

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

Decision notice

Date: 9 January 2023

Public Authority: Armagh City, Banbridge and Craigavon Borough Council

Address: Craigavon Civic & Conference Centre
66 Lakeview Road, Craigavon
BT64 1AL

Decision (including any steps ordered)

1. The complainant has requested information from Armagh City, Banbridge and Craigavon Borough Council in relation to the sale or transfer of land to Southern Regional College (SRC) for development. The Council initially refused all parts of the request in reliance on the exception at regulation 12(5)(e) (confidentiality of commercial information) of the EIR. It subsequently sought to rely on regulation 12(4)(d) (unfinished documents) in respect of some parts.
2. The Commissioner's decision is that the Council has failed to demonstrate that regulation 12(4)(d) is engaged. He also finds that the Council has failed to demonstrate that the public interest in maintaining the exception at regulation 12(5)(e) outweighs the public interest in disclosure.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information to the complainant.
4. The Council must take these steps 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 FOIA and may be dealt with as a contempt of court.

Request and response

2. The complainant submitted a request to the Council on 15 December 2020 seeking the following information:

Under FOI arrangements can Council please confirm:

1. Whether Council has received the sum of £500,000 from SRC in satisfaction of the terms of the original Options Agreement listed in the minutes of the meeting of the Finance and Resources Committee dated 5th March 2015.

2. If a lesser amount was paid, the value of that transaction.

3. The total amount of land to be sold / transferred to SRC as part of the options agreement.

4. Whether Council have agreed to transfer /sell any land to Southern Regional College without a charge.

4 [4a]*. If a value for additional land was agreed, the agreed value for that additional land.

5. Whether Council has fulfilled it's [sic] obligations to acquire best price for the land transferred / sold / leased to Southern Regional College on this site.

6. The total amount of land at Craigavon City Park, if any, that Council have transferred or agreed to transfer to Southern Regional College under a lease agreement.

5 [7]*. The length in years of any lease agreement relating to this site.

6 [8]*. The value paid for the land under lease.

*Renumbered by the Commissioner for clarity

3. The Council responded to the complainant on 18 January 2021. It refused all parts of the request in reliance on the exception at regulation 12(5)(e) of the EIR.
4. The complainant requested an internal review on 18 March 2021. The Council initially advised that the request was out of time but subsequently agreed to conduct an internal review.

5. The Council provided the complainant with the outcome of the internal review on 2 July 2021. It upheld its refusal and reliance on regulation 12(5)(e) in respect of all parts of the request.

Scope of the case

6. The complainant contacted the Commissioner on 7 July 2021 to complain about the Council's handling of their request.
7. During the course of the Commissioner's investigation the Council sought to claim a late reliance on the exception at regulation 12(4)(d) in respect of parts 4a, 6, 7 and 8 of the request. The Council also cited regulation 14(4) in respect of these parts of the request.
8. The Commissioner acknowledges that public authorities may at any stage seek to rely on an exemption or exclusion not previously claimed. This was confirmed by the Upper Tribunal in the case of *McInerney v IC and Department for Education* [2015] UKUT 0047 (AAC).¹
9. The Commissioner has therefore considered whether the Council was entitled to rely on the exceptions at regulations 12(4)(d) and 12(5)(e) in respect of the withheld information.
10. The Commissioner notes that the Council also cited regulation 14(4) of the EIR along with regulation 12(4)(d). Regulation 14(4) provides that if a public authority specifies regulation 12(4)(d) as a ground for refusal, it should also specify, if known, the name of another public authority preparing the information and the estimated time in which the information will be finished or completed. It does not, however, constitute an exception from disclosure in its own right, therefore the Commissioner has considered regulation 14(4) as part of his analysis of regulation 12(4)(d) below.
11. The Commissioner's usual practice, followed in this case, is to remind public authorities that it is for them to demonstrate that they have complied with the requirements of the EIR. The Commissioner's decision is based on the information provided to him by the complainant and the public authority.
12. Accordingly the Commissioner expects authorities to ensure that they provide full details of any information or arguments they wish the

¹ <https://administrativeappeals.decisions.tribunals.gov.uk/Aspx/view.aspx?id=4420>

Commissioner to take into account, and be mindful that the Commissioner cannot make assumptions. This is especially important where the public authority seeks to introduce reliance on a new exception during the course of the investigation.

Reasons for decision

Request for environmental information

13. The Commissioner notes that part 5 of the complainant's request asked the Council to advise whether it had fulfilled its obligations to acquire the best price for the land in question.
14. The Commissioner notes that the EIR applies to requests for 'environmental information'. This is defined at regulation 2(1) of the EIR as follows:

"environmental information" has the same meaning as in Article 2(1) of the [Council Directive 2003/4/EC(d) on public access to environmental information], namely any information in written visual, aural, electronic or any other material form..."
15. The Commissioner's guidance states that "the definition of environmental information encompasses recorded information in any material form"² but clarifies that public authorities are not required to create information in order to respond to a request.
16. For this reason the Commissioner finds that part 5 of the request was a request for the Council's opinion, rather than a request for recorded information. The Commissioner therefore finds that the Council was not required to respond to this part of the request under the EIR.

Regulation 12(4)(d) – material in the course of completion or unfinished documents

17. As indicated above, the Council sought to rely on regulation 12(4)(d) in respect of parts 4a, 6, 7 and 8 of the request.
18. Regulation 12(4)(d) of the EIR states that a public authority may refuse to disclose information to the extent that:

² <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/regulation-2-1-what-is-environmental-information/#eir3>

"... the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data."

19. Regulation 12(4)(d) is a qualified exception, which means it is subject to the public interest test at regulation 12(2) of the EIR. Information which falls within the scope of regulation 12(4)(d) may only be withheld if the public interest in maintaining the exception outweighs the public interest in disclosure. The public authority must also apply a presumption in favour of disclosure when considering the public interest.
20. In this case the Council advised the Commissioner that the information falling within parts 4a, 6, 7 and 8 of the EIR was exempt by virtue of regulation 12(4)(d) because it would be "in the public domain once registration is completed at Land Registry for the deeds".
21. The Council did not provide any other explanation in support of its reliance on regulation 12(4)(d). For example, it did not indicate or estimate when registration might be completed at Land Registry.
22. As set out above, the Commissioner explicitly reminded the Council at the outset of the investigation that it was required to provide full details of any exceptions claimed. Since the Council has failed to do this, the Commissioner cannot be satisfied that the Council has properly applied the exception. The Council has failed to demonstrate that the exception at regulation 12(4)(d) is engaged with respect to parts 4a, 5 7 and 8 of the request. Consequently the Commissioner finds that the exception is not engaged and he is not required to consider the balance of the public interest.

Regulation 12(5)(e) - confidentiality of commercial or industrial information

23. The Council maintained reliance on the exception at regulation 12(5)(e) in respect of parts 1, 2, 3 and 4 of the request. It did not explicitly withdraw reliance on regulation 12(5)(e) in respect of parts 4a, 6, 7 and 8 of the request, therefore the Commissioner has considered its submissions in relation to this information as well.
24. Regulation 12(5)(e) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.

25. In order for the exception to be engaged, four criteria must be met:
 - i. The information is commercial or industrial in nature.
 - ii. Confidentiality is provided by law.
 - iii. The confidentiality is protecting a legitimate economic interest.
 - iv. The confidentiality would be adversely affected by disclosure.
26. The Council advised the Commissioner that the information withheld under regulation 12(5)(e) related to a commercial activity involving the potential sale of land by the Council.
27. The complainant disputed that the information was commercial information.
28. Having examined the information in question the Commissioner accepts that it is commercial information. The Commissioner acknowledges the complainant's argument that the Council and SRC are "public bodies whose usual business is not the buying and selling of land for profitable purposes". However, the test is whether the information is commercial or industrial. In the circumstances of this case the information relates to the sale of land assets by the Council, who would be reasonably expected to secure value for money on behalf of residents. The Commissioner accepts that the requested information is therefore commercial information.
29. The Commissioner understands that in order to be covered by the common law duty of confidence information must not be trivial in nature or already in the public domain. The Council confirmed that the information in question was not trivial and had not been widely shared or published. It added that the information had been "jointly created and agreed with a third party", and that both parties had a genuine interest in the information remaining confidential. The Commissioner accepts that the second test is met.
30. The Council set out that disclosure of the withheld information would damage the economic interests of both parties, ie the Council and SRC. The Council provided the Commissioner with a confidential summary of the withheld information, which it considered provided evidence that the agreement between the Council and SRC was deserving of legal protection.
31. The Council further set out that disclosure would harm the Council's interests if the agreement were not to be executed. The Council stated that its ability to negotiate future agreements "could be negatively impacted". Specifically the Council maintained that

"If the withheld information was to be disclosed it would enable other potential developers to compare the amounts agreed for this stretch of land and insist on, potentially, more favourable terms."

32. The Commissioner is satisfied that the information in question is clearly commercial in nature, and accepts that the Council and SRC shared an understanding that it is confidential. The Commissioner further accepts this confidence is protecting a legitimate economic interest, namely the commercial interests of the Council and SRC. It follows that the fourth criterion is met and the exception at regulation 12(5)(e) is engaged.

The public interest test

33. Regulation 12(1) of the 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.
34. Regulation 2(2) states that the public authority must apply a presumption in favour of disclosure when considering the public interest.

Public interest in favour of disclosing the information

35. The complainant pointed out that the Council and SRC are public bodies who publish annual accounts. They referred the Commissioner to the minutes of the Council's Finance and Resources Committee Meeting on 5 March 2015, which noted that an agreement had been reached in terms of the valuation of 10 acres of land at the South Lake Area, Craigavon, to facilitate the development of the new Craigavon Campus for the Southern Regional College (SRC). The figure recorded was £675,000.
36. The complainant stated that they were also aware of an options agreement whereby the Council would receive "£500,000 before 31 March 2015 and If planning permission is not given, £470,000 would be paid back to Southern Regional College".
37. The Council acknowledges that disclosure of the requested information would promote accountability, transparency and scrutiny of its commercial activities. However it maintained that much of the requested information would eventually be publicly available via the Land Registry.

Public interest in favour of withholding the information

38. The Council set out that disclosure of the requested information "might damage value for money in relation to this agreement and others like it by disclosing the Council's bargaining position". It was concerned that

disclosure in this case would prejudice its negotiating position in "any future, similar arrangements".

39. The Council pointed out that it was required to "generate capital and commercial returns for the borough". It claimed that disclosure of the information would "result in prejudice, putting the sale and development of the site in jeopardy and resulting in a great loss to local people, the local economy, and the council".
40. The Council maintained that it was essential that it could conduct commercial relationships in "normal conditions of confidentiality without being at a serious disadvantage purely because of their status as a public authority".
41. The Council also claimed that the significance of the requested information was relatively limited, given the large amount of information in the public domain.

Balance of the public interest

42. The Commissioner acknowledges the general public interest in accountability, especially with regard to environmental information. He accepts that there is a legitimate public interest in disclosing information that would inform the public as to the Council's decision making process in this case. Disclosure of the requested information would provide insight into – and allow scrutiny of – the Council's decision to dispose of a considerable amount of land for development (albeit to another public authority). Such development would be likely to have a significant impact on residents and ratepayers, though it is not for the Commissioner to judge the merits or otherwise of the plans.
43. With regard to the public interest arguments in favour of maintaining the exception, the Commissioner considers that there will always be some inherent public interest in maintaining the principle of confidentiality and the relationship of trust. However, the Council has confirmed that the information at parts 4a, 6, 7 and 8 of the request will be made publicly available via the Land Registry. It is accordingly difficult for the Commissioner to accept that disclosure of this information through the EIR would harm the Council's relationship with SRC or future negotiating partners. Furthermore, the Commissioner expects parties who engage or are considering engaging with public authorities to be aware that the public rightly expect greater transparency and accountabilities in matters that have the potential to affect the environment.
44. As with any case, the Commissioner can only make his decision on the basis of the information provided to him. It is therefore essential that a public authority provide detailed and specific arguments in support of

any decision to refuse a request, otherwise the Commissioner is more likely to order the disclosure of information. This includes details of the public interest test in respect of any exceptions claimed. The Commissioner is mindful that he has issued a number of decision notices regarding the Council's handling of requests for information relating to plans for Craigavon City Park. The Commissioner is therefore of the opinion that the Council ought to be well aware of its obligations and sufficiently prepared to explain its position.

45. The Commissioner finds that the Council's public interest arguments are too general to carry significant weight in the balancing process. Consequently the Commissioner cannot be satisfied that in this particular case the public interest in maintaining the exception outweighs the public interest in disclosing the requested information.

Right of appeal

46. 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

47. 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.
48. 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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SK9 5AF