

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

**Decision Notice**

**Date:** 11 January 2018

**Public Authority:** Causeway Coast and Glens Borough Council  
**Address:** Civic Headquarters  
Cloonavin  
66 Portstewart Road  
Coleraine  
BT52 1EY

**Decision (including any steps ordered)**

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1. The complainant has requested information relating to a planning application. The Council provided some information and withheld other information under regulations 12(4)(e), 12(5)(b) and 13 of the EIR.
2. The Commissioner's decision is that the Council was entitled to rely on regulation 12(5)(b). It was also entitled to rely on regulation 12(4)(e) and regulation 13 with regard to most of the information withheld under those exceptions. However the Commissioner finds that some of the information falling within the scope of regulation 12(4)(e) and regulation 13 ought to have been disclosed. The Commissioner also finds that the Council does not hold any further information relevant to the request.
3. The Commissioner requires the public authority to take the following steps:
  - Disclose the information specified in the confidential schedule.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

## Request and response

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5. On 7 November 2016 the complainant requested from the Council the following information relating to a particular planning application:

*"I request copies of all notes, records, memoranda, reports and all records howsoever compiled, including all electronic communications, arising from contact between the Council and its planning office and the above applicants, their servants or agents, and also any such communications with third parties, up until the date of validation of the above application, with the exception of any documents appearing on the planning portal."*

6. The Council responded on 17 January 2017. It advised that the request had been considered under the FOIA and the EIR. Some information was disclosed to the complainant, and the Council claimed reliance on the exemptions at sections 21(1), 40(2), 42(1) and 43(2) of the FOIA to refuse to provide other information. The Council also referred the complainant to information published on the EPIC Planning Portal.<sup>1</sup>
7. The complainant wrote to the Council on 19 January 2017 to request an internal review. He described certain information that he believed the Council held, and that he believed ought to have been disclosed to him. The complainant also disputed the Council's reliance on the exemptions claimed.
8. The Council provided the complainant with the outcome of the internal review on 23 February 2017. The Council confirmed that it did not hold any further information relevant to the request that had not been provided or withheld. However the Council did provide the complainant with one document that was also publicly available via the Planning Portal. The Council maintained its position with regard to the exemptions cited.

## Scope of the case

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9. The complainant contacted the Commissioner on 2 March 2017 to complain about the way his request for information had been handled. He did not accept that the Council did not hold the information specified
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<sup>1</sup> <https://www.planningni.gov.uk/index/tools/public-access-info.htm>

in his letter of 19 January 2017, and he wished to challenge the Council's application of the exemptions claimed.

10. On receipt of the complaint the Commissioner noted that the Council had cited the FOIA and the EIR, but had relied solely on exemptions under the FOIA. It appeared to the Commissioner that the requested information was likely to be environmental information within the meaning of regulation 2 of the EIR. The Council agreed to reconsider the request under the EIR, and issued a revised response to the complainant on 19 June 2017.
11. In its revised response the Council disclosed some of the previously withheld information, and cited the exceptions at regulation 13 and regulation 12(5)(b) of the EIR in respect of the remaining withheld information.
12. The complainant remained dissatisfied. In particular he maintained that the Council held further information relevant to his request, saying it was "bizarre" that the Council had claimed not to hold anything further.
13. The Commissioner again asked the Council to reconsider the request, and the Council issued another revised response to the complainant on 3 October 2017, in which it disclosed some further information. The Council confirmed to the Commissioner on 26 October 2017 that it sought to rely on regulations 12(4)(e) and 12(5)(b) in respect of the remaining withheld information.
14. In light of the above, the scope of the Commissioner's investigation is to determine whether the Council holds any relevant information beyond that previously identified, and whether the Council is entitled to rely on the exceptions cited. The Commissioner is aware that the complainant has submitted a further information request, but her decision in this case relates to the request submitted on 7 November 2016.

## **Reasons for decision**

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### **Does the Council hold any further information relevant to the request?**

15. To the extent to which a public authority does not hold the requested information it may cite the exception at regulation 12(4)(a) of the EIR. Where there is a question as to whether information is held by a public authority the Commissioner uses the civil standard of proof, ie the balance of probabilities.

16. The complainant provided the Council with a number of examples of information that he expected to receive, such as notes of telephone calls and conversations that would support its decision making. Despite its search the Council stated that it did not hold any of this information. The complainant has argued to the Commissioner, as he did to the Council, that he would expect the Council to hold further information in order to support its decision making functions. The Commissioner cannot consider whether information ought to be held, nor can she require a public authority to generate or create information. However the Commissioner can require a public authority to conduct further searches if she believes this is necessary in order to ascertain whether information is held.
17. The Commissioner asked the Council for details of the search conducted. The Council explained that it had undertaken a broad search, on the basis that if meetings were held involving different Council business areas, there may be records or documentation held in several locations. The Council provided the Commissioner with a detailed chronology of the search, indicating that all Directors and Heads of Service had been asked at least twice if they held any relevant records, before the initial response had been issued. These individuals were asked again during the internal review.
18. The Commissioner acknowledges that it may be difficult for a public authority to prove that it does not hold information. Accordingly, she will generally take into account the quality and extent of the public authority's search for the requested information, along with the complainant's reasons for believing that the information is held. In this case the Commissioner accepts the Council's explanation of the search conducted. She is satisfied that the Council has demonstrated that it took reasonable steps to identify and locate relevant information.
19. The Commissioner notes the complainant's argument that the Council ought to hold certain information, but as set out above she has no remit to consider this. The Commissioner may only decide whether, on the balance of probabilities, the Council does actually hold information. In this case the Commissioner has seen no evidence to indicate that the Council does hold further information. The Commissioner has also considered whether, if she were to uphold the complaint, she could specify any further steps that the Council should take in order to comply with the legislation. The Commissioner is unable to identify any further actions or searches that it would be reasonable to require the Council to undertake. The Commissioner therefore finds that the Council does not hold any further information relevant to the request.

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

20. Regulation 12(4)(e) provides an exception from disclosure to the extent that the information in question constitutes internal communications. The exception is class-based, which means that if the information in question falls within the scope of the exception then it will be exempt. There is no need to consider prejudice or harm in order to engage the exception.
21. The Council sought to rely on regulation 12(4)(e) in respect of nine internal emails. The Commissioner has inspected this information and is satisfied that it all comprises internal communications. The exception is therefore engaged. Since regulation 12(4)(e) is a qualified exception, the Commissioner must consider whether the public interest favours disclosing the information or maintaining the exception.

#### Public interest in favour of disclosing the withheld information

22. The Council confirmed to the Commissioner that it had taken into account the presumption in favour of disclosure as required by regulation 12(2) of the EIR. It also identified a general public interest in disclosure as a means to promote transparency and accountability.
23. The Council acknowledged that disclosure of information can promote public awareness and understanding of environmental matters. This may in turn aid a free exchange of views and more effective public participation in environmental decision making.
24. More specifically the Council said that disclosure of the withheld information in this case would support its decision making process, and pointed out that minutes of relevant Council meetings had already been published. The Council said that disclosure would demonstrate that the granting of an easement did not prejudice the Council in its decision making role in the planning process.
25. However, the Council considered that the public interest in disclosure was weakened by the fact that the Council had not withheld any information relating to the planning application, or the request for use of leased land. The Council was of the view that disclosure of the remaining withheld information would not inform the public, nor would it assist public debate, regarding these two issues.

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

26. The Council said that it had sought internal advice, including legal advice, and that it needed to be able to do this "without fear of external interference". The Council said that its internal deliberations and decision making processes could be harmed if internal communications

were disclosed. The Commissioner's published guidance on regulation 12(4)(e) describes this kind of argument as relating to "safe space".<sup>2</sup>

27. The Council also said that the disclosure of internal communications could lead to officials not having free and frank discussions via internal email, or taking longer to draft emails on the assumption that they would be disclosed into the public domain. The Council was concerned that this would have a detrimental impact in terms of the time required to complete tasks, and also on the quality of engagement and advice. The Council considered that this would lead to poorer decision making.
28. The Council acknowledged that the decision to grant the easement had been taken, and was in the public domain, at the time of the request. However it was of the view that a "chilling effect" period was required to promote, explain and defend the decision. The Council said it was also required to ensure that there was no adverse impact on the planning process.
29. Finally, the Council considered that there was a strong public interest in protecting the confidentiality of internal communications relating to legal advice. The Council was of the view that disclosure of this information would weaken the general principle of legal professional privilege and would make it more difficult for the Council to obtain legal advice in the future.

#### Balance of the public interest

30. The Commissioner notes that, during the course of her investigation, the Department disclosed a large amount of information that it had previously withheld. The Council's arguments relate only to nine pieces of information, none of which is lengthy or detailed.
31. The Commissioner considers that public interest arguments in maintaining the exception at regulation 12(4)(e) should be focused on the protection of internal deliberation and decision making processes. She accepts the Council's "safe space" argument in principle, but considers that it must be properly examined in the context of the actual withheld information.
32. The Commissioner should also clarify that the "chilling effect" as set out in her guidance does not refer to a period of time required after a

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<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1634/eir\\_internal\\_communications.pdf](https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf)

decision has been taken. Rather, it is more relevant to the Council's arguments at paragraph 24 above relating to the impact of disclosure on future communications. In any event the Commissioner is of the view that the chilling effect argument cannot carry any significant weight in this case. The Council does not accept that Council officials would reasonably require extra time to draft communications, or that the quality of engagement would suffer. She is of the view that Council officials would be more likely to continue to fulfil their responsibilities as required and expected of them.

33. The Commissioner observes that most of the nine pieces of information record innocuous administrative exchanges. She accepts that there is limited public interest in the disclosure of this information because, as the Council points out, the substantive information has largely been disclosed. However, the public interest test at regulation 12 says that information may only be withheld if the public interest in maintaining an exception outweighs the public interest in disclosure.
34. The Commissioner is of the view that there is equally little public interest in maintaining the exception at regulation 12(4)(e) in respect of the innocuous information. Bearing in mind the presumption in favour of disclosure, the Commissioner is not satisfied that the public interest in maintaining the exception is sufficiently strong to outweigh the public interest in disclosure of most of the information falling under regulation 12(4)(e). The Commissioner finds that extracts from two pieces of information may be withheld, but the remainder ought to be disclosed. The Commissioner has set out the information to be disclosed in a confidential schedule which is provided only to the Council in order to avoid the inadvertent disclosure of exempt information.

### **Regulation 12(5)(b)**

35. Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature.
36. The Council clarified that the information withheld under regulation 12(5)(b) comprised correspondence relating to legal advice obtained for the purpose of granting an easement. The Council was of the view that disclosure of the information in question, would undermine legal professional privilege, which it described as being of "*fundamental importance as a long-standing legal concept*".

37. The Commissioner has been guided by the then Information Tribunal's description of legal professional privilege in *Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry*:

*"...a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communications or exchanges come into being for the purposes of preparing for litigation."*<sup>3</sup>

38. Having inspected the withheld information the Commissioner is satisfied that it comprises confidential communications between the Council and its legal adviser, created for the purpose of obtaining and receiving legal advice. Accordingly she is satisfied that the withheld information is information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings.
39. The Commissioner understands that privilege belongs to the client and allows them to explain the issues on which they require advice as fully as possible and the legal adviser to provide full and frank advice on those issues. A client's ability to speak freely and frankly with their legal adviser in order to obtain appropriate legal advice is, as the Council has indicated, a fundamental requirement of the justice system. The Commissioner is satisfied that the disclosure of such communication would have an adverse effect on the course of justice.
40. For this reason the Commissioner finds that the exception at regulation 12(5)(b) is engaged in relation to the withheld information. Like regulation 12(4)(e), regulation 12(5)(b) provides a qualified exception so the Commissioner must consider whether the public interest favours disclosing the information or maintaining the exception.

#### Public interest in disclosing the information

41. The Council acknowledged the inherent public interest in ensuring that public authorities are transparent in the decisions they make, especially concerning matters that may have an impact on the environment. It pointed out that it had only withheld a small proportion of the requested information.

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<sup>3</sup> Appeal EA/2005/0023, 4 April 2006



42. The Council also identified that disclosure would enable the public to see that legal advice had been sought and received, which would reassure the public that the Council had acted properly.
43. Finally, the Council said that disclosure of the information could assist objectors in participating in the planning objection process.

#### Public interest in maintaining the exception

44. The Council set out that there was a strong public interest in ensuring that decisions are made within a fully informed legal context. It argued that disclosure of the withheld information would deter those involved from seeking legal advice in the future, which would not be in the public interest.
45. The Council also argued that there was a strong public interest in protecting the confidential relationship between lawyer and client. In the Council's opinion disclosure of the withheld information would harm this relationship, since the fear of disclosure would deter free and frank exchanges and discussion in future cases. If the Council was unable to obtain thorough legal advice it would lead to poorer decisions being made, which would not serve the public interest.
46. The Council referred to the fact that the planning application in question was live at the time the request was submitted. The Council attached substantial weight to this as an argument in favour of maintaining the exception.

#### Balance of the public interest

47. The Commissioner considers that there is a strong inherent public interest in protecting the confidentiality of communications between a client and their legal adviser. She is assisted by the Information Tribunal's consideration of the public interest in the context of legal professional privilege as set out in *Bellamy*:  
  
*" ... there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest ... it is important that public authorities be allowed to conduct free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cases ...".*
48. The Commissioner considers that the Tribunal's comments in *Bellamy* are relevant to this case. Disclosure of the withheld information would result in the loss of confidentiality of communications, and this would have a wider detrimental effect on the course of justice. The

Commissioner accepts that this argument in favour of maintaining the exception carries significant weight.

49. In favour of disclosure, the Commissioner has attached some weight to the general public interest in informing the public as to how a public authority carries out its functions. As the Council has acknowledged, this is especially important when those functions relate to the protection of the environment. However, in the circumstances of this particular case, the Commissioner is not satisfied that this is sufficiently strong to counter the inherent public interest in maintaining the exception at regulation 12(5)(b). Nor has the Commissioner been able to identify any other overriding public interest argument in favour of disclosure.
50. In conclusion the Commissioner finds that the public interest in maintaining the exception at regulation 12(5)(b) outweighs the public interest in disclosing the withheld information.

### **Regulation 13: third party personal data**

51. Regulation 13 of the EIR states that a public authority is not obliged to disclose information if to do so would:
  - constitute a disclosure of personal data, and
  - this disclosure would breach any of the data protection principles or section 10 of the Data Protection Act 1998 (the DPA).
52. As set out above the Commissioner has found that the Council was not entitled to withhold some information in reliance on the exception at regulation 12(4)(e). The Council had also sought to rely on the exception at regulation 13, to the extent that the withheld information comprised personal data relating to its staff. Consequently the Commissioner has gone on to consider the Council's reliance on regulation 13.
53. The Commissioner notes that the withheld information included the name, job title and contact details of a number of individuals. The Commissioner is satisfied that this information is personal data, as the individuals in question can be identified by their names, job titles and contact details.
54. The Council advised that its policy was to withhold information relating to Council staff below the grade of Heads of Service, since these individuals had a reasonable expectation that their information would not be disclosed. It follows, therefore, that where the information which the Commissioner requires the Council to disclose comprises personal data relating to staff at or above the grade of Head of Service, the Council does not consider that regulation 13 is engaged. The

Commissioner has set out this information in the confidential schedule which is provided to the Council.

55. With regard to personal data relating to Council staff below the grade of Head of Service, the Commissioner has considered the Council's policy in the context of the first data protection principle, which provides that personal data must be processed fairly and lawfully. In considering whether disclosure would be fair or unfair the Commissioner has taken the following factors into account:
- whether disclosure would cause any unnecessary or unjustified damage or distress to the individuals concerned (i.e. the consequences of disclosure);
  - the individuals' reasonable expectations of what would happen to their information; and
  - are the legitimate interests of the public sufficient to justify any negative impact to the rights and freedoms of the individuals as data subjects?
56. The Commissioner has found in many previous cases that junior staff should not be held personally accountable for decisions made by a public authority. She further accepts that junior staff may have a reasonable expectation that their information would not be disclosed into the public domain.
57. With regard to the third factor listed above the Commissioner acknowledges that there is a legitimate public interest in accountability and transparency, and the public is entitled to be informed about the operation and decisions of the Council. Nevertheless, the Commissioner recognises that the legitimate interests of the public must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects in considering how the factors balance.
58. In this case the Commissioner has required the Council to disclose the substantive content of some of the withheld information. The Commissioner accepts that disclosure of the personal data of junior staff is not required in order to inform the public as to the Council's decision making process.
59. In light of the above the Commissioner finds that it would not be fair to disclose personal information relating to staff below the grade of Head of Service. The Commissioner finds that the Council was entitled to rely on the exception at regulation 13 to withhold this information.

## Right of appeal

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60. 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@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)

61. 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.
62. 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  
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