

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 20 November 2023

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 requested from Causeway Coast and Glens Borough Council (the Council) information concerning two planning applications LA01/2018/1277/F and LA01/2021/0411/F relating to the same plot. The Council initially refused the request under regulation 12(4)(b) (manifestly unreasonable) of the EIR. However, it subsequently disclosed some information, but withheld the remainder, citing regulation 13 (third party personal data), regulation 12(5)(d) (confidentiality of proceedings) and regulation 6(1)(b) (publicly available) of the EIR.
2. The Commissioner's decision is that the Council was entitled to rely on regulations 13(1) and 12(5)(d) of the EIR to refuse to provide the information. With regard to regulation 6(1)(b), the complainant did not dispute the Council's reliance on this provision, therefore the Commissioner has not considered it in this notice. However, the Commissioner finds that the Council breached its obligations under regulations 5(2), 14(2) and 11(4) of the EIR.
3. The Commissioner does not require the Council to take any steps as a result of this decision.

Request, response and background

4. On 1 August 2022 the complainant wrote to the Council and requested information in the following terms:

"Under the Freedom of Information Act 2000 and with regard to the relevant All correspondence and notes of meetings and telephone conversations relating to Planning Application LA01/2018/1277/F made after 26th June 2020 until the 31st July 2022.

I request that this information be all correspondence and notes of communication from

- a) Internal communication between employees and/or representatives of Causeway Coast and Glens Council.
 - b) External communication between employees and/or representatives of Causeway Coast and Glens Council and any third party."
5. On 25 August 2022 the Council asked the complainant for clarification of his request, and on 28 August 2022 he provided the specific details to the Council in the following terms:

"1. All correspondence, notes of meetings and notes of telephone conversations in relation to Planning Application LA01/2018/1277/F made after 26th June 2020 until 31st August 2022. I request that this information should include:

- a) All internal communication between employees and/or representatives (including elected) of Causeway Coast & Glens Council. This should include Causeway Coast & Glens Building Control and include communication under any reference number allocated, by them, to Planning Application LA01/2018/1277/F for the purposes of construction.
- b) External communication between employees and/or representatives (including elected) of Causeway Coast & Glens Council. This should include correspondence with the Office of the Northern Ireland Public Service and include communication under any reference number allocated, by them, to Planning Application LA01/2018/1277/F for the purposes of query and investigation.

2. All correspondence, notes of meetings and notes of telephone conversations in relation to Planning Application LA01/2021/0411/F made on or before publication of that application in May 2021 and until 31st August 2022. I request that this information should include:

- a) All internal communication between employees and/or representatives (including elected) of Causeway Coast & Glens Council. This should include Causeway Coast & Glens Building Control and include communication under any reference number allocated, by them, to Planning Application LA01/2021/0411/F for the purposes of construction.
 - b) External communication between employees and/or representatives (including elected) of Causeway Coast & Glens Council. This should include correspondence with the Office of the Northern Ireland Public Service and include communication under any reference number allocated, by them, to Planning Application LA01/2018/1277/F for the purposes of query and investigation.”
6. On 13 December 2022 the Council responded. It refused the request under regulation 12(4)(b) (manifestly unreasonable) of the EIR. On the same day the complainant requested an internal review.
 7. On 31 March 2023 the complainant contacted the ICO about not receiving the Council’s review response.
 8. As a result of the Commissioner’s intervention, on 1 August 2023 the Council provided the complainant with its review response and disclosed the following information:
 - (a) Correspondence exchanged between the complainant and the Council;
 - (b) Policies, procedures, guidance and legislation.
 9. However, the Council withheld the remaining information, which it considered to be the personal data of third parties. It also cited regulation 12(5)(d) (confidentiality of proceedings) and regulation 6(1)(b) (publicly available) of the EIR
 10. The Commissioner asked the Council to provide a copy of the withheld information and detailed explanation for the parts of the EIR cited. The withheld information, the Council’s submissions and an explanation regarding the complainant’s request for an internal review were presented to the Commissioner on 1 August 2023. The Council determined the information which should be withheld under regulation 13(2A) of the EIR were the names of: Council officers; Planning applicants; Planning agents; and Elected members. The Council stated its reasoning, it also said that four categories of information are held and set out the relevant considerations to the Commissioner.

11. The complainant expressed his dissatisfaction with the Council's review response and set out his points of concern:
 - "The current FOI request is made because it became apparent at beginning August 2022 that the actual build that was taking place was not as per the plan approved (LA01/2018/1277/F) but as per the later application that was withdrawn in early 2022 (LA01/2021/0411/F).
 - The build started in spring 2022 and was completed in December 2022.
 - The fact that the build was not according to the plan as approved was acknowledged by CCG, in writing, in November 2022.
 - I believe it is in the public interest and my interest to understand how a plan that was approved can become a build to a plan that was withdrawn."
12. The complainant informed the Commissioner that out of the 17 pieces of information which the Council had provided, he believes only four of the files are "arguable pertinent to the information as requested in the FOI request of 1 August 2022 and as clarified. The remaining 13 files do not reference either of the planning applications on which information was requested." The complainant argued that the 13 files are policy documents and are already in the public domain. He said the disclosed information is not the Council's correspondence, notes of meetings, notes of telephone conversations relating to either planning application LA01/2018/1277 or LA01/2021/0411. Also, several of the documents are not produced by the Council. With regard to information already in the public domain, the complainant is of the view that there is "very little" information in scope of his request which is in the public domain.
13. The complainant further argued that the Council had not disclosed information on internal communication about the planning applications in question, or information on external communication as requested. He said, in respect of planning application LA02/2018/1277/F the Council had provided him with redacted copies of the complaint responses of July, September and October 2020, but that no other information had been disclosed and specifically, no communication regarding the build itself. The complainant reiterated his request for disclosure of information "regarding the planning applications referenced and the build as it has happened on the ground."
14. The complainant criticised the Council's review and said it was "error riddled, factually and grammatically..." he disputed some of the reasons which the Council cited for refusing to disclose the information.

15. The complainant was dissatisfied with the Council's untimely responses to his FOI requests. He also questioned the 'quality' of the Council's review. He said that it "does not consider the specific circumstances of the case and fails to address the time period or the specific reason for this further request for information."

Reasons for decision

16. The Commissioner notes the complainant's concerns about the quality and accuracy of the Council's review. These concerns, whether justified or not, would not amount to any statutory breach of the legislation. However, he has considered the Council's compliance with the statutory timeframes for responding to this request.
17. This reasoning covers why the Council was entitled to rely on regulations 13(2A) and 12(5)(d) of EIR to refuse to provide information to parts of the request. As the Council subsequently disclosed some information to the complainant, it is not necessary for the Commissioner to consider regulation 12(4)(b) which the Council had initially cited.

Regulation 13 – personal information

18. Regulation 13(1) of EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the requester, and if its disclosure would otherwise breach any of the data protection principles.
19. In this case, the relevant condition is contained in regulation 13(2A)(a) 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 UK General Data Protection Regulation ('UK GDPR').
20. Firstly, the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (DPA). If it's not personal data, then regulation 13(1) of the EIR cannot apply.
21. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of the information would breach any of the DP principles.

Is the information personal data?

22. Section 3(2) of the DPA defines personal data as:

“any information relating to an identified or identifiable living individual”.

23. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
24. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
25. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
26. The Council provided its external communications but with the names redacted. Having considered the withheld information, the Commissioner is satisfied that these names are personal information. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.
27. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA or EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

28. Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

29. In the case of an EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
30. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

31. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“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”¹.

32. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the EIR, it is necessary to 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 legitimate interest(s) or fundamental rights and freedoms of the data subject.

33. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interest test:

34. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.

¹ Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

35. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
36. In this case, some of the requested information had been disclosed to the complainant. However, the complainant strongly believes publication of the information (all correspondence and notes of communication) which had not been disclosed, is in the public interest "to understand how a building in an application as approved, can be built to an application plan as withdrawn."
37. The Council considers there is no identified legitimate interest in transparency in relation to this matter.
38. In this instance, the Commissioner deems the complainant is pursuing a legitimate interest – albeit that it is largely a private interest.

Is disclosure necessary?

39. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
40. The Council considers there is "no pressing need for disclosure of this information" because this planning application has been subject to an internal complaint and a referral to the Public Service Ombudsman.
41. In the Commissioner's view, being able to understand the details of specific planning applications through the redacted correspondence, satisfies the general legitimate interest in the Council being transparent about its decision-making. To include the names would add little value to the information, and the complainant had already raised an Ombudsman complaint without having had this specific information. The Ombudsman would have been able to consider the unredacted information.
42. The Commissioner has decided disclosure is not necessary. He has therefore concluded that the Council was entitled to withhold the personal data under regulation 13(1), by way of regulation 13(2A) of the EIR.

Regulation 12(5)(d) – confidentiality of proceedings

43. Regulation 12(5)(d) of the EIR says that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that, or any other public authority where such confidentiality is provided by law.
44. The engagement of the exception rests on three conditions being met.
45. First, the confidentiality referred to by a public authority must specifically relate to “proceedings” that it or another public authority is required to carry out.
46. In his guidance², the Commissioner interprets ‘proceedings’ as possessing a certain level of formality. They will include, but are not limited to: formal meetings to consider matters that are within the authority’s jurisdiction; situations where an authority is exercising its statutory decision making powers; and legal proceedings.
47. The information withheld for the purposes of this exception, relates to the Ombudsman’s investigatory process – this is a formal proceeding.
48. Second, this confidentiality must be provided by law. The Commissioner’s guidance states; “If a piece of legislation states that particular proceedings are confidential, the confidentiality of those proceedings will have a basis in statute law.”
49. Section 30(5) of the Public Services Ombudsman Act (Northern Ireland) 2016 states; “An investigation must be conducted in private.” Section 49 of that Act provides further protection by forbidding the disclosure of information obtained by the Ombudsman in the course of either deciding whether to investigate a complaint or in investigating that complaint. The Commissioner is therefore satisfied that the confidentiality of these proceedings is protected by law.
50. Third, it must be demonstrated that disclosure would have an adverse effect on the confidentiality of the proceedings.

² [Regulation 12\(5\)\(d\) – confidentiality of proceedings \(Environmental Information Regulations\) | ICO](#)

51. The Commissioner asked the Council whether or not the withheld information relates to information supplied to the Ombudsman regarding investigation, or if it relates to internal communications within the Council.
52. In its response, the Council explained that the information it holds relates to the Ombudsman's investigation which is made up of the following categories:
 - a) Complaint correspondence including procedures and policy
 - b) Policies, legislation and guidance
 - c) Development management information
 - d) Correspondence between the Council and the complainant regarding his complaint
53. The Council stated category (a) included internal correspondence regarding complaints against decisions made by the Planning Team; related policy information and correspondence between the Council and the Ombudsman regarding the Ombudsman's investigation.
54. The Commissioner is satisfied that this internal communication relates to the Ombudsman's investigation and disclosure would affect that investigation's confidentiality. The reason is that the correspondence includes details of specific lines of enquiry for the investigation. It would reveal what the Ombudsman was specifically investigating and how the investigation was being conducted.
55. With regard to category (b) the Council said this information consists of policies, legislation and guidance regarding the planning application relevant to the investigation and provided to the Ombudsman. Whilst the policies themselves might be published, the specific selection of policies would, again, reveal details of the Ombudsman's investigation.
56. Regarding category (c) the Council deemed this information as publicly available on the Planning Portal. Category (d) contains correspondence between the Council and the complainant about his complaint. Copies of this were provided within the Council's review response.
57. The focus of this exception is not the information itself, but the proceedings and what the information reveals about those proceedings.

58. The Ombudsman's investigations must be carried out confidentially and that confidentiality is protected by law – regardless of whether the investigation has concluded. Although this particular investigation has concluded, the confidentiality of the proceedings remains protected by law. The withheld information would reveal the inner workings of this particular investigation, thereby eroding the confidentiality of the proceedings.
59. On this basis, the Commissioner has decided disclosure would have an adverse effect on the confidentiality of proceedings. Regulation 12(5)(d) of the EIR is therefore engaged.

Public interest test

60. The Commissioner must consider the balance of the public interest. In doing so, he has taken into account the presumption in favour of disclosure set out in regulation 12(2) and the public interest in transparency and accountability.
61. The complainant argued that it is in the public interest "to understand how a plan that was approved can become a build to a plan that was withdrawn."
62. The Commissioner accepts in this case there is a public interest that public authorities are appropriately open and transparent about their decision-making processes. This is particularly so in respect of concerns about planning matters.
63. The Council recognises that it would allow for more informed debate on the issue, and disclosure would also promote accountability and transparency in relation to the Council's decisions. It said it would assist the public to understand and challenge the Council's decisions; the specific circumstances of the case and the content of the information requested in relation to those circumstances.
64. The Council also took into account whether any of the information was already in the public domain; and the impact of disclosure upon individuals and the wider public.
65. However, the Council argued the fact that the planning application at the centre of the request has been subject to an investigation and an outcome, reduces the public interest in transparency. That remains the case even if those proceedings were conducted in private.

66. The Council said, due to the likelihood and severity of harm which disclosure may cause - there is a significant inbuilt weight attached to the need to preserve confidentiality. If the information in question was disclosed now, there is the potential for it to undermine the relationship between the Ombudsman and the Council in the future.
67. The Council stated it would be in breach of section 49 of the Public Services Ombudsman Act (Northern Ireland) if it were to provide this information. This would not be true, as Regulation 5(6) of the EIR specifically disapplies any legislation that would prevent the disclosure of information under the EIR. However the Commissioner recognises that there is normally an expectation that such material would remain confidential.
68. The Council's view is the Ombudsman and the Council need to be able to consult, discuss and consider information within a process which is private.
69. Though this particular investigation has concluded, its confidentiality remains protected. The Council must be able to present the full facts of the matter candidly before the Ombudsman so that the matter can be investigated thoroughly. If the Council fears that candid responses will subsequently enter the public domain, it may be less co-operative with the Ombudsman in future and that is not in the public interest.
70. The Commissioner acknowledges that there is a public interest in planning applications. He is aware of information available on line (Planning Applications Validated) which includes details of proposals for each application. The Commissioner also accepts that the public may wish to understand details of approved plans and withdrawn plans. However, given the size of the applications in question, the Commissioner is not persuaded that the public interest in disclosure is substantial - particularly given the information already in the public domain.
71. In this case, the Council provided the complainant with some information relating to his request and also explained its rationale for withholding information. The Commissioner considers that greater weight is placed on the proceedings of the Ombudsman. As stated within this notice, confidentiality is needed to ensure the ombudsman process is at its most effective.
72. The Commissioner has decided that in all the circumstances, the public interest in maintaining the application of regulation 12(5)(d) outweighs the public interest in disclosure. Therefore, the Council was not obliged to disclose this information.

Procedural matters

Regulation 5(2) – Time for responding

73. Regulation 5(2) of the EIR states information shall be made available as soon as possible and no later than 20 working days after the date of receipt of the request.
74. 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.
75. In this case, the request was made on 1 August 2022 and on 26 August 2022 the Council asked the complainant to clarify his request. Following clarification, the Council did not provide its response until 13 December 2022. This is 95 working days and is therefore not compliant with the timeframe set out in the EIR.
76. The Commissioner has found that the Council breached its obligations under both regulations 5(2) and 14(2) of the EIR.

Regulation 11 – Representations and reconsideration

77. Regulation 11 of the EIR covers public authorities' obligations in relation to the carrying out of internal reviews of the handling of requests for information.
78. Regulation 11(4) of the EIR provides that a public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations.
79. The complainant asked for an internal review on 13 December 2022. Following the Commissioner's intervention, the Council provided its review response on 1 August 2023, more than 40 working days later.
80. From the evidence presented to the Commissioner, it is clear the Council failed to comply with its obligations under the EIR. The Commissioner finds that the Council therefore breached regulation 11(4) of the EIR.

Right of appeal

81. 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

82. 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.

83. 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

Roger Cawthorne
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Wycliffe House
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