

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 21 May 2019

**Public Authority:** Department for Communities Northern Ireland

**Address:** 1-7 Bedford Street  
Belfast BT2 7EG

#### **Decision (including any steps ordered)**

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1. The complainant has requested information from the Department for Communities Northern Ireland (DfC) in relation to the proposed redevelopment of Casement Park. The DfC disclosed some of the requested information to the complainant, however it refused to disclose certain information ('the withheld information') citing regulations 12(4)(e) and 12(5)(e) of the EIR as a basis for non-disclosure.
2. The Commissioner's decision is that the DfC has correctly applied the exception as set out in regulations 12(4)(e) and 12(5)(e) to the withheld information.
3. Therefore, the Commissioner requires no steps to be taken.

## Request and response

4. The complainant on 27 April 2017 made the following request for information to the DfC:-

The items of information I am requesting are as follows:

"The final version of the Outline Business Case (OBC) for Regional Stadia Development in Northern Ireland. To clarify, my request encompasses the appraisal of options proposed by the three sports governing bodies, i.e., the GAA, IRFU and IFA. The comments of Departmental economists on the OBC (i.e., the then-Department for Culture, Arts and Leisure, now subsumed within DfC), including those which formed the basis of discussions between DCAL and other external organisations, including Sport NI."

5. The DfC responded to the complainant on 26 June 2017. It refused to disclose some of the requested information ("the withheld information") citing regulations 12(4)(e) and 12(5)(e) of the EIR as a basis for non-disclosure. It did disclose some information in relation to the complainant's request.
6. The complainant then requested an internal review of the DfC's decision on 18 May 2017, the result of which was communicated to him on 27 April 2018. The reviewer upheld the original decision, however provided the complainant with some additional information that had been omitted from the DfC's original response to him.

## Scope of the case

7. The complainant contacted the Commissioner on 28 September 2017 to complain about the way his request for information had been handled, in particular that he had not yet received a response to his request for internal review. Following correspondence from the Commissioner, the DfC provided a response to the complainant's request for internal review on 27 April 2018.
8. The Commissioner has considered the DfC's handling of the complainant's request, in particular the delay in issuing its internal review response and its application of regulations 12(4)(e) and 12(5)(e) of the EIR to the withheld information.

## Reasons for decision

### Regulation 12(4)(e) – internal communications

9. Regulation 12(4)(e) states that a public authority may refuse to disclose information to the extent that the request involves the

disclosure of internal communications. It is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. Rather, so long as the requested information constitutes an internal communication then it will be exempt from disclosure. A wide range of internal documents are caught by the exception, although in practice the application of the exception is limited by the public interest test.

10. The EIR do not provide a definition of what constitutes an internal communication, but the underlying rationale behind the exception is that public authorities should have the necessary space to think in private. Although the exception has no direct equivalent in the Freedom of Information Act 2000, many arguments about protecting a private thinking space are similar to those made under section 35 (formulation of government policy) and section 36 (prejudice to effective conduct of public affairs).
11. Regulation 12(8) of the EIR states that for the purposes of regulation 12(4)(e), internal communications includes communications between government departments.
12. Part of the withheld information in this case concerns internal communications (comments of Departmental economists regarding the Outline Business Case (OBC)). The Commissioner is therefore satisfied that this information falls within the scope of regulation 12(4)(e) of the EIR.

### **Public Interest Test**

13. As with all EIR exceptions, regulation 12(4)(e) is subject to the public interest test as set out at regulation 12(1)(b). Therefore, the Commissioner must determine whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
14. Public interest arguments in favour of maintaining this exception are focused on protecting the public authority's private thinking space. There is no automatic or inherent public interest in withholding an internal communication. Arguments must relate to the particular circumstances of the case and the content and sensitivity of the specific information in question.
15. In her guide to the EIR, the Commissioner advises that, in addition to the general public interest in transparency and accountability, there is a further public interest in disclosing environmental information because it supports the right of everyone to live in an adequate

environment, and ultimately contributes to a better environment. The importance of openness in relation to environmental information is evidenced by regulation 12(2), which requires a public authority to apply a presumption in favour of disclosure.

### **Public interest factors in favour of disclosure**

16. The DfC has explained that it is aware of the need for openness, transparency and accountability in the way in which it conducts its business. It therefore considers that some factors lend weight in favour of the information being disclosed, especially as this is a case which concerns the expenditure of public money.
17. The DfC is also aware that disclosure of the information would inform public awareness of, understanding of, and participation in its decision-making processes.
18. Disclosure of the information would inform the public regarding the redevelopment of Casement Park, a matter in which there is considerable public interest. The public would be able to scrutinise the financial viability of the options as set out in the withheld information.
19. The DfC therefore considers, and the Commissioner agrees, that some factors lend weight in favour of the withheld information being disclosed.

### **Public interest factors in favour of maintaining the exception**

20. The DfC stated that it requires a 'safe space' away from public scrutiny. Disclosure of incomplete material would undermine the integrity of the decision-making process and inhibit free and frank discussion, which is important for departmental economists to have in order to be able to give their views freely and frankly, without fear of disclosure. The inhibition of relevant individuals in expressing their views and opinions and the undermining of the decision-making process as a whole would not be in the public interest.
21. The DfC also states that the development of Casement Park is not completed and release of the withheld material into the public domain would distract public debate away from the substantive issues.
22. The DfC states that it must be able to undertake a full consideration of all of the options, requiring a private space in which to undertake scenario planning and risk assessment. In this context, disclosure of advice and opinions may close off discussion, undermining frank reporting and the identification and assessment of potential risks.

## Balance of the public interest factors

23. Whilst the Commissioner is aware of the need for openness, accountability and transparency in the way in which government departments and other public authorities conduct their business, she is also mindful that the DfC is aware of this as well, and to achieve this as far as possible, the DfC has disclosed most of the information it holds which was requested by the complainant. The only information it withheld was that information which constituted internal communications, and that information, disclosure of which it considered would adversely affect commercial confidentiality, which is explored later in this notice.
24. With regard to the safe space arguments put forward by the DfC, the Commissioner recognises and accepts that significant weight should be given to such public interest arguments; the concept that departmental officials need a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction, where the discussions are live and ongoing and the requested information relates to those discussions. This safe space is well established, with the Information Tribunal ruling in *Department for Education and Skills v Information Commissioner and Evening Standard (EA/2006/0006)* that:-
- 'Ministers and officials are entitled to time and space to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy'.*
25. The Commissioner accepts that premature disclosure of the withheld information, would not have responsibly managed public expectations and may have led to members of the public placing undue reliance on the information. It could also have distracted public debate away from the substantive issues surrounding the proposed options for the redevelopment, although the Commissioner does accept that it is open to the DfC to provide contextual information alongside the withheld information.
26. Clearly, there would be a strong and compelling public interest in transparency and accountability in the decision-making process surrounding the redevelopment, but the Commissioner considers that this has been met as far as possible, and public interest and debate informed as far as possible, by that information which the DfC has already disclosed in relation to the Casement Park redevelopment.

27. The Commissioner has concluded that, at the time of the request, the public interest in disclosure of the withheld information was outweighed by the stronger public interest in maintaining the important and necessary safe space to enable the DfC to reach a carefully considered and robust decision.

### **Regulation 12(5)(e) – commercial confidentiality**

28. Regulation 12(5)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect “the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest”.
29. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She has considered how each of the following conditions applies to the facts of this case:
- Is the information commercial or industrial in nature?
  - Is the information subject to confidentiality provided by law?
  - Is the confidentiality provided to protect a legitimate economic interest?
  - Would the confidentiality be adversely affected by disclosure?

### **Is the information commercial or industrial in nature?**

30. The DfC states that the information withheld from the OBC consists of commercial information provided by the three sports governing bodies as part of commercial negotiations for the redevelopment of sports stadia in various areas of Northern Ireland. Having perused the withheld information, the Commissioner accepts that the information is commercial in nature.

### **Is the information subject to confidentiality provided by law?**

31. It is understood by the Commissioner that the DfC regards the information as being protected by the common law of confidence. For information to be protected in this way it has to have been provided in circumstances that would give rise to an expectation of confidence. The information itself also has to have the necessary quality of confidence.

32. The information constitutes sections of the OBC for the redevelopment of the sports stadia. This is a voluminous document comprised of options, financial analyses, cost-benefit analyses, strategies and proposals from the governing bodies of the three relevant sports – football, Gaelic games and rugby. The information withheld under regulation 12(5)(e) consists of the commercial information provided to the business consultants by the three sports governing bodies for the purposes of the OBC. That information was provided by the sports governing bodies upon the understanding that it was restricted, commercially sensitive and would not be shown to any other person. The Commissioner accepts that the information was provided to the DfC in circumstances that would give rise to an expectation of confidence.
33. The information also has to have the necessary quality of confidence, i.e. it is neither generally known nor is it trivial. Having examined the information the Commissioner is satisfied that the information is not generally known and would be known to only a limited number of people. She is also satisfied that it is not trivial, relating as it does to the commercial information of the three sports governing bodies.
34. In respect of whether that confidentiality is protecting a legitimate economic interest it is first important to look at whose legitimate interests are being protected. In this case it is the interests of both the DfC and the various sports bodies. The next step is to ensure that the interests in question are both economic and legitimate ones. Clearly the proposed development of sports stadia is an entirely legitimate economic interest.
35. However the real test of this condition is whether the duty of confidence serves to protect that economic interest. In other words, if the economic interests of the DfC and the other parties would be adversely affected if that duty of confidence was not in place and the information was disclosed.
36. It should be noted that under the EIR the Commissioner has to consider whether disclosing the information '**would**' be harmful. This is a high test. The Commissioner has to be satisfied that it is more probable than not that the harm would arise.

37. Where the interests that would be harmed are those of someone other than the public authority, the public authority must consult with that third party or parties. It is not sufficient for the public authority to speculate on why disclosure of the information would harm the interests of those parties. DCAL has consulted with those other parties and has obtained representations from them as to how disclosure of the information would adversely affect their economic interests.

### **How disclosure would affect the economic interests of the DfC**

38. The DfC has informed the Commissioner that disclosure by it would undermine the DfC's relationship with the sports governing bodies and would affect the DfC's ability to conduct similar business with those bodies or with other delivery partners in the future. It is important to preserve trust in the DfC's ability to treat third party information, provided by such bodies or by other delivery partners, in confidence. If the sports governing bodies or other delivery partners do not have assurance in the future that commercial confidences will be respected, there is a significant risk that they will be discouraged from confiding in the DfC. Ensuring the free flow of information is critical for the DfC's functions.

### **How disclosure would affect the economic interests of the sports governing bodies**

39. The DfC has consulted with the various sports governing bodies regarding the disclosure of their commercial information. The information withheld under regulation 12(5)(e) relates to the current and future business plans of those bodies. Each of the bodies has to operate in a competitive commercial environment and it is their view that information which they provided in the strictest confidence to a government body should not be disclosed to a member of the public at this stage.



40. The OBC contains details of the sports governing bodies' projected future income and expenditure, broken down into various categories, which is information that could be used by their competitors to gain a commercial advantage. The DfC also states that other concert venues are also direct competitors for some parts of the sports governing bodies' business. The DfC considers that it is essential not to disclose commercially sensitive data relating to the sports governing bodies as this would directly affect the sports governing bodies' ability to negotiate or re-negotiate arrangements such as commercial deals or even wages and salaries.
41. Specifically in terms of the GAA, disclosure of the commercial information would prejudice the GAA's ability to redevelop and operate Casement Park as a viable stadium. This would risk defeating the purpose of providing public funding for the project.
42. Having considered the information and the arguments submitted by the DfC and its partners the Commissioner is satisfied that, should the information be disclosed, then a degree of harm would occur to the legitimate interests of the parties. The requirement for Regulation 12(5)(e) is that an adverse effect would occur. There is no requirement to show that the harm would be significant in order to engage the exception. However questions about the depth, the severity and the frequency of the harm do play a part in determining whether the public interest lies in disclosure of the information or not.
43. If the information which has been withheld under Regulation 12(5)(e) were to be disclosed the Commissioner is satisfied that a degree of harm would be caused to legitimate economic interests of the DfC and the governing bodies of the three sports, for the reasons provided by the DfC in consultation with those bodies. Therefore, she considers that the exception under regulation 12(5)(e) is engaged in relation to the information withheld under that exception. The Commissioner must therefore carry out a public interest test as required by Regulation 12(1)(b) of the EIR. The test is whether the public interest in maintaining the exception outweighs the public interest in the information being disclosed. If it does not then the information should be disclosed in spite of the exception being engaged.

### **Public interest test**

44. Regulations 12(1) and (2) of the EIR provide:

*"(1) ... a public authority may refuse to disclose environmental information requested if-*

*(a) an exception to disclosure applies under paragraphs (4) or (5); and  
(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*

*(2) A public authority shall apply a presumption in favour of disclosure."*

### **Public interest in disclosing the information**

45. In its submissions to the Commissioner the DfC acknowledged the general presumption in favour of disclosure provided by regulation 12(2) of the EIR.

46. The DfC also accepted that there is always a public interest in transparency and the good decision making and accountability within public authorities which this can promote.

47. The DfC is also aware that disclosure of the information would inform public awareness of, understanding of, and participation in its decision-making processes.

48. Disclosure of the information would inform the public regarding the redevelopment of Casement Park, a matter in which there is considerable public interest. The public would be able to scrutinise the financial viability of the options as set out in the withheld information.

49. The DfC therefore considers, and the Commissioner agrees, that some factors lend weight in favour of the withheld information being disclosed.

### **Public interest in maintaining the exception**

50. The DfC argued that disclosure of the withheld information would have an adverse impact on negotiations for tenders. It is in the interests of the delivery partners, the DfC and the general public that best value is obtained in the delivery of the projects.

51. The DfC further argued that publication of the withheld information relating to Casement Park before the procurement process is complete

would significantly prejudice the outcome of the ongoing procurement competitions and jeopardise the integrity and confidentiality of the procurement process, which would not be in the public interest.

### **Balance of the public interest arguments**

52. The Commissioner considers that there is a strong public interest in public bodies demonstrating effective decision-making and obtaining best value for public funds. She also accepts that there is already a significant amount of public interest in the proposals to develop the stadia, as these will affect a substantial section of the public, such as those residing in the areas surrounding the stadia.
53. However, the Commissioner also considers that it is very important for public bodies to be given space to negotiate and to thoroughly discuss various options in relation to financially and environmentally significant proposals such as those outlined in the withheld information. She also considers that it is important for a procurement process to be allowed to have the space and confidentiality needed in order to acquire the best tenders at the best prices. She considers that premature disclosure of the withheld information would not be in the public interest as such disclosure may not lead to the best option being chosen.
54. The Commissioner considers that it is very important that the public be kept informed and allowed to be consulted regarding proposals which could significantly affect their lives. However, the DfC has stated to the Commissioner that it has disclosed all of the OBC to the complainant and therefore into the public domain other than the commercial information relating to the sports governing bodies. The Commissioner is satisfied that efforts have been made as far as possible to keep the public informed without compromising the commercial confidentiality and sensitivity of the withheld information.
55. Therefore the Commissioner considers that, in all the circumstances of the case, the public interest in maintaining the exception under regulation 12(5)(e) of the EIR outweighs that in disclosure of the requested information.

## Right of appeal

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56. 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)

57. 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.
58. 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 .....**

**Deirdre Collins**

**Senior Case Officer**

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