

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

Decision notice

Date: 16 June 2020

Public Authority: Causeway Coast and Glens Borough Council
Address: Civic Headquarters
Cloonavin
66 Portstewart Road
Coleraine
BT52 1EY

Decision (including any steps ordered)

1. The complainant has requested information about the sale of a piece of Council-owned land. The Council provided some information, stated some information was not held, and withheld some information under regulations 12(4)(e), 12(5)(b) and 13 of the EIR.
2. The Commissioner's decision is that the Council was entitled to rely on the exceptions cited in respect of the withheld information. The Commissioner also finds that the Council does not hold any further information relevant to the request. The Commissioner does not require any steps to be taken.

Request and response

3. On 1 May 2019 the complainant requested from the Council the following information relating to the sale of a piece of land owned by the Council:

"I would like to make a freedom of information request in connection with land that was sold by the council [address redacted]. There is a planning application LA01-2018/0416/F which relates to the ground in question.

I would like to request a copy of all correspondence in connection with the sale above to include correspondence between the council and the purchaser, a copy of the independent valuation report and minutes of any meetings that were held in connection with the sale.

If the council holds any other information relating to this sale I would also like a copy of this. Can the council also confirm why this land was not advertised for sale? If there is no valuation report can the council confirm why an independent surveyor was not instructed to value the land before it was sold?

Can you also confirm if the council has compulsory purchase powers to purchase listed buildings that are in poor condition? Has the council investigated the fact that [name of building] is a dilapidated building and is having a detrimental impact on the neighbourhood? If there is any correspondence in relation to [name of building] I would like a copy of it sent to me."

4. The Council advised the complainant on 29 May 2019 that additional time was required, and a response would be issued no later than 17 June 2019.
5. On 10 June 2019 the Council requested clarification from the complainant, citing section 1(3) of the FOIA. The Council provided the complainant with an aerial map and asked him to mark the map with the area for which he required records.
6. The complainant responded to the Council on 11 June 2019. He pointed out that he had provided the Council with its own planning application reference and the description of the location of the land from the Council website. The complainant said it was not acceptable for the Council to require further clarification, and asked for the Council's complaint handling procedures so that he could make a complaint.
7. On 12 June 2019 the Council provided the complainant with a copy of its complaint procedure. It also explained how it had searched for the information and why clarification had been sought.
8. The complainant remained dissatisfied and requested an internal review on 4 July 2019.
9. The Council provided the complainant with the outcome of the internal review on 1 August 2019. It acknowledged that it had not responded within the statutory deadline. However the Council advised that it had conducted further searches which resulted in relevant files being located. The Council stated that a substantive response would follow.
10. The complainant was unhappy with this response and requested another internal review on 7 August 2019.

11. The Council issued its substantive response to the complainant on 16 August 2019. This stated that the request had been handled under the EIR rather than the FOIA. The Council explained how it had searched for the requested information, and provided some of the information that it had now located. The Council withheld other information in reliance on the exceptions at regulations 12(4)(e), 12(5)(b) and 13(1) of the EIR. The Council stated that it had not located information relating to valuation reports, advertisements or the appointment of an independent surveyor. The Council further explained that it had redacted some information which fell outside the scope of the request.
12. With regard to the part of the request relating to the specified building, the Council refused to confirm or deny that it held the requested information. The Council cited the exception at regulation 13(5A)(a) in respect of this refusal.
13. On 19 August 2019 the complainant wrote to the Council. He queried the Council's explanation that it had been unable to locate "*the valuation report, copy of advertisement and appointment of [sic] independent valuer*". The complainant asked the Council to look for the invoice paid to the valuer and contact the valuer to request a copy of the valuation report. The complainant also asked the Council to contact its solicitor to obtain a copy of the heads of terms and valuation report. The complainant asked questions regarding how the sale price was agreed at £750, especially since the site had subsequently been granted planning permission. Finally, the complainant queried redactions made to the minutes of a meeting. The complainant asked the Council to conduct another internal review and advised that he had complained to the Commissioner.
14. On 29 August 2019 the Council advised the complainant that it had already conducted an internal review, therefore it declined to conduct a further review.

Scope of the case

15. The complainant originally contacted the Commissioner on 7 August 2019 to complain that the Council had not provided him with the requested information. At this point the Council had not issued its substantive response.
16. The Council confirmed to the Commissioner on 10 September 2019 that it did not intend to conduct a further review. Given that the complainant had already requested, and received, an internal review

the Commissioner accepted the complaint as eligible for investigation.

17. The Commissioner notes that the Council disclosed the following information to the complainant:

- i) Copy of signed conveyance;
- ii) Minutes of 18 December 2012; and
- iii) Minutes of 22 January 2013.

18. The Commissioner considered the scope of the complaint to include the following:

- The complainant was unhappy with the time taken to respond to his request;
- He did not accept that the Council had identified all the relevant information it held; and
- He did not accept the Council's reasons for withholding some of the requested information.

19. During the course of the Commissioner's investigation the Council amended its position slightly. The Council reconsidered its refusal to confirm or deny that it held information relating to the specified building. The Council confirmed that it did hold some information, but stated that this information was exempt by virtue of regulation 13(1).

Reasons for decision

Information redacted as out of scope

20. The complainant was concerned that the Council had redacted part of the minutes of a Council meeting held on 18 December 2012. The minutes noted that a number of items were discussed "In Committee", ie without the public being present. The redacted portion of these minutes relate to items discussed In Committee.

21. The Commissioner has inspected the unredacted minutes and is satisfied that the redacted information does not fall within the scope of the complainant's request. She is further satisfied that the Council has disclosed in full the part of the minutes that fall within the scope of the request. The complainant is not entitled to receive information that falls outside the scope of his request and the Commissioner is satisfied that the Council was entitled to redact that information from the disclosed information.

Regulation 12(4)(a): information not held

22. The complainant was concerned that the Council had not provided him with all the information he expected to receive. Specifically the complainant was of the view that the Council ought to have provided him with information relating to any valuation of the land and any advertisement of the land for sale.
23. The Commissioner has explained to the complainant that the EIR only provides for recorded information to be disclosed into the public domain. This means that a public authority is only required to provide recorded information that it holds at the time of the request. In addition the Commissioner has stressed to the complainant that neither the FOIA nor the EIR in themselves require public authorities to hold information, they merely provide for access to information that is already held. The Commissioner cannot comment on whether a public authority ought to hold certain information, she can only decide whether or not, on the balance of probabilities, it does hold that information.
24. The Commissioner's published guidance states that when considering whether information is held, the Commissioner uses the civil standard of proof, i.e. whether it is likely or unlikely on the balance of probabilities.¹ In assessing such cases the Commissioner will consider the extent and quality of the authority's search for the requested information, any other explanations provided, and the complainant's reasons for believing that the information is held.
25. The Commissioner asked the Council how it had searched for the requested information, and how it was satisfied that it did not hold the information specified by the complainant.
26. The Council explained that it undertook several searches of physical and electronic records, including retrieving records from storage that related to the former Coleraine Borough Council.² The Council explained that the specific file containing information relevant to the request had been misfiled and was not identified until more extensive searches were conducted.

¹ https://ico.org.uk/media/for-organisations/documents/1169/determining_whether_information_is_held_foi_eir.pdf

² In 2015 the Council areas of Coleraine, Limavady, Ballymoney and Moyle merged to form the new Causeway Coast and Glens Borough Council.

27. The Commissioner acknowledges the complainant's frustration that the Council was initially unable to locate the information he requested. However she is of the view that the searches described by the Council were reasonable and appropriate, and ought to have identified any relevant information.
28. The Commissioner has seen no evidence to suggest that any relevant information was deliberately misfiled or withheld from the initial search. Therefore, on the balance of probabilities the Commissioner accepts that the Council is unlikely to hold any further information relevant to the request. It is of course possible that further information was misfiled, but there is no indication as to where any such information might have been placed. For this reason the Commissioner considers that it would be disproportionate to require the Council to conduct further searches without appropriate parameters.
29. The Commissioner considers that the complainant has made a reasonable argument as to why the Council might hold further information. However, the Commissioner understands that the Council explained to the complainant that the sale of the land followed a possessory title claim by the individual to whom the land was sold. The Council has also confirmed that it did not obtain a valuation or advertise the land for sale.
30. The Commissioner has stressed to the complainant that she cannot comment on whether the Council acted appropriately in respect of the sale of the land. The Commissioner accepts the Council's explanation as to how it is satisfied that it does not hold the information specified by the complainant. The Commissioner finds that the Council ought to have cited the exception at regulation 12(4)(a) of the EIR in respect of the information it did not hold. She has commented on this at Procedural Matters below.

Regulation 12(4)(e): internal communications

31. The Council withheld a small portion of information on the basis of regulation 12(4)(e). This regulation provides that information is exempt if it comprises internal communications.
32. The Commissioner has inspected the information in question and is satisfied that it comprises communications between Council officers, as well as communications between councillors and Council officers. Therefore the requirement of the exception is met.
33. Regulation 12(4)(e) provides a qualified exception. Therefore the information must be disclosed unless the public interest in maintaining the exception outweighs the public interest in disclosure.

In addition, regulation 12(2) provides that a public authority must apply a presumption in favour of disclosure.

Public interest in disclosure

34. The Council acknowledged the general public interest in transparency and accountability around decision making. It also acknowledged the benefit to the public in terms of increasing understanding and assisting public participation in decision making.
35. The Council also identified that disclosure of the internal communications would support the Council's decision making with regard to the sale of the land.
36. The Council confirmed that it had taken into account the presumption in favour of disclosure.
37. The complainant argued that the public had a right to know why the Council sold the land in the way that it did. He pointed out that the land had been sold to a private individual for a relatively small amount of money, and now that planning permission had been granted the land may be worth considerably more.

Public interest in maintaining the exception

38. The Council considered that it required "safe space" to consider its response to the possessory title claim without external interference. It argued that disclosure of the information into the public domain would make it more difficult to consider such cases in future, which would not be in the public interest.
39. The Council argued that the disclosure of internal communications could result in officials taking longer to draft emails on the assumption that they would be disclosed to the world at large. This would impact on the time taken to complete tasks and exchange information and opinions. It would consequently have a detrimental effect on the quality of engagement and advice and would lead to poorer decision making.
40. The Council pointed out that no information was withheld relating to the "democratically made policy decision related to the transfer of title". Therefore the Council was of the view that the public had been properly informed and disclosure of the withheld information would not increase public understanding of that decision. The Council was concerned that disclosure would however reveal its deliberations while considering the possessory title claim, which would give third parties an unfair advantage if similar cases arose in the future.

Balance of the public interest

41. The Commissioner accepts that there is a legitimate public interest in informing the public as to how the land went from public to private ownership. However she considers that this interest cannot be afforded significant weight in the context of the specific information in question. The Commissioner is mindful that the Council has disclosed information which goes some way towards meeting this interest, including a copy of the signed conveyance itself. The fact that there was a possessory title claim suggests that this was not a straightforward commercial transaction but involved the threat of litigation.
42. The Commissioner considers that there is a strong public interest in protecting the confidentiality of the internal communications in this case. She accepts that disclosure of the information would reveal the Council's deliberations and make it easier for other parties to bring similar claims in the future.
43. The Commissioner has had regard to the content of the information that falls within the scope of this exception. It does not indicate any wrongdoing, which might create a stronger public interest in disclosure. Although it would to a limited extent add to public knowledge about the land sale, it would not in the Commissioner's opinion significantly increase the detail of public knowledge.
44. The Commissioner finds that the public interest in maintaining the exception at regulation 12(4)(e) is sufficiently strong to outweigh the public interest in disclosure, even taking into account the presumption in favour of disclosure. Therefore she finds that the Council was entitled to withhold this portion of the requested information.

Regulation 12(5)(b): the course of justice

45. Regulation 12(5)(b) provides an exception where disclosure of the information in question 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.
46. The Council relied on the exception at regulation 12(5)(b) in respect of the bulk of the withheld information. This mainly comprised communication between the Council and its legal advisers regarding the possessory title claim and subsequent sale of the land. It also included documents created for the purpose of court proceedings.
47. The Council claimed that regulation 12(5)(b) applied to this information on the basis that it attracted legal professional privilege

(LPP), and that to disclose the information would adversely affect the course of justice.

48. The Commissioner has examined the information withheld under regulation 12(5)(b), and is satisfied that all of it can be described as communications between the Council and its legal advisers. She is further satisfied that it was created for the purpose of providing and obtaining legal advice about proposed or contemplated litigation, ie the possessory title claim.
49. The Commissioner has seen no evidence to suggest that the information has been shared with a third party, which would cause it to lose its confidential nature. Therefore the Commissioner accepts that the information in question attracts LPP.

Would disclosure have an adverse effect on the course of justice?

50. The Commissioner understands that LPP exists to protect the confidentiality of communications between a person and their legal adviser. This is a fundamental principle underpinning the justice system and the Commissioner accepts that advice on the rights, obligations and liabilities of a public authority will be relevant to the course of justice.
51. The Commissioner is satisfied that the disclosure of information subject to LPP would result in a loss of confidentiality, which in turn would have a detrimental effect on the course of justice.

Public interest in favour of disclosure

52. Again the Council acknowledged the general public interest in disclosure. It also recognised that disclosure of the information would enable the public to see that legal advice was sought and received. This would serve the public interest because it would demonstrate that decisions were made on the basis of that advice.
53. The Commissioner has also taken into account the arguments put forward by the complainant as set out above.

Public interest in favour of maintaining the exception

54. The Council's public interest arguments focused on the importance of ensuring access to full and frank legal advice as part of the justice system. The Council argued that a decision to disclose the information in question would be used against it in future cases. It would also prejudice the Council's ability to seek legal advice in future cases. The Council considered that the public interest would be better served by avoiding this kind of harm.

55. The Council also argued that the harm caused by disclosure could result in the public losing confidence in the Council's ability to defend its position in issues of land and boundaries.
56. The Council said the arguments did not provide a "clear, compelling and specific justification for disclosure".

Balance of the public interest

57. The Commissioner's published guidance³ on regulation 12(5)(b) states the following:

"In relation to LPP, the strength of the public interest favouring maintenance of the exception lies in safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice."

58. In the Commissioner's opinion, there will always be a strong argument in favour of maintaining LPP because of its very nature and the importance to it as a long-standing common law concept.
59. The Commissioner is assisted by the Upper Tribunal's comments in *DCLG v Information Commissioner & WR*.⁴ The Upper Tribunal accepted that the risk of the disclosure of legally privileged information, leading to a weakening of confidence in the general principle of LPP, was a public interest factor of "very considerable weight" in favour of maintaining the exception. It added that there would have to be "special or unusual factors" in a particular case to justify not giving it this weight.
60. This does not mean that the arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that LPP is designed to protect as described above.
61. The Commissioner notes that the withheld information is at least seven years old. The particular matter the advice relates to is no longer "live" in that the Council did sell the land to the individual. However the Commissioner does not consider it to be stale because

³ https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

⁴ [2012] UKUT 103 (AAC)

the content of the advice may be relevant to other cases involving possessory title claims in the future.

62. The Commissioner recognises the importance of protecting an authority's ability to defend its position properly and fairly without the other side being put at an advantage by not having to disclose its own legal advice in advance.
63. The Commissioner has consistently recognised the principle that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so, from the result of disclosure, could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice.
64. In this case the Commissioner accepts that disclosure of this information into the public domain would put the Council at a disadvantage in future cases, and this should be afforded significant weight in the balancing exercise.
65. The Commissioner is also persuaded that disclosure would be likely to affect the candour of future exchanges between the council and its legal advisers, which could lead to advice that is not informed by all the relevant facts. In turn this would be likely to result in poorer decisions made by the council because it would not have the benefit of thorough legal advice.
66. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their decisions. She also accepts there is a clear public interest where those decisions concern activities that could have significant impacts on the environment, such as land use.
67. However, having considered all the circumstances in this case the Commissioner is of the view that the Council's right to obtain legal advice in confidence outweighs the public interest in disclosure. The Commissioner has seen no evidence of wrongdoing, and has not identified any significant factors that would counter the weighty public interest in protecting the principle of LPP. The Commissioner has therefore concluded that the public interest in maintaining the exception at regulation 12(5)(b) outweighs the public interest in disclosure.

Regulation 13: personal data of third parties

68. Regulation 13(1) of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the

requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.

69. In this case the relevant condition is contained in regulation 13(2A)(a).⁵ This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data (the DP principles), as set out in Article 5 of the General Data Protection Regulation (GDPR).
70. The Council relied on regulation 13 in respect of correspondence between the Council and the individual to whom the land was sold. It also relied on regulation 13 in respect of correspondence with other individuals who lived in the vicinity of the specified building. The Council maintained that these individuals had a reasonable expectation that their information would not be disclosed to the public. The Council further stated that there was "no strong legitimate interest that would override the prejudice to the rights and freedoms" of the individuals. Therefore the Council concluded that disclosure of the information would be unlawful.
71. The Commissioner is satisfied that the information in question is personal data of a number of individuals other than the complainant. This is because the individuals could be identified from their names and contact information, and the information clearly relates to the individuals in the context of their correspondence with the Council. The Commissioner has therefore gone on to consider whether disclosure of this information into the public domain would be unlawful.
72. Article 5(1)(a) of the GDPR states that personal data shall be:
- "processed lawfully, fairly and in a transparent manner in relation to the data subject".*
73. The public authority must be able to rely on a lawful basis for processing (in this case disclosure of the information into the public domain) as set out in Article 6(1) of the GDPR.
74. The Commissioner considers that the lawful basis most likely to be relevant in relation to a request for information under the EIR is Article 6(1)(f) (legitimate interests):
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⁵ As amended by Schedule 19 Paragraph 307(3) of the Data Protection Act 2018.

"...processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child".

75. In considering the application of Article 6(1)(f) the authority should consider the following three-part test:
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the interests, fundamental rights and freedoms of the data subject.
76. In particular, the Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied. If the public authority cannot satisfy this three-part test then disclosure of the information into the public domain is likely to be unlawful and thus contravene the first DP principle.
77. The Council referred the Commissioner to a court case involving rights of way across the land in question. The Council suggested that the complainant's request may be linked to concerns over the rights of way. Ultimately though, the Council maintained that there was no strong legitimate interest in disclosing the information.
78. The complainant advised the Commissioner that he made the request because he had concerns about the way the sale of the land was handled. The complainant argued that disclosure of the information was necessary to inform and reassure the public about the matter. The complainant also raised concerns about rights of way regarding the land.
79. The Commissioner is prepared to accept that the complainant does have a legitimate interest in seeking information about the sale of land. She does not accept that there is a legitimate interest in disclosure of the third party personal data that does not relate to the individual to whom the land was sold. This information was obtained private individuals who were not involved in the sale of the land.
80. Having inspected the withheld information carefully the Commissioner is not satisfied that disclosure of any of the withheld information is in fact necessary to meet the legitimate interest identified above. The Commissioner is mindful that the Council has disclosed key information documenting the decision, including a copy

of the conveyancing document and minutes of Council meetings recording the decision to sell the land to the third party. The Commissioner is also mindful of her conclusion that the information that is not third party personal data has been properly withheld under other exceptions. Disclosure of the third party personal data would partially inform the public, but in the absence of other contextual information it would not be especially helpful to the public.

81. The Commissioner further acknowledges that correspondence regarding legal disputes such as a possessory title claim would not routinely be disclosed into the public domain unless the matter went to court. Correspondence between the parties would generally be exchanged in confidence since it would set out each side's legal arguments and details of negotiations. The Commissioner does not consider it necessary to disclose personal information that has been provided in such confidential circumstances.
82. In light of the above the Commissioner is not satisfied that the Council may rely on Article 6(1)(f) as providing a lawful basis for disclosing the third party personal data. It follows that disclosure of this information would be unlawful and in breach of the first DP principle. Consequently, the Commissioner finds that the Council was entitled to rely on regulation 13 of the EIR as a basis for withholding this information.

Procedural requirements

83. The complainant asked the Commissioner to consider the time taken to issue a response to the request.
84. Regulation 5(2) of the EIR states that, subject to exceptions, a public authority is required to make environmental information available no later than 20 working days after the date the request is received.
85. Regulation 9(2) states that if the authority decides that the request is too general, it may ask the requester to provide "more particulars in relation to the request". It must do this no later than 20 working days after the date the request is received.
86. Regulation 14(2) states that if the authority wishes to refuse a request it must issue a refusal notice no later than 20 working days after the date the request is received.
87. In this case the complainant submitted his request on 1 May 2019, and the Council asked him for clarification on 10 June 2019. This exceeds the 20 day time limit by a small margin, therefore the Commissioner finds that the Council failed to comply with regulation

- 9(2). The complainant argued that the Council should not have required clarification at all, but the Commissioner accepts that the Council had adequately explained to the complainant why it considered it necessary.
88. The Commissioner notes that the Council wrongly cited section 1(1) of the FOIA, rather than regulation 9(2) of the EIR. However this is a technical point and did not disadvantage the complainant. In the Commissioner's opinion the Council was correct to issue its substantive response under the EIR. The requested information related to the transfer of land from public to private ownership, and the content of some of the information also relates to the use of the land, as well as measures to control public access.
89. The Council provided its substantial response to the complainant on 16 August 2019. At this point the Council disclosed some information and issued a refusal notice regarding the remainder. The Commissioner accepts that this response was also outside the time for compliance, even taking into account the request for clarification. Therefore the Commissioner finds that the Council failed to comply with regulation 5(2) with regard to the information disclosed, and regulation 14(2) with regard to the refusal notice.
90. The Commissioner does however consider it important to acknowledge that the Council exceeded the time for compliance because it was undertaking further searches in order to locate the requested information. Had the Council not done so it may have wrongly concluded that it did not hold the information in question. This would have disadvantaged the complainant more significantly than the short delay in providing a substantive response.
91. It is unfortunate that the information had been misfiled, since this led to significant additional work for the Council. The Commissioner would remind public authorities that good records management is essential for compliance with access rights under the FOIA and EIR. The Commissioner is however aware that the information in question was created by Coleraine Borough Council before Causeway Coast and Glens Council came into existence.
92. The Commissioner would therefore also remind public authorities of the importance of ensuring that such legacy records are properly managed and retained in order to reduce the impact of administrative errors.

Right of appeal

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

94. 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.

95. 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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