

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

**Date:** 20 March 2019

**Public Authority:** Ards and North Down Borough Council

**Address:** Town Hall  
The Castle  
Bangor  
BT20 4BT

**Decision (including any steps ordered)**

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1. The complainant has requested the minutes of meetings that took place between the Ards and North Down Borough Council's (the council) Planning and Environmental Health departments, his local golf club and/or their consultants and local residents. The council disclosed one set of notes, with a paragraph redacted under regulation 13 of the EIR. The council however refused to disclose the remaining set of minutes under regulations 12(5)(b) and 12(5)(f) of the EIR.
2. The complainant is concerned with the remaining set of minutes and the council's refusal to disclose this information. The Commissioner's decision is that the council is entitled to rely on regulation 12(5)(b) of the EIR and that the public interest rests in favour of maintaining the exception.
3. The Commissioner has however found the council in breach of regulations 11 and 14(2) and 14(3) of the EIR.
4. The Commissioner does not require any further action to be taken.

## Request and response

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5. On 18 May 2017, the complainant wrote to the council and requested copies of minutes of the meeting of 28 October 2015 between residents and Planning Services and Environmental Health departments and minutes of the meeting of 5 May 2016 between the local golf club, its consultants and Environmental Health.
6. The council responded on 14 June 2017. It disclosed the notes taken at the meeting held on 28 October 2015 with the exception of the last paragraph, which it considered was exempt from disclosure under regulation 13 of the EIR. With regards to the minutes of the meeting on 5 May 2016, the council refused to disclose this information citing section 30(2) of the Health and Safety at Work (Northern Ireland) Order 1978.
7. Prior to requesting an internal review, the council confirmed that it had relied on section 30(2) of the Health and Safety at Work (Northern Ireland) Order 1978 in error. It stated that it was relying on sections 22(2)(d), (l) and (m).
8. The complainant requested an internal review on 25 August 2017.
9. The council carried out an internal review and notified the complainant of its findings on 7 September 2017. It upheld the applications of regulation 13 of the EIR and 22(d),(l) and (m) of the Health and Safety at Work (Northern Ireland) Order 1978.
10. The Commissioner received a complaint from the complainant on 2 November 2017.
11. On 14 June 2018 the Commissioner wrote to the council to request that it issue a fresh response to the complainant under the EIR for the meeting minutes of 5 May 2016. She advised the council that it had used Health and Safety at Work legislation incorrectly as a bar to disclosure.
12. The council issued a fresh response on 16 July 2018. It refused to disclose the withheld information under regulation 12(5)(f) of the EIR.
13. The complainant requested an internal review in accordance with regulation 11 of the EIR on 22 July 2018.
14. The council carried out an internal review and notified the complainant of its findings on 1 August 2018. It upheld the application of regulation 12(5)(f) of the EIR and informed the complainant that it also wished to rely on regulation 12(5)(b).

## Scope of the case

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15. The complainant contacted the Commissioner again on 13 August 2018 to complain about the way his request for information had been handled. The complainant confirmed that the withheld information relates to a planning application which is now complete. He therefore cannot accept that disclosure would have any adverse consequences on the parties involved. He also made reference to the public interest test and the public interest in openness, transparency and fair treatment for all.
16. The Commissioner notes that she asked the council to consider the request afresh in June 2018, as the council had not issued any response to one element of the request under the EIR. She has to consider the circumstances at the time the request was made and cannot take account of events post dating that. In this case, as she did ask the council to consider the matter afresh (which amounts to the same as the complainant resubmitting it himself to be considered afresh), she will consider the circumstances at the time of this instruction; 14 June 2018.
17. The Commissioner will first consider the council's application of regulation 12(5)(b) of the EIR. She will only go on to consider regulation 12(5)(f) if some or all of the withheld information is not exempt from disclosure under regulation 12(5)(b).

## Reasons for decision

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18. Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
19. The course of justice at regulation 12(5)(b) is a broad exception which encompasses any adverse effect on the course of justice and the Commissioner considers that it is not limited to only information that is subject to legal professional privilege (LPP). This allows for information that is not subject to LPP to still be covered by the exception, as long as disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature. The Tribunal affirmed this view in the case of *Surrey Heath Borough Council v Kevin McCullen and the ICO (EA/2010/0034)* when they acknowledged that the regulation covered more than just LPP.

20. As such, the Commissioner accepts that 'an inquiry of a criminal or disciplinary nature' is likely to include information about investigations into potential breaches of legislation, for example, planning law or environmental law.
21. The council explained that the withheld information is the minutes of a meeting that took place on 5 May 2016 between the council's Environmental Health Officers and members, officers, employees of and consultants engaged by the golf club close to the complainant's property to discuss matters pertaining to the golf course as part of a health and safety investigation being conducted by Environmental Health. The meeting was an attempt to address and resolve the health and safety matters without having to proceed to formal enforcement action. The council confirmed that the golf club attended voluntarily and engaged with Environmental Health in a spirit of fullness and frankness to attempt to resolve the issues. The council advised that later in 2016 the golf club submitted a planning application to carry out works to the golf course which included works to address the health and safety issues. The golf club was granted planning permission on 8 August 2018 but to the date of the council's submissions to the Commissioner (28 January 2019) the works have not been completed.
22. The council confirmed that the Environmental Health department's investigation will not be concluded until suitable and sufficient works in accordance with the planning permission have been carried out to reduce, so far as is reasonably practicable, the health and safety risk associated with play from the first tee. The council said that while it has no reason to doubt that the works will not be carried out, its Environmental Health investigation remains open until such time as they are carried out. Should the works not be completed to address the health and safety issues as per the planning permission, it may become necessary for the council to proceed with enforcement action.
23. The complainant disagrees the withheld information is covered by this exception. He stated that there has to be a firm basis for any exception and he does not consider, no matter how widely "the course of justice" is interpreted, the circumstances and subsequent material arising from those circumstances (the withheld information) come within that ambit in any shape or form. Regarding the council's supporting arguments, the complainant stated that the works have now been completed so the need for potential future enforcement has now evaporated.
24. Dealing with the matter of whether the withheld information is covered by the exception first, the Commissioner is satisfied that the withheld information falls within the wider interpretation of the exception as discussed in paragraphs 19 and 20 above. At the time the request was considered afresh there was still a live Environmental Health

investigation, a planning application under consideration (which included the work required to address the health and safety issues) and the real prospect that formal enforcement action may be required; such matters which come within "an inquiry of a criminal or disciplinary nature". The Commissioner has considered the contents of the withheld information and accepts that they directly relate to and discuss those issues and ongoing enquiries.

25. Turning now to the complainant's submission that because the works have now been completed there is no longer any prospect of future enforcement action, as detailed in paragraph 16 above, the Commissioner must consider the circumstances at the time of the request. Events afterwards cannot be taken into account. As the Commissioner ordered the council to consider the request afresh on 14 June 2018, she has considered the circumstances as of this date.
26. At this time planning permission had not been granted (as this did not take place until early August), the council's Environmental Health investigation was still open and there was still a real prospect that formal enforcement action may be required. The matter was therefore still live and under investigation.
27. The Commissioner will now consider whether disclosure of the withheld information would have an adverse affect.
28. The council explained that the golf club attended the meeting in question voluntarily and engaged with Environmental Health in the spirit of fullness and frankness to attempt to resolve the issues without the need for more formal action. It believes a person subject to a health and safety investigation would hold the reasonable expectation that information held by the council in relation to that investigation would be treated in confidence until, at the very least, the matter proceeds to court or is otherwise concluded. The council confirmed that disclosure would discourage the co-operativeness of persons under investigation; both in terms of this investigation and the golf club and future Environmental Health investigations. This would adversely affect the council's ability to deliver an effective and efficient health and safety regulatory function as it would inhibit full and frank discussions between Environmental Health and parties under investigation aimed at securing a satisfactory resolution as expediently and efficiently as possible. It stated that taking these matters into account it is the council's view that disclosure of information relating to an investigation which has not yet concluded would adversely affect the council's ability to carry out an investigation free from outside interference.
29. The Commissioner notes the circumstances at the time of the request. The health and safety investigation was still open, the planning

application was still being considered and there was a real prospect that matters may progress to the formal enforcement stage. The issue was still live and current. The Commissioner is satisfied that disclosure would have adversely affected the council's ability to investigate the ongoing issues at the golf club and bring these matters to an effective and efficient resolution. It would have discouraged the golf club from participating so freely and frankly due to the fear of public disclosure and damaged the ongoing relationship it had with the council. The Commissioner also accepts that disclosure would adversely affect the council's ability to investigate and resolve future cases effectively and therefore hinder its ability to carry out its statutory and core functions. Disclosure of such informal discussions whilst both parties are trying to work together to find a solution would deter those subject to such investigations from cooperating with the council.

30. For the above reasons the Commissioner is satisfied that regulation 12(5)(b) of the EIR is engaged. She will therefore now go on to consider the public interest test.

### **Public interest test**

31. The council stated that it appreciates how important it is for the public to understand why the council has acted in a specific manner in discharging its duties and that it has properly executed its regulatory functions. It recognises the need for transparency and accountability in its actions and that through openness and transparency it can build confidence that the council is discharging its duties in an appropriate and fair manner.
32. However, it considers the public interest rests in maintaining the exception. It stated that there is a strong public interest in ensuring investigations are conducted in such a manner as to ensure that no party under investigation is prejudiced. It confirmed that there is a public interest in protecting the ability of the council to maintain confidentiality in on-going investigations to ensure the full and frank cooperation of those under investigation, and in ensuring investigations are conducted free from outside interference. The council advised that there is an important public interest in the council delivering its health and safety regulatory functions in the most effective and efficient manner as reasonably practicable.
33. The complainant disagrees with the council's balance of the public interest test. He believes the public interest rests in disclosure. The complainant confirmed that he represents a group of local residents whose properties are in close proximity to the golf club concerned. He is of the view that the public interest rests with the residents; the citizens and rate payers whose rights to a family life and peaceful enjoyment of

their property has been adversely affected by the development at the golf club. The complainant does not consider there is any specific or genuine reason for non-disclosure other than to prevent the concerned residents from seeking and obtaining the truth.

34. The Commissioner considers there are compelling public interest arguments on both sides. There is the general public interest arguments in respect of openness, transparency and accountability; arguments which will always carry some weight. There is also the public interest in allowing the public access to recorded information which enables them to understand and take part in important decisions that are made by public authorities. Disclosure enables members of the public to scrutinise the actions of public authorities to ensure that they are carrying out their statutory functions efficiently and effectively.
35. The Commissioner also notes in this particular case that the withheld information is of great interest and importance to the local residents that have been affected by the development at the adjoining/nearby golf club. Disclosure would enable them to understand more clearly what actions have been taken by the council and why.
36. However, in this case, considering the circumstances at the time of the request, the Commissioner is of the opinion that there are stronger public interest arguments in favour of maintaining the exception. At the time of the request there was still an ongoing health and safety investigation, a planning application under consideration and the prospect of formal enforcement action should the issues identified not be resolved by less formal means. The matter was still very much live and the withheld information relevant and of importance to the ongoing issues and the investigations underway. The Commissioner considers there is a strong public interest in ensuring public authorities are able to carry out such investigations and statutory functions efficiently and effectively. Public authorities rely heavily on the informal cooperation of third parties and the free and frank discussions that are required if it is going to resolve matters without the need of more formal routes. The Commissioner does not consider it is in the wider public interest to damage the council's ability to do this in this particular case or future cases.
37. As the Commissioner has decided that regulation 12(5)(b) applies to all the withheld information and that the public interest rests in maintaining this exception, there is no requirement for her to go on to consider regulation 12(5)(f).

## Procedural matters

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38. Regulation 14(2) of the EIR states that a refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request. Regulation 14(3) states that the refusal shall specify (a) any exception relied upon and (b) the public interest considerations.
39. It is noted in this case that for the withheld information the council failed to initially issue an appropriate refusal notice in accordance with the EIR and within 20 working days of receipt. Instead it refused to disclose the information under different legislation. The Commissioner has therefore recorded a breach of regulation 14(2) and (3) of the EIR in this case.
40. The Commissioner also notes that the first internal review was not conducted in accordance with regulation 11 of the EIR as the council again considered the prospect of disclosure under different legislation.
41. Regulation 11(3) states:

The public authority shall on receipt of the representations and free of charge -

  - (a) consider them and any supporting evidence produced by the applicant; and
  - (b) decide if it has complied with the requirement.
42. As the council did not carry out the initial internal review under the EIR the Commissioner has recorded a breach of regulation 11 in this case.



## **Right of appeal**

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43. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

44. 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.
45. 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**

**Samantha Coward**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
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