

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

### **Decision notice**

**Date:**

**Public Authority: Derry City & Strabane District Council**

**Address: Council Offices  
98 Strand Road, Derry  
BT48 7NN**

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

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1. The complainant has requested information from the Council in relation to Environmental Impact Assessment (EIA) developments. The Council directed the complainant towards some of the information which was publicly available, and refused to disclose the remainder ("the withheld information) citing regulation 12(5)(b) of the EIR as a basis for non-disclosure.
2. The Commissioner's decision is that the Council has correctly applied the regulation 12(5)(b) of the EIR to the withheld information.
3. Therefore, the Commissioner requires no steps to be taken.

#### **Request and response**

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4. On 26 March 2019 the complainant made a request to the Council for the following information:

"In light of the Department for Infrastructure Chief Planner's update of 7 December 2018 to the Head of Planning, please can I be provided with a list of all unauthorised Environmental Impact Assessment (EIA) developments that Derry City and Strabane District Council is currently dealing with.

This should include the current planning and enforcement status of these unauthorised EIA developments and any unauthorised EIA developments that the council considers have become immune from enforcement action."

5. The Council responded to the complainant's request on 29 April 2019, stating that cases of unauthorised EIA development that have had formal enforcement action taken will be available to view on the public enforcement register, along with the accompanying EIA Determination, and inviting the complainant to make an appointment to view the register.
6. The Council also stated that all current cases of unauthorised EIA development are subject to ongoing enforcement investigations. Therefore it did not consider it appropriate at this point to provide the details that currently form part of the enforcement files and has applied the exception under regulation 12(5)(b) of the EIR to the withheld information.
7. On 30 April 2019, the complainant wrote to the Council seeking an internal review of its decision to withhold certain requested information under regulation 12(5)(b) of the EIR. He stated that he was merely seeking a list of unauthorised EIA developments currently being dealt with by the Council, and that regulation 12(5)(b) should not apply to this.
8. The internal review was conducted on 7 June 2019 and the result of it was sent to the complainant on 8 June 2019. The reviewer upheld the original decision and further stated that under GDPR the Council could not disclose a personal identifier. The reviewer noted the complainant's assertion that some unauthorised EIA developments had become immune from enforcement action and stated that such matters were often more complex than they appeared and that the Council would not wish to do anything to possibly jeopardise its position in future proceedings. However, the reviewer invited the complainant to submit to the Council any concerns he had regarding individual sites which may have become immune, and the Council may be able to identify whether live enforcement files exist for these sites.

## Scope of the case

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9. The complainant contacted the Commissioner on 5 June 2019 to complain about the way his request for information had been handled.
10. The Commissioner has considered the Council's handling of the complainant's request, in particular its application of regulation 12(5)(b) to the withheld information.

## Reasons for decision

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### Regulation 12(5)(b) – course of justice

11. Regulation 12(5)(b) of the EIR provides that a public authority can refuse to disclose information on the basis that "...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".
12. The Commissioner's guidance explains 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<sup>1</sup>. The exception also encompasses any adverse effect on the course of justice, and is not limited to information only subject to legal professional privilege (LPP). 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.
13. In the decision of Archer v Information Commissioner and Salisbury District Council (EA/2006/0037) the Information Tribunal highlighted the requirement needed for this exception to be engaged. It has

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<sup>1</sup> [https://ico.org.uk/media/fororganisations/documents/1625/course\\_of\\_justice\\_and\\_inquiries\\_exception\\_eir\\_guidance.pdf](https://ico.org.uk/media/fororganisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf)

explained that there must be an "adverse" effect resulting from disclosure of the information as indicated by the wording of the

exception. In accordance with the Tribunal decision of Hogan and Oxford City Council v Information Commissioner (EA/2005/0026 and EA/2005/030), the interpretation of the word "would" is "more probable than not".

***Is the exception engaged?***

14. The Council has provided the Commissioner with a copy of the withheld information. None of the cases in the schedule provided to the Commissioner are deemed by the Council to be immune from enforcement. Therefore the cases on the schedule all represent live enforcement files at various stages of investigation and progression. The files are identified by an address and an operator name. The Council is of the view that the provision of this information and its publication to the world at large would negatively impact the Council's enforcement strategy by revealing information around live investigations and thereby reducing the ability of the Council to conduct investigations without interference.
15. Further, the Council considers that the information would identify potential defendants prior to the conclusion of an investigation and before any potential court proceedings had commenced. The Council believes that this would adversely impact those potential defendants' GDPR rights, which would have an adverse effect on the course of justice in general and in particular the Council's ability to conduct a fair investigation.
16. The Commissioner is of the view that disclosure of information relating to live and ongoing investigations will have an adverse effect on the course of justice and on a public authority's ability to conduct such investigations without interference. She considers the likelihood of this happening to be more probable than not. Having regard to the Council's arguments, the nature of the withheld information and the subject matter of the request, the Commissioner is satisfied that disclosure of the withheld information would have an adverse effect on the course of justice and therefore finds that the exception at regulation 12(5)(b) is engaged.
17. As regulation 12(5)(b) is subject to a public interest test the Commissioner has gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure.

### **The public interest test**

18. Regulation 12(1)(b) requires that, where the exception in regulation 12(5)(b) is engaged, then a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out her assessment of the public interest test, the Commissioner has applied the requirement of regulation 12(2) which requires that a public authority shall apply a presumption in favour of disclosure.

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

19. The Council has acknowledged the general presumption in favour of disclosure under the EIR. It has also recognised the importance of transparency and accepted disclosure of the requested information will ensure that it remains accountable to the public in respect of its operations and decision making.

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

20. The Commissioner considers that there is a strong public interest in public authorities being able to conduct inquiries and investigations in a full and fair manner, without fear of interference. These public authorities need a safe space in which to make sound, well thought out and balanced decisions regarding the matters under investigation. The Commissioner considers that disclosure of the withheld information would have a significant impact upon the extent to which such investigations can be properly carried out, perhaps negatively affecting the quality of the decisions reached, which would not be in the public interest.
21. The Council has informed the Commissioner that it proactively provides details about closed cases on its public enforcement register. The information on the attached Schedule will be added to the public enforcement register once the cases are closed. This public enforcement register can be viewed by anyone including the complainant in this case.

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

22. As the Commissioner is satisfied that viewing the register would inform the public about the Council's decision making processes in closed enforcement cases, and is further satisfied that disclosure of the

withheld information while the investigations are still live would have an adverse effect on the Council's ability to conduct full and proper investigations, she has concluded that the public interest in

maintaining the exception outweighs the public interest in disclosure of the withheld information in all the circumstances of the case.

## **Right of appeal**

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

24. 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.
25. 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**

**Information Commissioner's Office**

**Wycliffe House**

**Water Lane**

**Wilmslow**

**Cheshire**

**SK9 5AF**