

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

Date: 27 April 2021

Public Authority: Armagh City, Banbridge and Craigavon Borough Council

Address: Craigavon Civic and Conference Centre
66 Lakeview Road
Craigavon
BT64 1AL

Decision (including any steps ordered)

1. The complainant requested an advice note relating to a planning matter. Armagh City, Banbridge and Craigavon Borough Council (the 'Council') initially refused to provide the advice note, citing Regulation 12(5)(b), (the course of justice and inquiries), of the EIR. Following its internal review, the Council revised its position and instead relied upon Regulation 12(5)(f) (interests of the information provider) and said that the public interest favoured withholding the requested advice note.
2. The Commissioner's decision is that the Council was correct to handle this request under the EIR. She finds that Regulation 12(5)(f) of the EIR is engaged and that the balance of the public interest favours maintaining the exception. By failing to carry out its internal review within the statutory 40 working days' limit, the Council has breached Regulations 11(4) and 11(5) of the EIR.

No steps are required as a result of this notice.

Background

3. The Commissioner understands that the request relates to a planning matter in which a named Pentecostal church submitted a planning application to the Council for the demolition of former industrial premises and the erection of a new church, together with associated

facilities including creches, children's rooms, multi-purpose halls, meeting rooms and offices, car parking and associated site works.

4. Details of planning applications and associated published documents can be viewed online via the Council's planning portal¹. Unfortunately the link provided by the complainant in respect of this planning matter does not work and the Commissioner has been unable to locate the exact planning application herself.
5. It is against this background that the Commissioner has carried out her investigation.

Request and response

6. On 25 October 2019 the complainant wrote to the Council and requested information in the following terms:

"We note that in the cover letter from the agent dated 15th October 2019 there is reference to the submission of an advice note prepared by senior counsel. As this advice note does not appear to have been uploaded to the planning portal, can you please email me a copy of it?"

7. The Council responded on 19 November 2019 and refused to provide the requested information citing the following EIR exception: Regulation 12(5)(b) (the course of justice and inquiries). It concluded that the public interest test favoured withholding the requested information.
8. The complainant requested an internal review on 7 January 2020. The Council responded, late, on 3 June 2020. It revised its position and now said that Regulation 12(5)(f) (the interests of the person who provided the information to the public authority) applied, and found that the public interest favoured maintaining the exception.

Scope of the case

9. The complainant contacted the Commissioner on 20 July 2020 to complain about the way her request for information had been handled. She submitted detailed grounds of complaint, all of which were relayed

¹ <https://www.armaghbanbridgecraigavon.gov.uk/resident/planning-applications-residents/>

to the Council for its consideration as part of the Commissioner's investigation.

10. The complainant summarised her grounds of complaint as follows; she said that the Council had failed to:
 - i) Comply with the statutory time period contained within Regulation 11(4) of the EIR;
 - ii) Start with a presumption in favour of disclosure, which is contrary to Regulation 12(2) of the EIR;
 - iii) Apply the correct tests as set out in *John Kuschnir v Information Commissioner and Shropshire Council (EA/2011/0273; 25 April 2012)* and referenced in the ICO Guidance;
 - iv) Demonstrate that disclosure in this case would have an adverse effect on the Planning Applicant;
 - v) Demonstrate that it owes the Planning Applicant a duty of confidentiality; and
 - vi) Apply the public interest test and demonstrate that the public interest in maintaining the exception outweighs the public interest in disclosing the advice note.
11. The Commissioner has considered the above grounds of complaint and whether the Council was entitled to rely on Regulation 12(5)(f) in relation to the requested advice note. She has also considered whether the Council was correct to handle the request under the EIR.

Reasons for decision

Is the requested information environmental?

12. The starting point for the Commissioner when investigating any information rights complaint is establishing whether the appropriate legislation has been applied by the public authority. In this case, the Commissioner began by looking at whether the Council should have used the EIR or FOIA as the basis for its decision. She asked the Council to reconsider its handling of the request and to review whether the requested information fell to be considered under FOIA or the EIR.
13. 'Environmental information' is defined at EIR regulation 2(1). In accordance with the European Council Directive 2003/4/EC, from which the EIR derive, the Commissioner's view is that the definition should be interpreted widely. It is not necessary for the information itself to have a

direct effect on the environment, or to record or reflect such an effect, in order for it to be environmental.

14. Regulation 2(1) of the EIR defines environmental information as being information 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

...

(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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);".

15. The Council did not respond to the Commissioner's investigation question as to why it had handled the request under the EIR, so the Commissioner has carried out her own analysis.
16. In considering this matter the Commissioner had regard for her own guidance.² This says that it is often clear that a project itself constitutes a measure that will affect the environment. In this case, demolishing an existing industrial site and developing the site is a measure that will affect the environment. She therefore decided that the requested information fell within the definition of information about environmental measures as set out in EIR regulation 2(1)(c).

² https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf

17. The Commissioner's guidance for EIR regulation 2(1)(f) provides further detail and indicates that cultural sites, which include places that have an historical, literary, educational, or artistic value, and religious, ethnic, or social significance (including modern as well as historical, and urban as well as rural locations), are environmental. Likewise, built structures including buildings and built infrastructure, such as roads, railway lines, pylons, aerials, bridges, canals and tunnels.
18. The Commissioner decided that the industrial site constitutes a physical structure and that its demolition, and the replacement church and associated facilities, are 'built structures' within the meaning of EIR regulation 2(1)(f). Information 'on' any measures comprising additions to those, or adaptations of them, would therefore be environmental and need to be considered with reference to the EIR.
19. She has concluded, therefore, that the requested information is environmental and that the Council was correct to consider this request under the EIR.

Regulation 12(5)(f) – interests of the person who provided the information

20. The withheld information in this case is an advice note (also referred to by the Council as a "*report*" and "*legal opinion*") prepared by senior counsel in relation to the specified planning application (see also paragraph 25 of this notice).
21. Regulation 12(5)(f) provides an exception in relation to information provided to a public authority from another person and sets out four requirements which must be met for this exception to be engaged. First, disclosure must result in an adverse effect to the person who provided the information to the public authority. Having established that an adverse effect would occur, three tests must also be met:
 - (i) the person was not under any legal obligation to supply that information to any public authority;
 - (ii) the person supplying the information did not supply it in circumstances in which the public authority is not entitled, apart from under the EIR, to disclose it; and
 - (iii) the person supplying the information has not consented to its disclosure.
22. It is important to note that the exception refers to "*the interests of the person who provided the information...*". The word "*person*" is not restricted to an individual and also includes legal persons such as companies. The information must also not be on emissions, which it is not in this case.

23. This exception is also qualified by the public interest.

Adverse Affect

24. The Council's basis for citing Regulation 12(5)(f) was that the information in question was a voluntary submission, made by a third party, concerning the planning application submitted for these specific premises. It explained that the third party was under no legal obligation to supply the information to the Council and that they had not consented to the disclosure of the information. Specifically, it said:

*"The agent who provided this information on behalf of their client (i.e. **the planning applicant**) was under no legal obligation to do so. The withheld information is a Legal opinion privately commissioned by the planning applicant to address a number of issues that are considered material to the planning application which have been addressed by experts retained by the applicant."*

25. The Council also explained that:

"The report was not requested by the Council, and is not required as part of any planning application procedure."

26. The Council provided the Commissioner with a copy of an email from the agent dated 25 March 2021 which states:

"I can confirm, on behalf of my clients, that our previous instruction in connection with the Legal Opinion, which we shared with the Council's Planning Department, still stands; that is, that it is not for disclosure.

My clients had engaged the services of Senior Counsel to advise on the handling of their planning application and it remains our view that disclosure of the Legal Opinion and/or associated advices would adversely affect my clients' interests. Therefore we stand by our previous instruction that this should not be disclosed to any third party.

I trust that this clarifies my clients' position."

27. As with all the exceptions in regulation 12(5), the threshold necessary to justify non-disclosure, because of adverse effect, is a high one. The effect must be on the interests of the person(s) who voluntarily provided the information and it must be adverse.

28. In considering whether there would be an adverse effect in the context of this exception, a public authority needs to identify harm to the third party's interests which is real, actual and of substance (ie more than

trivial), and explain why disclosure would, on the balance of probabilities, directly cause the harm.

29. As the Tribunal in the case of *John Kuschnir v Information Commissioner and Shropshire Council* (EA/2011/0273³) noted, there is no requirement for the adverse effect to be significant – the extent of the adverse effect would be reflected in the strength of arguments when considering the public interest test.
30. However, the public authority must be able to explain the causal link between disclosure and the adverse effect, as well as why it would occur.
31. The need to point to specific harm, and to explain why it is more probable than not that it would occur, reflects the fact that this is a higher test than 'might adversely affect', which is why it requires a greater degree of certainty. It also means that it is not sufficient for a public authority to speculate on possible harm to a third party's interests.
32. It is not possible to prove beyond reasonable doubt that an adverse effect would happen, but a public authority must still show that:
 - the causal link between disclosure and effect is so convincing that the adverse effect is more likely than not to happen. This could be the case even if the adverse effect would happen only once or affect only one person or situation; or,
 - disclosure is more likely than not to have an adverse effect, given the potential for the adverse effect to arise in certain circumstances, and how frequently these circumstances arise (ie the number of people, cases or situations in which the prejudice would occur).
33. On the issue of the adverse effect, the Council's reasoning was that the withheld information submitted to it as the local planning authority, related to sensitive commercial/legal information and that this was submitted specifically in relation to a planning application. The Council argued that, should the legal opinion be publicly disclosed, it would reveal the planning applicant's position, including counter arguments, which have been addressed by experts retained by the applicant, to the world at large; therefore jeopardising their right to a fair hearing.

³https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i750/2012_04_25%20Mr%20Kuschnir%20decision.pdf

34. In terms of the complainant's suggestion to consider the disclosure of the advice note/report with redactions, the Council said it:

"... has on record that following discussion with the agent they did not consent to the disclosure of the report. It should be noted that the procedure within the Planning Department is that all information is screened before being uploaded to the planning portal. In this case, as the agent did not consent to the disclosure of the document as a whole document therefore, the department did not go on to consider redaction of same".

35. The Council noted that the complainant considers "disclosure was made to the Council without any restriction on its future use". While the Council said it accepts that the applicant did not mark the information as 'non-disclosure' or 'legally privileged' in their covering letter, the applicant stated on refusal of planning permission: "It is my client's intention to follow the Senior Counsel's advice and appeal (ie rely on the legal opinion, privately commissioned by the applicant), with an accompanying application for costs."
36. Taking this into consideration, and after reviewing the advice provided, the Council said it considered the advice should not be classed as suitable for 'disclosure at large' ie available to the public. As a result, the Council marked the document as 'restricted access'. In the Council's view, the applicant's refusal of consent to disclose the information supported this judgement. As a result, the planning department did not include the information on the Planning Portal.
37. The Council considers that the applicant provided information they intend to rely on by way of appeal and any potential legal proceedings as a restricted disclosure. It stated:

"'Restricted disclosures' remain confidential from the rest of the world, unless the information is later disclosed in open court. Since the applicant stated their intention to use the information in this manner and it did not enter the public domain, it remains protected by legal professional privilege for the purposes of EIR."

38. The Council said it is satisfied that the disclosure of the report (legal opinion) would adversely affect the interests of the applicant or third party for the reasons provided above.
39. In its investigation response of 26 March 2021, the Council advised:

"The subject matter i.e. the planning application is still "live" therefore; the passage of time has not had any impact on the status of the information."

Conclusion

40. The Commissioner is satisfied that the tests outlined at paragraph 22 above have been met in this case and that consequently, the Council will owe the person that supplied the information a duty of confidence. She therefore finds that Regulation 12(5)(f) is engaged.
41. The Commissioner must next consider the public interest test which will then determine whether or not the requested information should be disclosed.

Public interest factors in favour of disclosure

42. The complainant did not provide any specific public interest arguments other than referencing that the EIR starts with a presumption in favour of disclosure.
43. The Council acknowledged that some weight should be given to the general principles of accountability and transparency, and that these in turn can help to increase public understanding, trust and participation in the decisions taken by the planning department.

Public interest factors in favour of maintaining the exemption

44. The Council submitted the following arguments in favour of withholding the requested advice note:
 - The information has been supplied to the Council by another person in the expectation that it would not be further disclosed.
 - The person who supplied the information to the Council has not agreed to its disclosure and to do so would undermine the general expectation of confidentiality in respect of such information.
 - Disclosure would also adversely affect the authority's ability to maintain a safe space to seek, discuss and, if appropriate, act on information in relation to any ongoing considerations.
 - On refusal of planning permission, the planning agent's client intends to use the information supplied to appeal. Release of the information would adversely prejudice their ability to develop effective legal arguments should the need arise. Disclosure of the information into the wider public domain would provide objectors with information of their potential strategies.

- As the Council has previously noted, the report was privately commissioned by the client, at their own expense, and in the expectation that the matter may be subject to appeal or future legal action. As such, the report refers to the strengths and weaknesses of the applicants' position. The disclosure of this information in the public domain would prejudice the applicants' position in any future appeal/litigation, and would dissuade individuals from voluntarily providing information to the Council when seeking to resolve such matters informally.

Balance of the public interest

45. The Council submitted the following:

"Having considered the context of the request, the Council recognises that the applicant has voluntarily provided the report in an effort to convince the Council of their position. The Council also recognised that disclosure of the legal opinion would prejudice the applicants' right to a fair hearing. It is also recognised that the disclosure of such information, provided voluntarily to the Council, would discourage individuals from seeking to engage with the Council in respect of contentious matters."

46. The Commissioner accepts that there is an inherent public interest in transparency and accountability, particularly in cases like this where planning decisions involve large developments which are likely to have a significant impact on the local community and/or surrounding area.
47. However, the Commissioner notes that the individual who has provided the information sought by the complainant, voluntarily and at their own expense, has definitively stated that it is not to be disclosed to any third party. The Commissioner must therefore also consider the interests of the information provider.
48. The Commissioner considers that the public's right to challenge a planning application is not affected by the non-disclosure of the requested information. That right can be properly exercised during the formal planning process which this specific development is subject to. The Commissioner does not consider that it is the purpose of the EIR to circumvent existing procedures within planning law and the mechanisms for public scrutiny which already exist. Whilst she acknowledges that facilitating public engagement with environmental issues is one of the general principles behind the EIR, she does not consider that, in this case, disclosure of the withheld information would assist in furthering this principle, at least not to the extent that any public benefit would outweigh the public interest in protecting the interests of the information provider.

Conclusion

49. Having considered the relevant facts and the submissions provided the Commissioner has concluded that, in this case, the balance of the public interest favours maintaining the exception.

Regulation 11 – Representations and reconsiderations

50. Regulation 11 of the EIR allows applicants to make representations and to ask public authorities to reconsider their original responses to EIR requests, ie the right to an 'internal review'.
51. Regulation 11(4) of the EIR states that a public authority should notify the applicant of its decision *"as soon as possible and no later than 40 working days after the date of receipt of the representations"*.
52. The Commissioner notes that the Council apologised to the complainant for the delay in completing the internal review, although it did not provide any explanation for the delay.
53. However, the Council highlighted the following to the Commissioner:

"An automated response to all email communication advises our requesters of the impact of COVID19-pandemic as we are continuing to working [sic] in unprecedented times. It addresses the exceptional circumstances due to the COVID-19 pandemic and advises that Council responses may take longer and in many cases, Council will not be able to meet the statutory timescale as resources may be diverted away from usual compliance or information governance work. Therefore, resulting in understandable delays when responding at this time."
54. Whilst the Council has not explicitly stated that the delay in this case was caused by the impact of the pandemic, the Commissioner considers it reasonable that delays could occur for this reason.
55. The Council acknowledged it had breached Regulation 11(4) of the EIR by failing to provide the internal review outcome within 40 working days.
56. The complainant submitted that the Council had also breached Regulation 11(5) of the EIR, which sets out that where a public authority decides that it has failed to comply with the regulations in relation to the request, the notification under paragraph (4) shall include a statement of the failure to comply, the action the authority has decided to take in order to comply and the period within which that action is to be taken.
57. Whilst the Commissioner recognises the impact that the pandemic has had on many public authorities, the council did not include the

statements required of it by Regulation 11(5) when providing its review to the complainant.

Conclusion

58. The Commissioner finds that the Council breached Regulations 11(4) and 11(5) of the EIR.
59. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft "Openness by Design strategy"⁴ to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of EIR enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"⁵.
60. In this case, she has recorded the Council's delay in completing the internal review, but has also noted that the delay occurred during the Covid-19 pandemic.

Other matters

61. The Council confirmed that it had taken all of the complainant's grounds of complaint into account. Whilst commenting that it considered many of the grounds to constitute "*statements and/or opinions of the complainant*", the Council produced a table for the Commissioner showing its assessment of each ground. The Commissioner has reflected the Council's responses through their inclusion at the relevant points within this notice.
62. The Commissioner wishes to place on record her understanding of the immense pressures placed on public authorities during the coronavirus pandemic. She is sympathetic to the difficult decisions such authorities must make, between prioritising front-line services and continuing to meet their obligations under the EIR.

⁴ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁵ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

63. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

64. 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.
65. 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

Carolyn Howes
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