



**UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000**

EA/2017/0090

**BETWEEN:-**

**DEPARTMENT FOR COMMUNITIES OF NORTHERN IRELAND**

**Appellant**

**-and-**

**THE INFORMATION COMMISSIONER**

**First Respondent**

**-and-**

**TONY DIGNAN**

**Second Respondent**

**Heard at: Royal Courts of Justice, Belfast:**

**Date of Hearing: 11 October 2017:**

**Before**

**Brian Kennedy QC (Judge)  
Malcolm Clarke  
Jean Nelson**

**Appearances:**

David Sharpe BL Counsel instructed by Des McCann for the Appellant.

Eric Metcalfe Counsel instructed by Nicholas Martin on behalf of the First Respondent.

**Subject matter:** Freedom of Information Act 2000 ("FOIA") & THE Environmental Information Regulations 2004 ("EIR") specifically the application of section 12(4)(e), EIR

**Decision:** The Tribunal refuses the appeal and the Decision Notice stands.

## REASONS

### Introduction:

[1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("the FOIA"). The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice ("DN") dated 30 March 2017 (reference FER0655999), which is a matter of public record.

[2] The Tribunal Judge and members sat to consider this case on 11 October 2017 and thereafter for deliberations as availability permitted.

### Factual Background to this Appeal:

[3] Full details of the background to this appeal, Mr Dignan's request for information and the Commissioner's decision are set out in the DN and not repeated here, other than to state that, in brief, the appeal concerns the question of whether the Department for Communities NI (previously Department for Culture, Arts and Leisure – "DCAL"), (hereinafter "the Department") was correct to apply Reg.12 (4)(e) EIR to withhold a report, ("the Disputed information") concerning the Minister's decisions on the redevelopment of the Maze site from the requester.

### Chronology

13 Nov 2015	Mr Dignan's' request for the release of a report prepared for NI Sports Minister regarding a decision at the Maze site
10 Dec 2015	Department refusal citing s35 (1)(b)
21 Dec 2015	Mr Dignan requests internal review
19 Feb 2016	Department upholds refusal on the same terms
12 May 2016	Mr Dignan complains to the Commissioner
28 July 2016	DN FER0629038 ordering Department to reconsider the request under EIR
25 Aug 2016	Department refusal citing Reg.12 (4)(e)
16 Sept 2016	Mr Dignan requests internal review of revised decision-making
17 Oct 2016	Department upholds refusal
17 Nov 2016	Mr Dignan complains to the Commissioner
7 March 2017	Commissioner writes to Department suggesting an informal disposal
10 March 2017	Department rejects offer of disposal
30 March 2017	DN FER0655999 ordering disclosure of requested material

### Relevant Legislation:

**FOIA:**

**35 Formulation of government policy, etc.**

- (1) Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to—
- (a) The formulation or development of government policy,
  - (b) Ministerial communications,
  - (c) The provision of advice by any of the Law Officers or any request for the provision of such advice, or
  - (d) The operation of any Ministerial private office.
- (2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded:
- (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
  - (b) for the purposes of subsection (1)(b), as relating to Ministerial communications.
- (3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

**EIR:**

**Regulation 2 - Interpretation**

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

**Regulation 12 - Exceptions to the duty to disclose environmental information**

(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure.

(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—

- (a) it does not hold that information when an applicant's request is received;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

**Commissioner's Initial Decision Notice:**

[4] The Commissioner's initial decision notice referred only to the appropriate access regime for Mr Dignan's request. During the Commissioner's investigation she asked DCAL why they had not considered EIR access, drawing to their attention a First Tier Tribunal decision holding that the proposed redevelopment of Casement Park stadium in Belfast was environmental information. DCAL responded that it considered that the report in issue was "remote from any environmental concern". Upon inspection of the disputed information in the report, the Commissioner was of the view that it fell to be considered under EIR access regime and ordered reconsideration accordingly.

**Commissioner's Second Decision Notice:**

[5] The second Decision Notice was limited to the Department's reliance on reg.12 (4)(e). The Commissioner was satisfied that the information fell under reg.12 (4)(e) as it could be described as internal communications. However, with EIR exemptions there is a

presumption in favour of disclosure, and all exemptions are subject to a public interest evaluation.

**[6]** The Department put forward four reasons to justify non-disclosure:

- a) *Safe Space* – ministers require a safe space to develop ideas and reach decisions;
- b) *Chilling Effect* – disclosure would inhibit free and frank discussions and impair future decision-making;
- c) *Collective Responsibility* – the document reveals views of individual ministers, and disclosure would undermine the principle of collective responsibility;
- d) *Timing* – the timing of the disclosure would distract public debate away from “current substantive issues”.

**[7]** The Commissioner considered that the need for a safe space would be strongest when an issue is live, otherwise the argument will carry little weight. The disputed report asked the Executive to note the Minister’s conclusions and plans, but did not seek agreement or discussion from other Ministers, diminishing any ‘chilling effect’. The ‘safe space’ argument is further damaged by the Minister having placed much of the information contained in the report into the public domain himself one month after the paper was presented to the Executive.

**[8]** In regards to collective responsibility, the Commissioner drew attention to a House of Commons briefing paper published in November 2016, which suggested that collective responsibility is *not* a feature of the Northern Ireland Executive, but accepted that the Ministerial Code refers to the importance of consensus in decision-making. It is a matter of public record that there existed significant disagreement between Ministers on various issues, including sports development. In the absence of specific evidence to the contrary, the Commissioner could find no basis on which to support the Department’s contention that disclosure would be so damaging to this collective responsibility that it would outweigh the public interest in transparency in decision-making.

**[9]** The Commissioner accepted that the proposed redevelopment of Casement Park was not completed at the time of the request, but noted that the Department did not elaborate on what the “substantive issues” were from which the public could be distracted. She dismissed this argument, stating, “*this right of access should not be limited to those issues which public authorities deem to be relevant or important.*” She was mindful of the act that at the time of the refusal, the disputed report was over seven years old, and as the report was merely informing the Executive of the Minister’s decisions, the decisions in question have to a certain extent been implemented and progressed since then. She criticised the Department for failing to take proper account of the developments in stadia funding for rugby and soccer in Northern Ireland since 2009.

[10] The EIR imposes a presumption in favour of disclosure, and the Commissioner concluded that the public interest in disclosure of this report was strong, and the Department's arguments against it were "largely generic". The Department did not argue that any of the information contained therein was particularly sensitive, and so there was no reason to withhold the report.

## **NOTICE OF APPEAL**

[11] The Department moved seven detailed grounds of appeal:

- i. The public interest was met by the information already released by the Minister;
- ii. Insufficient weight was given to the particular circumstances of Northern Ireland's compulsory coalition and the effect on effective ministerial communications;
- iii. There was insufficient appreciation of the fact that an Executive paper is the "highest and most important class of record" and not just a routine internal correspondence;
- iv. Insufficient weight was given to the 'chilling effect';
- v. Release of this report would draw attention away from a focussed discussion on resolving "potentially highly contentious matters" involving the redevelopment of Casement Park;
- vi. There is insufficient public demand for the release of a document of such vintage;
- vii. Insufficient weight given to the collective responsibility, as "individual Ministers are required to bring significant or controversial policy issues...to meetings of the full Executive for discussion and decision".

### **Commissioner's Response:**

[12] The Commissioner rehearsed the background to the request and cited not only the EIR but also the Directive that was implemented by those regulations, with special emphasis on the general rule of disclosure and the need for a restrictive interpretation of the application of any exemptions. She also provided a response to each of the grounds of appeal.

#### ***Ground I – existing ministerial disclosure***

[13] The Commissioner stated that she took full account of the fact that a large proportion of the information had already been disclosed, and it is plain in the Decision Notice that her consideration was directed towards the undisclosed portions. It was her conclusion that the public interest was therefore not exhausted by the 2009 disclosure.

#### ***Ground II – NI Executive's unique characteristics***

[14] The Commissioner had explicit regard to the system of government, citing it as an additional reason to expect legitimate public interest in ministerial decision-making. She reiterated that the Department had failed to show how this report would impact in a detrimental fashion upon this, as the report was not inviting comment or discussion.

***Ground III – Internal communication***

[15] The response to the previous ground was reiterated, with the Commissioner adding that the fact that this report concerned a major social programme with community and political implications was factor-adding weight to the public interest in disclosure.

***Ground IV – Chilling effect***

[16] The Commissioner denied insufficient consideration to this aspect, remarking that the report did not invite discussion, much of it had already been disclosed and Ministers cannot expect their decision-making on such important matters to be completely insulated from public scrutiny.

***Ground V – Live Issue***

[17] The Department did not provide any evidence as to how disclosure of this report after seven years would affect any live issue.

***Ground VI – Age of the Document***

[18] It is the Department itself that failed to have regard to how the decisions reflected in the report have already been implemented and progressed since the report was compiled. Furthermore, the Department did not specify what “current substantive issues” would suffer as a result of disclosure or how the public could be “distracted”, describing this argument as “bizarre”.

***Ground VII – Collective Responsibility***

[19] The Commissioner stated that she was entitled to have regard to the House of Commons briefing paper, which stated that the collective responsibility that applied to the Cabinet of the national government did not extend to the devolved administration in Stormont. Nonetheless she also took into account the Ministerial Code, and the fact that the composition of the Executive means that Ministers frequently and publicly disagree over policy decisions,

**Requestors' Response:**

[20] Mr Dignan was invited to indicate whether he wished to join the appeal. He did so and provided his grounds of opposition to the Department's appeal. His grounds were initially outlined in his request, dated 16 September 2016, for an internal review, ultimately refused by the Department stating: "*The public interest arguments continue to support the protection of internal deliberation and decision making processes and outweigh the presumption in favour of disclosure.*" Mr Dignan more generally adopts the Commissioner's Response and joined with the Commissioner in resisting this appeal.

**Evidence:**

[21] The Department called evidence from Denise Stockman, Director of Regional Stadia Programme and Neill Jackson from the Executive Office. The concern expressed by the former witness was essentially that the Casement Park project could be affected by further discussion about the Maze project. It is claimed that it has been vital that all parties in the design and development of the Casement Park project have to deliberate and debate had safe space. The Maze Option she felt would reignite the controversy and affect the Casement Park Option. However there was no demonstrable evidence of harm to the Casement Park project debate. The Tribunal accept Mr Dignan's' argument that failure to disclose will have no impact on future debate or decision in relation to stadia selection.

Further, given the time elapse since the disputed information in the report had been compiled and presented, the Tribunal find no evidence of harm in release of the remaining disputed information and we find it is in public interest to have transparency and accountability through release.

[22] Mr Neill Jackson called for the need for government to have a protected space for debate and decision, even though the requested information in the form of an Executive Memorandum had been largely placed in the public domain by a subsequent statement by the relevant minister. Mr Jackson informed the Tribunal that a subsequent further version explicitly sought the agreement of the Executive to the Ministers' proposed course of action. On cross-examination, Mr Jackson conceded the second paper was agreed.

[23] Mr Jackson referred to the disputed information as Confidential and Restricted and as of the lowest form of protection required on a scale used. He conceded it was a memorandum not being presented for discussion or debate with a ministerial colleague. He confirmed he had no view on the sensitivity of the remaining material (i.e. not yet released by the Minister). While he did express his view that it would expose the views of individual ministers, he did not demonstrate or suggest how that would cause harm or not be in the public interest.



He confirmed that it was "Not in question" that Mr Campbell, the author of the disputed information, was not concerned about having a public statement of his viewed exposed

He confirmed he was aware of the release of one government document without consultation but not aware of any effect by the release. When asked of the effect of the release of this document he said; "*I think it would make them more reluctant to express their opinion*" but failed to explain how or why or to demonstrate this assertion.

No evidence of how release of the disputed information in this case would undermine Collective Responsibility or protected space was given. He conceded there was no reference to Collective Responsibility in the Code of minister's conduct.

**[24]** We accept the strength of the submission referred to by the Commissioner in the quotation of the Friends of the Earth see Para 22 of the Commissioners' Response, where on the public interest test the onus is put thus; "- to specify the harm or harms": We are the view that the Department have failed to demonstrate any or adequate harm by disclosure of the disputed information.

**[25]** The Tribunal have considered all the evidence before us including the disputed information and find that the Commissioner has not erred in fact or in Law in the reasons given in the DN. We accept and adopt the submissions made in the Commissioners Response and more particularly at this appeal.

**[26]** Accordingly we dismiss the appeal.

Brian Kennedy QC

Judge of the First-tier Tribunal

Date of Decision: 26 February 2018.

Date Promulgated: 08 March 2018.

