

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 7 August 2024

Public Authority: Armagh City Banbridge and Craigavon
Borough Council

Address: Civic Building
Downshire Road
Banbridge
BT32 3JY

Decision (including any steps ordered)

1. The complainant has requested information relating to the repair or replacement of a footbridge. Armagh City Banbridge and Craigavon Borough Council (the council) disclosed some of the information but withheld the remainder citing regulation 12(4)(d) (material in the course of completion) and regulation 12(3) (personal information) of the EIR as its basis for doing so.
2. The Commissioner's decision is that the council was correct to rely on regulation 12(4)(d) and regulations 12(3) of the EIR.
3. The Commissioner does not require further steps.

Request and response

4. On 29 September 2023, the complainant wrote to the council and requested information in the following terms:

"Please supply me with any minutes/ decisions/ costings regarding the repair or replacement of the foot bridge located in Clare Glen from 2018 to the present day. Any planned time schedules regarding its repair/ replacement. Any consultation with public bodies or councillors."

5. The council responded on 30 October 2023. It stated that it did not hold information relating to minutes, regarding the repair or replacement of the foot bridge located at Clare Glen.
6. In relation to decisions about the repair or replacement of the footbridge, the council disclosed a redacted copy of a Condition Survey and Preliminary Structural Report (the report). It stated that its Building Maintenance staff made an onsite decision to close the bridge for health and safety reasons. The council confirmed that the condition survey was completed by an external structural engineer who recommended the replacement of the bridge. It decided that the personal information such as names, email addresses, telephone numbers and personal identifiers were exempt under regulation 12(3) and regulation 13(2)(a) of the EIR.
7. In relation to costings for the repair or replacement of the footbridge, the council stated that it was currently working on a business case which included costings and time schedules. It stated that the document is in a draft format and incomplete. On this basis the council withheld this information under regulation 12(4)(d) of the EIR.
8. Following an internal review on 26 January 2024, the council wrote to the complainant and partially upheld their request on the basis that it wrongly withheld minute extract from a full council meeting on 30 January 2023 (reference: C15/2023) and minute extract from Leisure Services Committee on 9 October 2023 (reference: LCS80/2023) which should have been disclosed to the complainant.

Scope of the case

9. The complainant contacted the Commissioner on 15 February 2024 to complain about the way their request for information had been handled.
10. During the Commissioner's investigations the council informed him that a further redaction was carried out on minute reference LCS80/2023 as the redacted information fell outside the scope of the request and did not relate to the footbridge at Clare Glen.
11. It stated that, as the information did not fall within the scope of the complainant's request it was redacted as irrelevant information. The council acknowledged that it had not properly conveyed this in its response to the complainant's internal review request.
12. The Commissioner has reviewed the withheld information and is satisfied that the redacted information does not relate to the replacement of the footbridge at Clare Glen.

13. The council has also advised that while the minute reference C15/2023 was released during the internal review process with redactions, it has noted that the minute was discussed in open council and therefore in the public domain. It maintains that at the time of the internal review, it considered that releasing the personal data in the minute was not necessary to satisfy the requirements of the request and therefore withheld the information under regulations 12(3) and 13(2)(a). The Commissioner is not aware that the complainant has been informed of this.
14. In light of the above, the Commissioner considers that the scope of his investigation is to determine whether the council was correct to rely on regulation 12(4)(d) to withhold the Outline Business Case (OBC), and regulations 12(3) and 13(2)(a) to withhold minute reference LCS80/2023 and the report.

Reasons for decision

Is the requested information environmental?

15. The Commissioner agrees that the requested information is environmental information falling within the scope of regulation 2(1)(a) of the EIR as it relates to measures and activities affecting the elements of the environment and therefore the council were right to consider this under the EIR access regime.

Regulation 12(4)(d)- Material in the course of completion

16. Regulation 12(4)(d) of the EIR states that a public authority may refuse to disclose information to the extent that the request relates to material, which is still in the course of completion, to unfinished documents or to incomplete data.
17. Regulation 12(4)(d) is a class-based exception. This means that there is no requirement to consider the sensitivity of the information in order to engage the exception, the only question is whether the withheld information falls within the class described in 12(4)(d). The exception is subject to a public interest test under regulation 12(1)(b), and the exception can only be maintained should the public interest test support this.
18. The council has applied regulation 12(4)(d) to costings for the repair or replacement of the footbridge contained in the OBC. In its submission to the Commissioner, it stated that officers are currently working on the OBC which remains in its infancy or draft format stage and is not yet complete.

19. It stated that while it recognises that in its original response to the complainant, it said that it intended to present the final draft at the start of the year, it says the timing has been put back and it recognises that the delay has caused frustration. However, it maintains that its position has not changed as officers need a safe, confidential space free from undue external influence to reach their conclusions.
20. The council says it is imperative that it ensures the completion of the OBC is not further delayed by spending time and resources to explain or justify ideas that are not final or may never be finalised.
21. The Commissioner has studied the withheld information which consists of a template document containing guidance notes at various stages to assist officers in completing the OBC. The council provided OBC's showing the original template in pdf format and a current one in Microsoft Word format which is still clearly in its draft state. He has also considered the file notes for the original response and the internal review report, which contains the case officers detailed narrative of the rationale for the application of the exception.
22. The Commissioner also noted that there are various parts of the document that is yet to be confirmed or details added. The Commissioner can see that there has not been an agreement on recommendations for the project and neither has the document received approval to proceed.
23. The council has informed the Commissioner that there has not been a public consultation to date and that it has not yet established whether public consultation will be undertaken.
24. The Commissioner accepts that at the time of the complainant's request, the OBC was still being formulated and subject to change following comments and observation from the council. He is therefore satisfied that the OBC constitutes material which is both an unfinished document and material in the course of completion. The Commissioner noted that the main withheld information is the OBC, and he is satisfied that all of the information forms part of the replacement of the footbridge at Clare Glen project.
25. In light of the above the Commissioner's decision is that the exception at regulation 12(4)(d) is engaged by this information. The Commissioner has therefore proceeded to consider the public interest test.

Public interest test

26. Regulation 12(1)(b) requires that where the exception under regulation 12(4)(d) is engaged, a public interest test should be carried out to

ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. The Commissioner is mindful of the provisions of regulation 12(2) which state that a public authority shall apply a presumption in favour of disclosure.

Public interest argument in favour of disclosure

27. The council recognises that disclosing copies of the draft OBC would allow the public a better understanding of how those reports are formulated and developed over time.
28. It also recognised a public interest in disclosure of information which forms the substance of decisions and would lead to greater accountability on how decisions are made enhancing a debate that would encourage an informed and meaningful participation by the public.

Public interest argument in favour of maintaining the exception

29. The council has relied on the same public interest arguments provided in its original response to the complainant. The council stated:

“The business case, which includes costings and time schedules, is currently being prepared by council exploring options. The draft business case remains subject to review and consultation with senior officers and Councillors. The document is still evolving, subject to change and can only be finalised by council after having been received, fully considered and having incorporated any comments. Draft reports are a necessary part of an evolving process which is subject to change, and it is often the case that some content in earlier drafts will not make it to the final version. At the time of this request, the business case is still in the drafting stage and therefore not yet in receipt of committee approval.

Council considers release of the document, at this stage in the process, would impinge upon council’s ability to discuss key assumptions, options and approaches made in the draft business case in a safe, confidential space free from undue external influence, so that its conclusions are based on thorough deliberation and robust evidence. During the creation of such reports, thinking space is often required as officers develop the policies or plans, and others make comments which result in changes to the final version prior to the publication of a final report.

Premature release of the business case risks inhibiting the process of finalising the document, risks prejudicing its integrity and could give a misleading or inaccurate impression of its final decision. It is imperative that council has the ability to formulate documents in an

informed and balanced manner, based on the best interests of its residents and environmental priorities.

There is a strong public interest to ensure that the publication of the business case is a properly planned and managed process, to ensure that the data is complete before it is placed into the public domain. In the interests of fairness, the document should be made available to all members of the public at the same time, and premature release under the Regulations could undermine that principle. The fullness of the information and its equal availability to the public are key to facilitating an informed and equitable discussion of the business case and the issues within it.

Disclosure whilst still in draft format would mean that those still involved in its production will be less frank and candid with their views affecting the quality of the advice and information required in the decision-making process and completion of the document. Disclosure before completion would undermine the general expectation of confidentiality from the parties involved in respect of such information. It is also in the public interest for council to ensure that it provides some protection from having to spend time and resources explaining or justifying ideas that are not, or may never be, final".

30. The council says it has considered fully the presumption in favour of disclosing the requested information and the public interest in being transparent and accountable. However, it argued that it is satisfied that the factors in favour of maintaining the exception outweigh the factors in favour of disclosure.

Balance of the public interest

31. In determining where the balance of the public interest lies, the Commissioner has given due weighting to the general presumption in favour of disclosure, the specific public interest in transparency and accountability in relation to decisions having a significant community impact. Very importantly the Commissioner has given full consideration to the complainant's letter of 4 February 2024 in which they have stated that the council are using the regulation to avoid providing the information about the repair or replacement of the foot bridge.
32. The Commissioner understands that there is a local public interest in both the project itself, and in any effect, it may have on the environment. However, the Commissioner is of the view that equally, there are strong public interest arguments in favour of non-disclosure of the withheld information.
33. The Commissioner is mindful that the purpose of this exception is to provide authorities with a safe space within which decisions, discussions

and exchanges of view can take place without the process being frustrated or hindered by premature public scrutiny.

34. The Commissioner 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 stage the process had reached at the point the request was responded to. There will always be a stronger public interest in protecting a process that is ongoing than one that has concluded.
35. In the Commissioner's view the timing of the request is important in this case. The Commissioner accepts that the council was still developing the OBC at the time of the request. In light of this the Commissioner considers there is a greater public interest in the council having the 'safe space' they need to formulate the OBC and reach decisions away from public scrutiny and distraction. That is particularly the case here given that the OBC is not finalised and likely to be subject to change. He also notes that once the OBC has been finalised and the costings and time schedules approved, it would be published into the public domain.
36. The Commissioner also considers that putting information in the public domain about speculative proposals which are not finalised and may not come to fruition may result in the effectiveness of decision-making being challenged as the council may be forced to handle enquiries about hypotheticals.
37. The Commissioner accepts that disclosure of the withheld information would frustrate the process of developing the OBC and the council's ability to carry out the necessary work to complete it. This goes to the heart of the activity which regulation 12(4)(d) is designed to protect.
38. 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. As stated in the Upper Tribunal decision *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).
39. Whilst the Commissioner accepts that the arguments in favour of disclosure in this case carry weight, he does not consider that they outweigh the arguments in favour of withholding the information. The

Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(d) was applied correctly by the council.

Regulation 12(3)/regulation 13(2)(a)-Personal information

40. Regulation 13(1), by way of regulation 12(3) of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the requester, and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.
41. In this case the relevant condition is contained in regulation 13(2)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ("the DP principles"), as set out in Article 5 of the General Data Protection Regulation ("GDPR").
42. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ("DPA"). If it is not personal data, then regulation 13 of the EIR cannot apply.
43. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

44. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual"

45. The two main elements of personal data are that the information must relate to a living person, and that the person must be identifiable.
46. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of the individual.
47. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
48. In this instance, the withheld information relates to names, initials, qualifications and signature of the reporting officer contained in the report as well as gender references contained in the minute extracts.

49. The council has argued that it considers this to be personal data as the individuals are known in the borough and therefore would be identifiable. This information therefore falls within the definition of "personal data" in section 3(2) of the DPA.
50. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
51. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

52. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."

53. In the case of an EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair, and transparent.
54. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful

Lawful processing: Article 6(1)(f) of the GDPR

55. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" lawful bases for processing listed in the Article applies.
56. The Commissioner considers that the lawful basis most applicable in determining whether to disclose personal data in response to a request under the FOIA or EIR is basis 6(1)(f), which states:
57. "Processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"¹

¹ Article 6(1) goes on to state that:- "Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks". However, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA) provides that:- "In determining for the purposes of this section whether the lawfulness principle in Article

58. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under EIR it is necessary to consider the following three-part test.

i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information.

ii) Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question.

iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

59. The Commissioner considers that the test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

60. In considering any legitimate interest(s) in disclosing the requested information under the EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

61. Further, a wide range of interests may be legitimate interests. They can be the requester’s own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

62. The Commissioner is aware of the complainant’s legitimate interest in ensuring that the council is open and transparent about the replacement of the footbridge at Clare Glen, which is of importance to local residents within the borough. In their letter of 4 February 2024, the complainant stated that the subject of the footbridge is emotive to the local ratepayer and also questioned how they can understand the system if they are not provided with the minimum amount of information.

63. Whilst the Commissioner has taken this into account, he does not consider that there is any wider public interest in the disclosure of information which would identify third parties associated with the report

5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”

or the meeting minutes which the Commissioner understands was held under confidential business.

64. The Commissioner is of the view that the disclosure of this type of information would not provide the complainant with any greater insight into the particular actions taken further to that already disclosed by the council.
65. The Commissioner considers the council has shown accountability by its previous disclosure of information to the complainant. On consideration of the above, the Commissioner finds that, in this case, it is not necessary for the council to disclose the requested information in order for it to meet the legitimate interests.
66. As there is no legitimate interest in disclosing the requested information it is not necessary for the Commissioner to consider the necessity test or the balancing test.
67. The Commissioner has therefore decided that the Council was entitled to withhold the information under regulation 13(1), by way of regulation 13(2)(a).

Other matters

68. The Commissioner is mindful that in handling the complainant's request, the council could have provided further explanation particularly in relation to the minute extract reference LCS80/2023.
69. The Commissioner considers that the council could have explained to the complainant that the majority of the redactions in the document do not fall within the scope of their request. This would have provided the complainant with a clearer understanding of the actual information being withheld under the EIR

Right of appeal

70. 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

71. 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.

72. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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