

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

Decision notice

Date: 6 March 2023

Public Authority: Loughs Agency
Address: 22 Victoria Road
Derry/Londonderry
BT47 2AB

Decision (including any steps ordered)

1. The complainant has requested information relating to a particular company, its proposal for a gold mine, and a planning application. The Loughs Agency refused the request in reliance on the exceptions at regulations 12(4)(e) (internal communications), 12(5)(b) (the course of justice), 12(5)(f) (the interests of the person who provided the information) and 13 (personal data) of the EIR.
2. The Commissioner's decision is that the Loughs Agency was entitled to rely on the exceptions at regulation 12(4)(e) and regulation 12(5)(b) in respect of the requested information. No further steps are required.

Request and response

3. On 5 March 2021, the complainant made the following request to the Loughs Agency:

"I hereby request copies of the following material in the possession of Loughs Agency, relating to Dalradian Gold Limited, its proposal for a gold mine or planning application LA10/2017/1249/F:-

1. Correspondence with third parties;
 2. Internal Agency documents including all emails, internal memoranda, reports, meeting notes and minutes."
4. Clarification was requested and received on the same day.

5. The Loughs Agency issued a response on 12 April 2021. It refused to provide the requested information, citing the exemptions at sections 22 and 36 of FOIA.
6. The complainant requested an internal review on 30 April 2021. They argued that the requested information was environmental information, therefore the request ought to have been handled under the EIR rather than FOIA. They also sought to challenge the Loughs Agency's refusal to disclose the requested information.
7. The complainant contacted the Commissioner on 14 September 2021 to complain that they had not received the outcome of the internal review.
8. On 22 September 2021 the Department for Infrastructure (the Department) requested that the Planning Appeals Commission (the PAC) hold a public inquiry for the planning application in accordance with sections 26 and 29 of the Planning Act (Northern Ireland) 2011.^{1 2}
9. Following the Commissioner's intervention the Loughs Agency provided the complainant with the outcome of the internal review on 6 October 2021.
10. At this point the Loughs Agency maintained that the requested information was not environmental information. In the alternative the Loughs Agency cited the exceptions at regulations 12(4)(e), 12(5)(b), 12(5)(f) and 13 of the EIR to refuse the request.

Scope of the case

11. The complainant contacted the Commissioner on 26 November 2021 since they remained dissatisfied following the outcome of the internal review. The complainant maintained that the requested information was environmental information and that the EIR was the correct access regime.

¹ <https://www.infrastructure-ni.gov.uk/news/dalradian-gold-ltd-minerals-planning-application-la1020171249f-and-nie-networks-powerline-planning>

² <https://www.pacni.gov.uk/public-inquiries-and-hearings>

12. The Commissioner understands that the Loughs Agency is an executive agency of the Foyle, Carlingford and Irish Lights Commission. The Commission is one of the six North South Implementation Bodies established under Part V of the Northern Ireland Act 1998.³ Neither the Commission nor the Loughs Agency are public authorities for the purposes of FOIA. This is not disputed by the complainant. Consequently the Commissioner cannot require the Loughs Agency to take any action under FOIA. Nor can he consider complaints about the Loughs Agency under FOIA.
13. The Loughs Agency has not disputed that it is a public authority for the purposes of the EIR. Accordingly the Commissioner has first considered whether the requested information, to the extent that it is held, comprises environmental information within the meaning of regulation 2 of the EIR. If the requested information is not environmental information then the Commissioner cannot require the Loughs Agency to respond under the EIR. If the information is environmental information then the Commissioner will go on to consider the exceptions cited by the Loughs Agency.

Reasons for decision

Regulation 2(1): environmental information

14. FOIA and the EIR provide separate, albeit similar, access regimes for information held by public authorities. It is important for public authorities to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition there are some procedural differences affecting how requests should be handled.
15. Regulation 2(1) of the EIR provides the following definition of environmental information:

"...any information in written, visual, aural, electronic or any other material form on-

³ <https://www.legislation.gov.uk/ukpga/1998/47/section/55>

- (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);"*
16. Further, the Commissioner considers that interpretation of the phrase 'any information... on' 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, with regard to regulation 2(c) it is the measure or activity that must be likely to affect the elements or factors as set out in regulation 2(1) (a) and (b).
17. The Commissioner has examined the wording of the request, and the requested information itself. He notes that the request is for information relating to a specific company, ie Dalradian Gold Limited, in the context of its proposal for a gold mine and associated planning application.

18. The Commissioner understands that the Department has designated the Loughs Agency as a statutory consultee regarding the planning application specified in the request.⁴ The requested information includes assessments of local environment and ecology, scientific assessments, internal discussions with regard to the scientific information, discussions and assessments taken in conjunction with other statutory bodies, and communications with external stakeholders who had made representations to the Loughs Agency.
19. The Commissioner is satisfied that the information held by the Loughs Agency which is relevant to this request will fall within the scope of regulation 2(1)(c) in terms of measures or activities affecting or likely to affect the elements and factors at regulation 2(1)(a).
20. Consequently the Commissioner finds that the Loughs Agency ought to have responded to the request under the EIR, albeit that it cited exceptions under the EIR in the alternative, following its internal review.
21. The Commissioner recognises that it can sometimes be difficult to identify environmental information, and has produced guidance to assist public authorities and applicants.⁵ The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.

Regulation 12(5)(b): the course of justice

22. Regulation 12(5)(b) provides an exception to the extent that disclosure of the information in question 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.
23. "Would adversely affect" means that it is more probable than not, ie a more than 50% chance that the adverse effect would occur if the information were disclosed. If there is a less than 50% chance of the adverse effect occurring, then the exception is not engaged.

⁴ <https://www.loughs-agency.org/managing-our-loughs/conservation/planning-guidelines/>

⁵ https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf

24. The Loughs Agency set out that disclosure of the requested information into the public domain engaged the exception on the basis that it would prejudice a live public inquiry (as described at paragraphs 8 and 18 above). The Loughs Agency confirmed that all of the requested information was relevant to the planning application which was the subject of the public inquiry, since the Loughs Agency was a statutory consultee. It also advised that the complainant would likely be called to give evidence during the inquiry, therefore if the requested information were to be disclosed, it could either directly or indirectly influence the evidence they provided.
25. In terms of adverse effect the Loughs Agency maintained that disclosure of the requested information would undermine the inquiry process and the jurisdiction of the PAC. This is because the PAC has the power to determine what information may be disclosed, and when, during the proceedings.
26. The Loughs Agency also explained that it is the enforcement body for the protection of fisheries interests in the river catchments which would be affected by the proposed operations described in the planning application. It carries out investigations and prosecutes offenders, but is reliant on members of the public to alert it to issues such as possible damage to the fishery, or pollution. The Loughs Agency argued that disclosure of the requested information under the EIR would have the effect of discouraging members of the public or other stakeholders from providing information to it on these issues. This would make it more difficult for the Loughs Agency to act as an enforcement body, and would also hamper it from providing such intelligence as part of its participation in the planning and public inquiry processes.
27. The complainant disputed that the exception at regulation 12(5)(b) was engaged. They did not accept that the exception could apply to a public inquiry since it was not of a criminal or disciplinary nature as described in the legislation. The complainant argued that the purpose of the public inquiry was to provide "an open forum for the investigation of unexplored issues to ensure an authority has sufficient information to enable it to reach a rational decision". They were of the view that disclosure of the requested information would not be prejudicial but would in fact assist the public inquiry process.

28. The Commissioner has considered his published guidance on regulation 12(5)(b).⁶ This sets out his view that the course of justice element of the exception covers a wide range of information, including "records of courts, tribunals and inquiries". He is also assisted by the Aarhus Convention Implementation Guide (the Implementation Guide),⁷ which comments as follows:

"The course of justice refers to active proceedings within the courts. The term 'the course of justice' implies that an active judicial procedure capable of being prejudiced must be under way."

29. The Commissioner understands that the PAC is a statutory tribunal responsible for conducting public inquiries and hearings in relation to regionally significant and "called-in" planning applications. The purpose of a public inquiry in this context is to consider representations in respect of the planning application and produce a report. It is the Department, rather than PAC, that has responsibility for making the final decision in any case.
30. The Commissioner is not persuaded that disclosure of the information withheld under regulation 12(5)(b) would in practical terms have an adverse effect on the public inquiry conducted by the PAC. The Commissioner understands that, at the time of the complainant's request and at the time of issuing this decision notice, the public inquiry had not yet commenced.⁸
31. The Loughs Agency has argued that the PAC determines what information is disclosed, but the PAC's public inquiry procedures state that "All documents on casework files can be viewed by any member of the public, under the Commission's supervision". Therefore the Commissioner does not accept that disclosure would restrict the PAC's ability to decide what information should be made available to the public.

⁶ https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/regulation-12-5-b-the-course-of-justice-and-inquiries-exception/#125b_say

⁷ <https://unece.org/environment-policy/publications/aarhus-convention-implementation-guide-second-edition>

⁸ <https://www.pacni.gov.uk/sites/pacni/files/media-files/Hearings%20and%20Inquiries%20-%20Requests.pdf>

32. The Commissioner is similarly not persuaded by the Loughs Agency's arguments with regard to influencing evidence provided to the public inquiry. The Loughs Agency has made a general statement in this regard but has not explained how disclosure would have such a consequence, or indeed how this would constitute an adverse effect on the course of justice.
33. However the Commissioner does accept the Loughs Agency's arguments with regard to its role as an enforcement body. The Commissioner accepts that members of the public would be less likely to provide information if they thought it would be disclosed into the public domain by the Loughs Agency. This would have an adverse effect on the Loughs Agency's ability to take enforcement action where appropriate.
34. In light of the above the Commissioner is satisfied that the exception at regulation 12(5)(b) is engaged only in respect of information provided to the Loughs Agency in the course of its role as an enforcement body. The Commissioner has gone on to consider the public interest in respect of this information.

Public interest

35. The Loughs Agency acknowledged the general public interest in the disclosure of information that would inform the public about its work. However it considered that this argument carried little weight since the requested information itself would have most relevance to the complainant rather than the general public.
36. The Loughs Agency argued that there was a weightier public interest in avoiding prejudice to the work of the public inquiry, as well as its own ability to participate effectively in the public inquiry process. It also maintained that there was a strong public interest in protecting its ability to obtain and receive information from the public in confidence.
37. The Commissioner is of the opinion that the public interest in disclosure of the information in question is clearly outweighed by the need to protect the Loughs Agency's ability to carry out its enforcement role. He therefore finds that the public interest in maintaining the exception at regulation 12(5)(b) outweighs the public interest in disclosure.

38. The Commissioner has taken account of regulation 12(2) of the EIR, which requires a public authority to apply a presumption in favour of disclosure when considering the public interest. The Upper Tribunal stated in *Vesco v Information Commissioner*⁹ that:

“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).

39. As set out above, the Commissioner has found that the balance of the public interest favours maintaining the exception, rather than being equally balanced. This means that the Commissioner’s decision, whilst informed by regulation 12(2), is that the Loughs Agency is entitled to rely on the exception at regulation 12(5)(b) in respect of the information specified at paragraph 34 above.

Regulation 12(4)(e): internal communications

40. Regulation 12(4)(e) of the EIR provides an exception from disclosure to the extent that the requested information comprises internal communications. The exception is class-based, which means that it is engaged if the information in question falls within its scope.
41. The Loughs Agency has relied on regulation 12(4)(e) in respect of internal documents. Having inspected the information withheld under this exception the Commissioner is satisfied that it falls under the description of “internal communications”. Therefore the exception at regulation 12(4)(e) is engaged.

Public interest

42. The Loughs Agency recognised the general public interest in openness, transparency and accountability, particularly in matters of public debate.
43. The Loughs Agency’s arguments in favour of maintaining the exception focused on “safe space”. It argued that disclosure of the internal communications would inhibit the free and frank expression of views and would affect the proceedings of working groups, committees, advisory functions and the development and formulation of policy. It provided

⁹ [2019] UKUT 247 (AAC), appeal no SGIA/44/2019

more detailed arguments which the Commissioner has not included in this decision notice since they relate to the content of the information in question.

44. The complainant argued that the Loughs Agency had failed to consider the specific requested information. They maintained that the information ought to be disclosed into the public domain.
45. The Loughs Agency and the complainant disagreed as to whether the matter was still "live". The complainant argued that the Loughs Agency had taken a formal position as a consultee in respect of the planning application, and that the consultation process was now complete. Therefore the complainant argued that the Loughs Agency did not require a "safe space" for deliberation.
46. The Commissioner observes that the underlying rationale for the exception at regulation 12(4)(e) is to protect a public authority's need for a private thinking space. He considers that the extent to which disclosure would have a detrimental impact on internal processes will be influenced by the particular information in question and the specific circumstances of the request.
47. The Commissioner has carefully considered the arguments put forward by the complainant and by the Loughs Agency. He recognises the legitimate public interest in disclosing information that would inform the public about decisions concerning activities that may have an impact (whether positive or negative) on the environment. Accordingly he is mindful that access rights under the EIR are designed to support public access to environmental information, public participation in decision making and access to justice.
48. The Commissioner can confirm that he has inspected the requested information in this case. Since the Commissioner must be careful not to disclose information that would defeat the purpose of relying on an exception, he cannot include details of the requested information in this publicly available decision notice.
49. The Commissioner accepts that there is a strong public interest in protecting the Loughs Agency's ability to exchange and discuss information away from outside pressure and interference and to have free and frank discussions without fear of these being disclosed.
50. The Commissioner is of the opinion that the requested information would be of limited value in assisting the public's understanding of the Council's decision making process in this particular case. In the Commissioner's opinion it does not provide any significant additional

insight into the Loughs Agency's decision making. Nor would it assist public scrutiny and debate.

51. The Commissioner is mindful that a public authority is required to apply a presumption in favour of disclosure, and in any event the public interest in maintaining an exception must outweigh the public interest in disclosure. If the public interest is balanced then the information in question must be disclosed.
52. The Commissioner finds that the public interest in this case is not especially balanced. He is satisfied that there is a significant public interest in protecting the Loughs Agency's ability to exchange internal communications in a "safe space". The Commissioner does not consider that the presumption in favour of disclosure changes this conclusion.
53. Consequently the Commissioner finds that the public interest in maintaining the exception at regulation 12(4)(e) does outweigh the public interest in disclosing the withheld information.
54. Since the Commissioner has concluded the Loughs Agency is entitled to withhold all of the requested information, either under regulation 12(4)(e) or regulation 12(5)(b), he has not gone on to consider the other exceptions cited.

Right of appeal

55. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

56. 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.
57. 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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