

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

### **Decision notice**

**Date:** 15 December 2022

**Public Authority:** Ards and North Down Borough Council

**Address:** Town Hall  
The Castle  
Bangor  
BT20 4BT

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

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1. The complainant has requested information held by Ards and North Down Borough Council (the council) relating to a particular planning enforcement file.
2. The Commissioner's decision is that the council is entitled to rely on regulation 12(5)(b) of the EIR – course of justice and inquiries, as its basis for refusing the request.
3. The Commissioner does not require the council to take any steps as a result of this decision notice.

#### **Request and response**

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4. On 11 February 2022, the complainant wrote to the council requesting information about an alleged breach of planning control. They referred to the enforcement case number, and then asked for the following:

I am writing to request information under the Freedom of Information Act 2000. I would be interested in any information held by your organisation regarding my request. I would like ALL documentation regarding the above [the planning enforcement case they had referred to]."

5. The council confirmed to the complainant that the information held that was relevant to the request consisted of a planning enforcement file set-up form, an acknowledgement, an update email, a site inspection note, and photographs. It advised the file also contained a copy of the council's published advice on playframes, and it provided a link to this information on its website.
6. The council went on to state that (aside from the information that was already publicly available) it was withholding the information held relevant to the request under regulation 12(5)(b) of the EIR.
7. The complainant advised in their internal review request that they only required a copy of the site inspection note that had been referred to by the council, and that it was in the public interest for such information to be disclosed.
8. The council's internal review response maintained that it was entitled to rely on regulation 12(5)(b) as its basis for withholding the requested information.

### **Scope of the case**

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9. The Commissioner will decide whether the council is entitled to rely on regulation 12(5)(b) of the EIR as its basis for refusing to release a copy of the site inspection note.

### **Reasons for decision**

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10. 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 inquiry of a criminal or disciplinary nature.
11. The exception at regulation 12(5)(b) encompasses any adverse effect on the course of justice; as such, the Commissioner accepts that 'an inquiry of a criminal or disciplinary nature' is likely to include information about investigations into potential breaches of legislation, for example, planning law or environmental law.
12. Whilst the council has advised that the planning enforcement case is now on hold pending the outcome of a retrospective planning application, the Commissioner understands that at the time of the request, the enforcement investigation was live and ongoing.

13. The council has argued that the disclosure of the information contained within the inspection note would prejudice and adversely affect the position of the council, and also those that are subject to the investigation.
14. The council goes on to say that the requested information may be relied on as evidence and that disclosure would have an adverse affect on the council's ability to carry out its planning enforcement functions in respect of both this investigation, and investigations more generally.
15. The Commissioner accepts that the information was obtained by the planning authority (that being the council) as part of a live and ongoing inquiry in order to help make informed decisions about whether there had been any breach of planning laws.
16. It is the Commissioner's view that the public disclosure of such information at the time of the request, and whilst the investigation was still ongoing, would not only inhibit the council's ability to effectively conduct an inquiry, but would damage public confidence in such inquiries being undertaken appropriately and with due regard to the rights and expectations of involved parties.
17. In view of the above, the Commissioner is satisfied that it is more probable than not that disclosure of the information would adversely affect the course of justice, and that the exception provided by regulation 12(5)(b) is therefore engaged.
18. As regulation 12(5)(b) is subject to a public interest test, the Commissioner has gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure in this case.

**Public interest test**

19. The council has said that it considered the following factors in favour of disclosure of the information contained within the site inspection note:
  - It will allow the public to have an understanding of why the Planning Enforcement Service has acted in a specific manner in discharging its duties and will also show whether it has properly executed its regulatory functions.
  - It provides for greater transparency and accountability in the council's actions, and this will build confidence that the council is discharging its duties in an appropriate and fair manner.

20. The council has said it considered the following arguments in support of the public interest in withholding the information:
  - There is a strong public interest in ensuring investigations are conducted in such a manner as to ensure fairness, and that neither the position of the council, or the party which may be under investigation, is prejudiced.
  - There is a significant public interest in protecting the integrity of the planning enforcement investigation process.
  - There is an important public interest in the council delivering its planning enforcement functions in the most fair, effective and efficient manner as reasonably practicable.
21. The council argues that the adverse effect on an enforcement investigation which has not yet been concluded would be counter to the public interest and that, on balance, the public interest rests in maintaining the exception.
22. The complainant has set out arguments that relate to their own private interests in support of the release of the information; they have also said that the information would be released solely to them.
23. As the council has already advised the complainant, the disclosure of information under EIR is to the world at large and not just to the requester. Therefore, the public authority must focus on whether the information is suitable for disclosure into the public domain, rather than solely to the individual who has asked for the information.
24. Whilst the complainant has set out private interest arguments in support of the release of the information, the Commissioner acknowledges that there is always some public interest to be associated with planning issues, and in particular with the local community. It allows for transparency and accountability in terms of the processes that are followed; it can also improve the wider public's confidence of the decisions made by a public authority. The Commissioner therefore recognises that there is a broader public interest in the release of information about a potential breach of planning control and the actions taken by a public authority in response.
25. However, having considered the withheld information, and the fact that the investigation was ongoing at the time of the request, it is the Commissioner's view that disclosure at that time would have represented an unwarranted interruption to the process, and the council's investigation would most likely have been undermined, and this would not be in the public interest.

26. After taking into account all the available information, it is the Commissioner's decision that the balance of the public interest rests in favour of withholding the information in this case.
27. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions.
28. As stated in the Upper Tribunal decision of *Vesco v Information Commissioner* (SGIA/44/2019):

"If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).
29. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(5)(b) was applied correctly to the complainant's request.

## Right of appeal

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30. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

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

31. 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.
32. 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 .....**

**Suzanne McKay**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**