on 15 December 2014

<sup>5</sup> [2015] UKSC 21 at [72]-[73]

*(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);"*

14. In the Commissioner's view the phrase 'any information... on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. The Commissioner considers a broad interpretation of this phrase will usually include information concerning, about, or relating to, the measure, activity, factor etc, in question. It is not necessary for the information itself to have a direct effect on the elements of the environment, or to record or discuss such an effect. Rather, the information should be *on* something falling within these sections.
15. The Commissioner has published guidance on identifying environmental information.<sup>6</sup> He has consistently found that redevelopment of land is likely to be a "measure" under regulation 2(1)(c) because it is an activity likely to affect the elements and factors referred to in 2(1)(a), ie the land and the landscape. Therefore in the Commissioner's view information relating to the redevelopment of the Casement Park site, and in particular the outline business case/economic appraisal, constitutes environmental information, as defined by regulation 2(1)(c) of the EIR.

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<sup>6</sup> [https://ico.org.uk/media/for-organisations/documents/1146/eir\\_what\\_is\\_environmental\\_information.pdf](https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf)

16. The Commissioner considers that part 2 of the request would also fall under the scope of regulation 2(1)(e), since the request was for the comments of departmental economists on drafts of the outline business case/economic appraisal. This is because the economists' comments could be interpreted as "cost benefit and other economic analyses" that relate to the activity (ie the redevelopment) that would be likely to affect the elements of the environment.
17. For the reasons set out above the Commissioner finds that the Department was correct to deal with part 2 of the complainant's request under the EIR.

**Regulation 12(5)(e): confidentiality of commercial or industrial information**

18. Information is exempt under regulation 12(5)(e) if its disclosure would adversely affect

*"the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest".*

19. The Department sought to rely on regulation 12(5)(e) in respect of the withheld information, ie redacted information relating to parts 1 and 2 of the request:

*"1. The outline business case/economic appraisal which formed the basis for the Programme for Government 2011-15 allocation to the sports stadia programme.*

*2. The comments of DFP economists on the first and all subsequent drafts of the sports stadia outline business case/economic appraisal."*

20. As indicated above the Commissioner issued a decision notice<sup>7</sup> relating to a request for similar information submitted by the complainant to another public authority, DCAL. DCAL also sought to rely on regulation 12(5)(e) and it is unavoidable that some of the explanatory information and analysis in this decision notice will be similar to the previous decision notice. Nevertheless the Department (DFP) and DCAL are separate public authorities for the purposes of the EIR and the Commissioner would stress that each case has been considered on its own merits.

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<sup>7</sup> Case reference FER0569788

Information redacted from the outline business case

21. The Commissioner notes that by the time this decision notice was issued the Department had disclosed much of the information that had previously been withheld, both by itself and by DCAL. Therefore the Commissioner's analysis below relates only to the remaining withheld information.
22. It can be seen from the information disclosed to the complainant that the redacted information includes the following:
  - a) Financial information provided by the GAA, including costs, and projected income/expenditure of options.
  - b) Details of scoring criteria and the score attached to each option.
  - c) Assessment of monetary risk, and results of monetary and non-monetary analysis of each option.

Information redacted from the economists' comments

23. The information redacted from this document includes the following:
  - a) Financial information provided by the GAA.
  - b) Information relating to Net Present Value analysis.
  - c) Names of departmental economists.

*Is the withheld information commercial or industrial in nature?*

24. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity either of the public authority concerned or a third party. The Commissioner's published guidance<sup>8</sup> on regulation 12(5)(e) explains that the essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
25. In this case the withheld information was created in order to assess options for the redevelopment of Casement Park. Casement Park, as a Gaelic games stadium, is operated on a commercial basis by the GAA.

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<sup>8</sup> [https://ico.org.uk/media/for-organisations/documents/1624/eir\\_confidentiality\\_of\\_commercial\\_or\\_industrial\\_information.pdf](https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf)

Some of the withheld information comprises financial information based on figures provided to the Department by the GAA. The GAA is a commercial organisation and the Commissioner is satisfied that the information provided by the GAA is clearly commercial in nature.

*Is the withheld information subject to confidentiality provided by law?*

26. The Commissioner considers that "provided by law" will include confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute. The Commissioner is not aware of any statutory duty of confidence applicable in this case so he has gone on to consider the common law of confidence, which has two key tests:
- Does the information have the necessary quality of confidence?
  - Was the information imparted in circumstances creating an obligation of confidence?
27. For the common law duty of confidence to apply the information must have the necessary quality of confidence, meaning the information should not be trivial in nature and should not already be in the public domain. The fact that information has been disclosed to the complainant does not necessarily affect the confidentiality of the remaining withheld information.
28. The Department provided the complainant with arguments that were almost identical to those provided by DCAL as set out in the previous decision notice. The Department argued that the outline business case in particular
- "...provides the basis on which the current commercial negotiations, procurement and funding agreements are controlled and managed between Government Departments, the three sporting governing bodies and other interested parties across all three stadium projects."*
29. The Department was of the view that disclosure of the withheld information would *"significantly prejudice the outcome of the ongoing procurement competition and jeopardise the confidentiality and integrity of the procurement process"*.
30. The complainant pointed out to the Commissioner that the capital cost summary information was publicly available at the time of the request. However the complainant argued that this information did not help inform the public as to the viability of the redevelopment project.
31. Having had the benefit of examining the withheld information the Commissioner is satisfied that it was not in the public domain at the



time of the complainant's request, nor is it trivial. Therefore the Commissioner accepts that the information in question will be subject to the common law duty of confidence.

*Is this confidentiality provided to protect a legitimate economic interest?*

32. The First-tier Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd*<sup>9</sup> that, to satisfy this element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. It is not enough that disclosure might cause some harm to an economic interest. A public authority needs to establish (on the balance of probabilities – ie more probable than not) that disclosure would cause some harm.
33. The Department confirmed that the GAA had not consented to the information being disclosed. Rather, the GAA had expressed concern that *“disclosure would cause real, actual and substantial prejudice to their interests”*.
34. In the DCAL decision notice the Commissioner accepted that financial information provided by the GAA, including costs, income, expenditure and sponsorship, would be commercially sensitive. In this case, with regard to the same information, the Commissioner is satisfied that the common law of confidence will apply to the information in question. The GAA provided detailed financial information for the purposes of the outline business case and would have a reasonable expectation that this financial information would not be disclosed into the public domain.
35. The Commissioner is further satisfied that disclosure of this information would adversely affect the GAA's legitimate economic interest, ie redeveloping and operating Casement Park as a commercial enterprise. The Commissioner accepts that other businesses offering sports, leisure and entertainment activities would benefit from access to the withheld information. As the GAA's competitors, they would be able to use the detailed financial information to compete with the GAA. Consequently the Commissioner finds that the exception is engaged in respect of the information withheld under regulation 12(5)(e).

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<sup>9</sup> Appeal no EA/2010/0106, 4 January 2011

Public interest in favour of disclosure

36. The Department's arguments in favour of disclosure are identical to those put forward by DCAL in the previous decision notice:

- Disclosure would promote transparency and accountability where the spending of public money is concerned.
- Disclosure would allow more effective public understanding and participation in decision making.
- The public would be able to scrutinise the financial viability of the options.
- Demonstrate value for money and making best use of resources.
- The right of the public to have access to the information.
- There is considerable public interest in the redevelopment of Casement Park.

37. The complainant also argued that there was a strong public interest in disclosing the withheld information. The complainant contended that the public required access to the withheld information in order to assess the viability of the proposed redevelopment. The complainant quoted the Minister for Culture, Arts and Leisure as saying:

*"I do believe the [name of residents' group] want to see Casement rebuilt but perhaps at a capacity that doesn't make it viable, the business case would not stand up."<sup>10</sup>*

38. The complainant argued that disclosure of the withheld information would allow the residents' group to assess this assertion and make its own case. The complainant also argued that withholding this information restricted the ability of the residents' group

*"...to participate in decision making; to hold public bodies to account; and to make decision-making more transparent."*

39. The Commissioner recognises that there is a strong public interest in transparency with regard to the redevelopment of Casement Park, which has historically been the largest venue for Gaelic games in Northern Ireland. The Commissioner is generally of the view that organisations accepting public money should expect a higher level of public scrutiny than if they did not seek public funding. The information disclosed into the public domain to date has already informed the public about various

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<sup>10</sup> Andersonstown News, published 5 November 2012

aspects of the proposal. The Commissioner accepts that disclosure of the remaining withheld information would provide the public with a more detailed understanding of the precise financial analysis of the outline business case.

#### Public interest in favour of maintaining the exception

40. Again, the arguments put forward by the Department in favour of maintaining the exception were substantially similar to those put forward by DCAL:

- As significant elements of the stadia project have yet to be tendered, there is a need to protect the confidentiality of the information as disclosure may have an adverse impact on negotiations for tenders.
- Publication of these sections of the outline business case before the procurement process is complete would significantly prejudice the outcome of the ongoing procurement competition and jeopardise the confidentiality and integrity of the procurement process.
- The outline business case contains details of a commercially confidential nature and provides the basis upon which the current commercial negotiations, procurement and funding agreements are controlled and managed between government departments, the sporting governing body and other interested parties across the project.
- The GAA does not consent to the information requested being released.

41. These arguments were provided to the Commissioner following the Department's decision to disclose further information to the complainant. Consequently the Commissioner would have expected the Department to provide specific arguments in respect of the remaining withheld information. As it stands the arguments reproduced above do not reflect this. The Department has not provided the Commissioner with any detailed arguments referring to the actual withheld information. Having considered the information in question and taking account of his decision in the previous case the Commissioner has therefore proceeded to make a decision on the basis of the information provided.

#### Balance of the public interest

42. As set out above and in the previous decision notice the Commissioner considers that there is a strong public interest in the disclosure of information that would inform the public about public authorities'

decision making with regard to the viability of Casement Park. In the previous decision notice the Commissioner found that the amount of public money involved is an important, but not overriding factor.

43. The Commissioner is mindful that Department has consulted the GAA as a third party whose commercial interests would be affected by disclosure of the withheld information. The Commissioner is of the view that third parties receiving public money should expect a certain level of public scrutiny, but again the Commissioner does not consider this to be an overwhelming argument in favour of disclosure of the withheld information in this case. The Commissioner is mindful that most of the requested information has been disclosed, albeit following his intervention. The Commissioner acknowledges the complainant's specific argument that the withheld information would inform the public as to how the question of viability was considered. However the Commissioner also considers that the information disclosed into the public domain does inform the public as to the wider decision making process in this case.
44. In the previous decision notice the Commissioner found that, although disclosure of the financial information would give a more complete picture, it was not necessary in order to inform the public as to the decision making. The Commissioner was also mindful that disclosure of the financial information would prejudice the GAA's commercial interests and make it more difficult for the GAA to redevelop and operate Casement Park. This would risk defeating the purpose of providing public funding for the project, which would not be in the public interest. The Commissioner considers that these arguments remain pertinent and valid in this case, and should be accorded significant weight. The Commissioner accepts that there is a substantial public interest in protecting the GAA's commercial interest in this particular case, and that this outweighs the public interest in disclosure.
45. In light of the above the Commissioner finds that the public interest in maintaining the exception at regulation 12(5)(e) does outweigh the public interest in disclosure of the withheld information. Therefore the Commissioner concludes that the Department was entitled to rely on this exception in respect of the withheld information.

## Right of appeal

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46. 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 123 4504  
Fax: 0870 739 5836  
Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

47. 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.
48. 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** .....

**Sarah O’Cathain**  
**Senior Case Officer**  
**Information Commissioner’s Office**  
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