

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

Decision Notice

Date: 22 November 2011

Public Authority: The Assembly Ombudsman for Northern Ireland
and Northern Ireland Commissioner for
Complaints

Address: 33 Wellington Place
Belfast
BT1 6HN

Decision (including any steps ordered)

1. The complainant has requested information obtained by the Assembly Ombudsman for Northern Ireland and Northern Ireland Commissioner for Complaints (the Ombudsman) relating to two complaints he submitted to him. The Ombudsman withheld this information under section 44 of the Act and regulation 12(5)(d) of the EIR.
2. The Commissioner's decision is that the Ombudsman has correctly refused the request under the Act insofar as it relates to non-environmental information. With regard to the information exempt under regulation 12(5)(d) the Commissioner finds that the public interest in maintaining the exception outweighs the public interest in disclosing the information. However the Commissioner finds that a small portion of information is not exempt as it relates to emissions.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant the withheld information relating to emissions (as set out in a confidential schedule to this Notice).
4. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

Background

5. The Ombudsman holds two formal offices:
 - Assembly Ombudsman for Northern Ireland; and
 - The Northern Ireland Commissioner for Complaints.
6. Both are separate public authorities listed under Schedule 1 to the Act. This Decision Notice relates to both bodies, but for clarity the Notice refers to the Ombudsman throughout.
7. The complainant, via an elected representative, made two complaints to the Ombudsman in September 2008. The complaints were made against the Planning Service for Northern Ireland (the Planning Service) and the Health and Safety Executive for Northern Ireland (HSENI). The complainant had reported a number of health and safety issues in relation to a quarry that adjoined his land, and he was of the view that neither authority had correctly dealt with these concerns.
8. The Ombudsman investigated these complaints (in the case of the complaint about HSENI, in his capacity as Northern Ireland Commissioner for Complaints), but did not uphold either of them.

Request

9. On 26 April 2010 the complainant requested the following information from the Ombudsman:

"I therefore request that all maps and documentation provided to the Ombudsman by the Planning Service and HSENI be provided also to me..."
10. The Ombudsman responded on 26 May 2010. It stated that the requested information was exempt from disclosure under section 44 of the Act. This exemption applies if the disclosure of information is prohibited by law, and the Ombudsman explained that the relevant statutory prohibition was Article 19(1) of The Ombudsman (Northern Ireland) Order 1996 (the Order). The text of Article 19(1) of the Order is set out in the legal annex at the end of this Notice.
11. Following an internal review the Ombudsman wrote to the complainant on 1 September 2010, upholding its original refusal.

Scope of the case

12. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
13. On inspecting the withheld information it appeared to the Commissioner that the request ought to have been considered under the EIR as well as the Act, as some of the withheld information was environmental. The Ombudsman agreed to reconsider the request under the EIR, and issued a revised refusal notice to the complainant on 10 June 2011. The Ombudsman cited regulation 12(5)(d) of the EIR as an exception from the duty to provide information.
14. Following an internal review under the EIR, on 23 June 2011 the Ombudsman upheld its refusal to disclose the requested information to the complainant.
15. The complainant remained of the view that the Ombudsman ought to have disclosed the requested information to him, and he asked the Commissioner to make a formal decision in the case.
16. Having inspected the correspondence the Commissioner notes that the Ombudsman considered the complainant's request under the Data Protection Act 1998 (the DPA) as well as under the Act. The Commissioner agrees that some of the relevant information is the complainant's personal data, for example, correspondence between the public authorities and the complainant. This is exempt from disclosure under the Act by virtue of section 40(1), and under the EIR by regulation 13, and should be considered as a subject access request under the DPA.
17. In light of the above the Commissioner has also conducted an assessment under section 42 of the DPA into the Ombudsman's compliance with that access regime. This does not form part of this Decision Notice, because a section 42 assessment is a separate legal process from a section 50 complaint.
18. Therefore the Commissioner's investigation is limited to those parts of the request which do not relate to the complainant's personal information. The Commissioner has inspected the withheld information and has received a submission from the Ombudsman in relation to its handling of the request.

Reasons for decision

Access regime

19. The Commissioner is of the view that most of the requested information in this case is environmental information within the meaning of regulation 2 of the EIR. This is because much of the information (for example, the maps and photographs) could be considered information on the state of the elements, namely the land and landscape and a measure and/or an activity likely to affect these elements, namely the quarry and the complainant's golf course.
20. In reaching this view, the Commissioner has considered the nature of the information held, rather than the reasons for holding it. The Commissioner does not consider it necessary for the information itself to have a direct effect on the elements of the environment, or to record or discuss such an effect. Rather, the information should be *on* something falling within regulation 2, and the Commissioner considers that to be the case in this matter.
21. In light of the above, the Commissioner has gone on to consider the Ombudsman's arguments in relation to the Act and the EIR.

Freedom of Information Act

Section 44

22. The Ombudsman refused to release the non-environmental information under section 44(1)(a) of the Act. Section 44(1)(a) provides an exemption from disclosure under the Act for information which is prohibited from disclosure under any law or enactment. It is an absolute exemption, so if the statutory bar applies then the information is exempt and no public interest test is necessary.
23. The Ombudsman cited Article 19 of The Ombudsman (Northern Ireland) Order 1996 as a statutory prohibition under section 44 of the Act. Article 19(1) of the Order applies to any information obtained in the course of, or for the purposes of, an investigation by the Ombudsman. The Commissioner notes that under the Order the Ombudsman is not permitted to disclose any information obtained in the course of, or for the purposes of, the investigation of a complaint, except in very limited circumstances. These exceptions are set out in the legal annex.
24. The Commissioner is satisfied that the non-environmental information in this case was obtained by the Ombudsman in connection with an investigation. Therefore the Commissioner is satisfied that this information does fall under the statutory prohibition under Article 19(1)

of the Order. The Commissioner is also satisfied that responding to a freedom of information request is not one of the reasons for disclosure provided for in sub-sections a) – e) of Article 19(1). Consequently, the Commissioner is satisfied that none of these exceptions apply in this case, and therefore the non-environmental information may not be disclosed to the complainant.

Environmental Information Regulations

Regulation 6(b)

25. The Ombudsman did not refer to regulation 6(b) in its communication with the complainant. However, it did indicate that some information was not provided in response to the request because the Ombudsman believed the complainant already possessed this information. This withheld information comprised planning information relating to the quarry.
26. Regulation 6(b) of the EIR states that information does not need to be provided in the format requested by the applicant if it is *“already publicly available and easily accessible to the applicant in another form or format”*.
27. The Commissioner notes that the planning information withheld is publicly available from the Planning Service via its Open File Policy¹. Therefore, although the Ombudsman did not explicitly rely on regulation 6(b), the Commissioner is satisfied that it was not obliged to provide this information to the complainant.

Regulation 12(5)(d)

28. Regulation 12(5)(d) of the EIR provides an exception where disclosure of the information in question would:

“adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law”.
29. The Commissioner considers that “provided by law” will include confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute.
30. The exception requires a public authority to consider whether disclosure *“would adversely affect”* the confidentiality of its proceedings provided

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http://www.planningni.gov.uk/index/about/planning_service_customer_service_statement_dec_3_2009_final.pdf

by law. In other words, it is not enough that the confidentiality is provided by law, there must also be a demonstrable adverse effect from disclosure. In the Commissioner's opinion, this sets a high threshold which requires that the likelihood of the adverse effect occurring should be more probable than not.

31. The Commissioner is of the view that the statutory prohibition on disclosure provided in Article 19(1) of the Order provides confidentiality in relation to the Ombudsman's investigations. The Commissioner further considers that Article 19(1) clearly indicates the intention that, for the Ombudsman to discharge its functions effectively, the information it obtains during the course of its investigations should normally be held in confidence. It therefore follows that disclosing information caught by this statutory prohibition on disclosure will usually adversely affect the confidentiality of the Ombudsman's proceedings. The Commissioner agrees it is more probable than not that the disclosure would adversely affect the confidentiality of the Ombudsman's investigations as contemplated by Article 19(1) of the Order in the circumstances of this case.
32. The Ombudsman routinely receives information in confidence for the purposes of his investigations. Consequently, the Commissioner accepts that disclosure of the requested information into the public domain would adversely affect this confidentiality, and the Commissioner finds that regulation 12(5)(d) is engaged.

Public interest test

33. The exception at regulation 12(5)(d) is subject to the public interest test, set out at regulation 12(1) of the EIR. This states that a public authority can only rely on an exception contained within regulation 12(4) or 12(5) if in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information. In addition, regulation 12(2) requires that the public authority applies an explicit presumption in favour of disclosure.

Public interest factors favouring disclosure of the information

34. The Ombudsman recognised the inherent public interest in openness, transparency and in the accountability of the Ombudsman.
35. The Commissioner considers that there is a strong public interest in fully informing the public's understanding of decisions made by public authorities, particularly those decisions that may have an impact upon the environment. The Commissioner is of the view that disclosure of the withheld information in this case could inform the public as to how the

Ombudsman investigates complaints. This in turn could increase confidence in the Ombudsman as a regulator.

Public interest factors favouring maintaining the exception

36. The Ombudsman argued that bodies and individuals submitting information as part of an investigation expect it to be held in confidence, as demonstrated by the statutory prohibition on disclosure. The Ombudsman argued that there was a strong public interest in maintaining this understanding of confidentiality.
37. The Ombudsman also argued that disclosure of information obtained in confidence could serve to undermine future investigations, as bodies and individuals may limit the information they provide to protect themselves from exposure in future requests.
38. The Ombudsman was of the strong view that any detrimental impact upon its ability to receive information in confidence may in turn adversely affect its ability to investigate complaints in the future, to the detriment of the general public and the public interest in transparency and accountability.
39. The Commissioner recognises that the Ombudsman could resort to exercising its statutory powers to compel third parties to provide it with information in relation to its investigations, however, he does not consider it would be a good use of public funds or resources to discourage voluntary co-operation and supply of information.

Balance of the public interest

40. The Commissioner recognises the importance of accountability and transparency, particularly in relation to regulatory bodies that investigate complaints made about other public authorities.
41. The Commissioner is also mindful that the EIR contains no equivalent provision to section 44 of the Act. The statutory bar which engages section 44 does not prevent disclosure of the requested information under the EIR.
42. However the Commissioner is of the view that the Order does provide a clear indication that information provided to the Ombudsman as part of an investigation will not be disclosed. The Commissioner considers this to weigh heavily in favour of maintaining the exception at regulation 12(5)(b). This is because the Commissioner recognises the strong public interest in protecting the Ombudsman's ability to receive sufficient information in order for him to investigate thoroughly and make determinations in relation to complaints.

43. The Commissioner notes, at paragraph 39 above, that the Ombudsman has statutory information gathering powers. However, the Commissioner also notes that, if disclosure of the withheld information in this case made such bodies more reluctant to provide information, then the Ombudsman would be more likely to need to exercise those powers. The Commissioner considers that there is a stronger public interest in protecting the voluntary co-operation and supply of information to the Ombudsman by those it investigates.
44. Having carefully considered the factors both in favour of and against disclosure, the Commissioner finds that the public interest in maintaining the exception at regulation 12(5)(b) clearly outweighs the public interest in disclosure of the requested information.

Regulation 12(9) - emissions

45. Regulation 12(9) states that a public authority may not rely on the exceptions at regulations 12(5)(d)-(g) to the extent that the information to be disclosed relates to information on emissions.
46. Having considered the withheld information the Commissioner is of the view that a small portion of it does relate to emissions, namely dust. As this information can not be exempt under regulation 12(5)(d), and no other exception has been applied, the Commissioner finds that this information ought to have been disclosed to the complainant. The Commissioner has set out this information in a confidential schedule to this Notice.

Right of appeal

47. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

48. 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.
49. 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

Gerrard Tracey
Principal Policy Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex 1

Extract from The Ombudsman (Northern Ireland) Order 1996

19 (1) Information obtained by the Ombudsman or his officers in the course of, or for the purposes of, an investigation under this Order shall not be disclosed except for the purposes of -

- (a) the investigation and any report to be made thereon under this Order;
- (b) any proceedings for an offence under the Official Secrets Acts 1911 to 1989 alleged to have been committed in respect of information obtained by the Ombudsman or any of his officers by virtue of this Order;
- (c) any proceedings for an offence of perjury alleged to have been committed in the course of an investigation under this Order;
- (d) an inquiry with a view to the taking of proceedings of the kind mentioned in sub-paragraphs (b) and (c); or
- (e) any proceedings under Article 15.