

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

### **Decision Notice**

**Date:** 28 November 2013

**Public Authority:** Department of the Environment  
**Address:** 10-18 Adelaide Street  
Belfast  
BT2 8GB

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

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1. The complainant requested internal communications relating to a request for assistance made by an organisation following a flood. The Department provided some information, but withheld the remainder under regulation 12(4)(e) of the EIR. The Commissioner's decision is that the public interest in maintaining the exception does not outweigh the public interest in disclosure.
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
  - Disclose the withheld information in full.
3. The public authority must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

#### **Request and response**

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4. On 1 March 2012, the complainant requested the following information from the Department:

*"I wish to re-apply under the Freedom of Information Act 2000 for records of any discussions held between the Environment Minister and his officials regarding a request for the possibility of an award in respect*

*of costs incurred due to flooding at the Beragh GAA Club following the extreme rainfall in October 2011.*

*I specifically request that the following information be provided:*

- Records of emails between the Minister and his officials*
  - Records of telephone conversations between the Minister and his officials*
  - Records of letters between the Minister and his officials*
  - Minutes of any meetings and copies of any correspondence between the Minister/his officials and Beragh GAA Club and any other records held of discussions between the Minister and/or his officials with Beragh GAA Club on this issue*
  - Minutes of any meetings and details of any telephone conversations and/or email correspondence/letters sent in relation to discussions between the Minister and/or his officials with any other Government department regarding this matter"*
5. The Department responded on 2 May 2012, providing some information but advising that the remainder was exempt under regulation 12(4)(e) of the EIR.
  6. The complainant requested an internal review on 11 July 2012 and this request was acknowledged by the Department on 17 July 2012.
  7. On 3 May 2013 the complainant wrote to the Commissioner to complain that he had not received the outcome of the internal review.
  8. The Commissioner contacted the Department on 19 July 2013. The Department responded to the Commissioner to advise that it had communicated the outcome of the internal review to the complainant on 20 May 2013.
  9. The complainant confirmed to the Commissioner that he had not received the Department's letter of 20 May 2013, and the Department agreed to issue a further copy. As a result of the internal review the Department advised that it did not hold any correspondence between the Minister and the organisation subsequent to the organisation's letter of 2 November 2011. The Department also upheld its decision to withhold information under regulation 12(4)(e) of the EIR.

## **Scope of the case**

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10. The complainant remained dissatisfied with the Department's response to his request and asked the Commissioner to investigate. The complainant did not accept the Department's assertion that the withheld

information was environmental information, and in any event was of the view that the information should have been disclosed to him in full.

11. The complainant did not raise any issue with the Department's assertion that it did not hold any correspondence between the Minister and the organisation subsequent to the organisation's letter of 2 November 2011. Therefore the Commissioner's investigation focused on the information withheld under regulation 12(4)(e) of the EIR.

## **Reasons for decision**

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### **Regulation 2: environmental information**

12. Regulation 2 of the EIR provides the following definition of environmental information:

*"...any information in written, visual, aural, electronic or any other material form 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 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);"*

13. In the Commissioner's view the phrase 'any information... on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. The Commissioner considers a broad interpretation of this phrase 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, the information should be **on** something falling within these sections.
14. The Department's position is that the withheld information is environmental information by virtue of regulations 2(1)(a), 2(1)(c) and 2(1)(f). However the Commissioner is disappointed to note that the Department did not explain to the complainant at any stage why it considered this to be the case.
15. The Commissioner is satisfied that the withheld information is environmental, since it all relates to the Department's consideration of its policy towards individuals and organisations affected by flood damage. The Commissioner considers that information relating to the flooding itself will fall under regulation 2(1)(a) as flooding can be described as the state of the environment in a particular location. Information in relation to the Department's consideration of the request for assistance will fall under regulation 2(1)(c) to the extent that it relates to measures likely to affect the elements of the environment. It will also fall under regulation 2(1)(f) to the extent that it relates to the effects of the flood on particular buildings.

#### **Regulation 12(4)(e): internal communications**

16. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information if the request involves the disclosure of internal communications.
17. The Commissioner is satisfied that the withheld information falls under the description of "internal communications". This is because it comprises emails between officials in the Department, and emails between officials in the Department and other government departments. Regulation 12(8) specifies that for the purposes of regulation 12(4)(e), "internal communications includes communications between government departments". Accordingly the Commissioner is satisfied that the information falls within the scope of regulation 12(4)(e).
18. Regulation 12(1) EIR states that disclosure of environmental information may be refused if (a) an exception to disclosure applies and (b) if in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Regulation 2(2) states that the public authority must apply a presumption in favour of disclosure when considering the public interest.

Public interest arguments in favour of disclosure

19. In its internal review letter the Department stated that it had taken account of the presumption in favour of disclosure. However it did not provide any explanation of how this had been considered.
20. The Department advised the Commissioner that it recognised the inherent public interest in openness and transparency, particularly where public money is spent.
21. The Commissioner considers that disclosure of the withheld information would inform the public as to the Department's consideration of the request for assistance made by the organisation. It would enable the public to understand how policies are considered and developed within government departments.

Public interest arguments in favour of maintaining the exception

22. Again, the Commissioner notes that the Department provided little detail in its refusal notice or internal review letter. The Department stated that that the timing of the request was a key public interest consideration:  
  
*"...premature disclosure of information prior to a policy being agreed and announced would prejudice the standard of debate and discussion, affecting the overall quality of decision making within government".*
23. However the Department did not go on to provide any explanation as to how such prejudice might occur in this particular case. Nor did the Department explain the level or likelihood of prejudice.
24. The Department also argued that there was a strong public interest in allowing Ministers and officials to complete a decision-making process in a protected space. The Department concluded that the public interest in good decision making meant that the balance was in favour of withholding the information.
25. The Commissioner agrees with the general principles identified by the Department. However the Department did not provide any evidence to demonstrate that it had considered the withheld information in the context of these generic arguments. The Commissioner pointed this out to the Department and offered a further opportunity for more detailed arguments to be provided. The Department declined to do so, stating that its position had already been set out in full.

### Balance of the public interest arguments

26. The Commissioner has carefully considered the explanatory information provided by the Department. However he remains concerned that the Department has failed to make sufficient reference to the withheld information in its submissions. Having inspected the withheld information the Commissioner has not identified anything which stands out as meriting protection in the absence of specific arguments provided by the Department.

27. The Commissioner has produced guidance on the exception at regulation 12(4)(e) of the EIR. This guidance does acknowledge the public interest in maintaining safe space where a policy is under deliberation. However this guidance clearly states that:

*"There is no automatic or inherent public interest in withholding an internal communication. Arguments should relate to the particular circumstances of the case and the content and sensitivity of the specific information in question."*

28. The Commissioner notes that the Department's arguments do not refer to any aspect of the withheld information. The arguments, if accepted, could apply to any internal communication which relates to a decision not yet made, thus defeating the purpose of the exception as being qualified. The Commissioner concludes that the Department has failed to demonstrate that it has fully considered the circumstances of the case.

29. The Commissioner would remind the Department, and public authorities more generally, that it is the public authority's responsibility to demonstrate that it has complied with the EIR. The Commissioner's decision is made on the basis of the information provided to him, and the Commissioner will not construct arguments or make assumptions on behalf of the public authority.

30. Consequently the Commissioner is not satisfied that in this particular case the public interest in maintaining the exception outweighs the public interest in disclosing the withheld information. The Commissioner's decision is that the information withheld under 12(4)(e) EIR should be disclosed to the complainant.

### **Procedural requirements**

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#### **Regulation 11: internal review**

31. Regulation 11(2) of the EIR provides that an applicant who is dissatisfied with the public authority's response to a request, may make

representations to the authority. Regulation 11(3) provides that the authority must consider these representations and advise the complainant, within 40 working days, whether it has complied with the EIR. This is effectively equivalent to an internal review under the FOIA, although regulation 11(3) prescribes a time limit for this procedure.

32. In this case the complainant wrote to the Department on 17 July 2012 to challenge its response. However the Department did not respond to this until 20 May 2013, ten months later and well in excess of the 40 working days allowed under the EIR. The Department's explanation for the delay was that the reviewer had "overlooked" the complainant's request for a review.
33. The Commissioner finds that the Department failed to comply with regulation 11(3) in failing to complete the internal review within the statutory time limit. The Commissioner expects that the Department will take adequate steps to ensure that such delays do not recur in relation to future cases.

#### **Regulation 14: refusal notice**

34. Regulation 14(3) states that where a public authority wishes to refuse any part of a request, it must specify the reasons not to disclose the requested information. The authority must also specify the matters considered in balancing the public interest in relation to any exceptions applied.
35. In this case the Commissioner is of the view that the Department's refusal notice did not adequately explain the public interest considerations. Therefore the Commissioner finds that the Department failed to comply with regulation 14(3)(b) in this respect.
36. The Commissioner notes that the Department was given several opportunities to explain its position, but it chose not to do so. As mentioned above the Commissioner is disappointed at the lack of detail in the generic arguments provided by the Department. The Commissioner would again stress that the onus is on the public authority to demonstrate that it has fully considered the requested information, and all the circumstances of the case.



## Right of appeal

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37. 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: 0116 249 4253  
Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

38. 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.
39. 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** .....

**Gerrard Tracey**  
**Principal Policy Adviser**  
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