

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

Decision Notice

Date: 28 July 2016

Public Authority: Department for Communities
Address: Lighthouse Building
1 Cromac Place
Belfast
BT7 2JB

Decision (including any steps ordered)

1. The complainant has requested information regarding the proposed development of sports stadia in Northern Ireland. The Department for Communities refused the request in reliance on the exemption at section 35(1)(b) of the FOIA.
2. The Commissioner's decision is that the requested information is environmental information within the meaning of regulation 2(1)(c) of the EIR. Therefore the request ought to have been handled under the EIR rather than the FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Reconsider the request under the provisions of the EIR and issue a fresh response to the complainant.
 - To the extent that the public authority withholds any of the requested information it should issue a refusal notice that complies with regulation 14 of the EIR.
4. The public authority 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 the FOIA and may be dealt with as a contempt of court.

Request and response

5. In 2002, the UK Government agreed to transfer a number of former security sites to the Northern Ireland Executive. These included a former prison and security base at the former Maze Prison site, near Lisburn. In 2005 plans were announced to build a multi-sports stadium and international centre for conflict resolution on this site. However in 2009 the project was cancelled.
6. On 13 November 2015 the complainant requested the following information from the then Department for Culture, Arts and Leisure (DCAL):

"In a BBC report dated 28 January 2009 (view at http://news.bbc.co.uk/1/hi/northern_ireland/7856036.stm), reference is made to a paper prepared for the then-Sports Minister Gregory Campbell explaining why the plans to build a multi-sports stadium at the Maze were being abandoned. I would be grateful if you could provide me with a copy of the report referred to in that BBC report."
7. On 10 December 2015 DCAL refused the request in reliance on the exemption at section 35(1)(b) of the FOIA.
8. On 15 December 2015 the complainant requested an internal review. In particular the complainant argued that the request ought to have been handled under the EIR.
9. On 19 February 2016 DCAL provided the complainant with the outcome of the internal review. DCAL maintained its position that the requested information was not environmental, and was exempt under section 35(1)(b) of the FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 12 May 2016 to complain about the handling of his request. The complainant was of the view that DCAL, now part of the new Department for Communities, ought to have considered his request under the EIR and disclosed the information to him.
11. The Commissioner's decision in this case relates only to the appropriate access regime, ie, whether the requested information falls to be considered under the EIR or the FOIA. The Commissioner has made no decision as to whether the requested information should be disclosed, since the issue of the appropriate access regime must be resolved first.

Reasons for decision

Regulation 2: environmental information

12. 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-

(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. It is important 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.

14. The Commissioner recognises that it can sometimes be difficult to identify environmental information, and has produced guidance to assist public authorities and applicants.¹ 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.
15. 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(a) and (b).
16. The Commissioner wrote to the Department on 23 June 2016 to ask why it had decided to handle the request under the FOIA rather than the EIR. The Commissioner pointed out that the First Tier Tribunal had recently confirmed that information relating to the proposed redevelopment of a sports stadium in Northern Ireland (Casement Park) was environmental information within the meaning of regulation 2(1)(c) of the EIR.² The public authority in that case was DCAL, who appealed the Commissioner's decision notice and argued that some of the disputed information was not environmental. The Tribunal dismissed DCAL's appeal and upheld the Commissioner's decision notice.
17. The Commissioner put her view to the Department that the proposal to develop the Maze site as a sports stadium was also a measure or activity, as defined in regulation 2(1)(c), which was likely to affect the elements of the environment as set out in regulation 2(1)(a), in particular land and landscape.
18. The Department responded that the requested information, ie the Executive Paper, was not environmental information since it was "*remote from any environmental concern*".

¹ https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf

² DCAL v Information Commissioner, appeal no EA/2015/0242

19. The Commissioner has inspected the requested information and remains of the view that it ought to be considered environmental information within the meaning of the EIR. In the decision referred to above the Tribunal dismissed DCAL's argument that the disputed information had *"nothing to do with the environment"* (para 25). In doing so the Tribunal reaffirmed that:

"The real test is whether the information has something to do with a "measure" or "activity" because that measure or activity is the one likely to affect the environment." (para 27)

20. Accordingly, the Commissioner has considered whether the disputed information in the present case has something to do with a measure or activity that is likely to affect the environment. Since he is not making a decision regarding disclosure at this stage the Commissioner must be careful not to disclose any information that may be exempt. However the Commissioner can confirm that the paper discusses the development of the Maze Prison site in the context of sporting infrastructure, as well as the wider issue of the disposal of military and security sites by the UK Government. The paper also includes information relating to economic appraisals of various redevelopment options regarding existing sports stadia in Northern Ireland. The Commissioner believes all of these issues can be regarded as measures and activities that are likely to affect the land and landscape. For this reason the Commissioner does not accept the Department's argument on remoteness.
21. The Commissioner has also considered the Department's assertion that the information is not environmental information because the development proposal did not proceed. However, the Commissioner considers that the "measure" in this case is not restricted to the development of the Maze Prison site. As set out above the Commissioner notes that the requested information encompasses a range of issues – and proposals - relating to the development of sports stadia in Northern Ireland. Therefore the Commissioner is not persuaded by the Department's assertion in this respect.
22. For the reasons set out above, the Commissioner finds that the requested information is environmental information within the meaning of regulation 2(1)(c) of the EIR.

Regulation 14: refusal notice

Regulation 5(1) of the EIR states that a public authority which holds environmental information shall make it available on request, subject to certain conditions. If the public authority wishes to refuse the request it must issue a valid refusal notice under regulation 14 of the EIR.

Regulation 14(3) states that a refusal notice must include details of any

exception relied on, as well as the relevant public interest considerations.

23. Since in this case the Department failed to identify the requested information as environmental information, it follows that the Department erred in issuing a refusal notice citing FOIA exemptions.

Right of appeal

24. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

25. 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.
26. 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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Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF