

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

Decision notice

Date: 22 May 2019

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

Decision (including any steps ordered)

1. The complainant has asked the Causeway Coast and Glens Borough Council ("the Council") for information relating to a proposal for a hotel at Ballyreagh Road, Portstewart and planning application LA01/2016/1328/F. The Council provided the complainant with information relevant to his request and withheld some information in reliance on Regulations 12(4)(e) and 13 of the EIR.
2. The Commissioner's decision is that the Council is entitled to rely on Regulation 12(4)(e) in respect of the information it has withheld under this exception. The Commissioner has also decided that the Council is entitled to rely on Regulation 13 in respect of the names, contact details and signatures of members of its staff who hold positions below Head of Service level.
3. The Commissioner has identified information which the Council has withheld in reliance on Regulation 13 which is either not personal data or which relates to members of staff at or above Head of Service level. The Commissioner requires the Council to disclose this information to the complainant.
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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 2 May 2018, the complainant wrote to the Causeway Coast and Glens Borough Council and requested information in the following terms:

"Pursuant to the Freedom of Information Act 2000 and the Environmental Information Regulations 2004, I wish to request the following information:-

A list of all meetings attended by Mr Jackson, Chief Executive, in connection with the proposal for an hotel at Ballyreagh Road, Portstewart before, during and after the lodging of planning application LA01/2016/1328/F and the dates of all such meetings, a list of the attendees and copies of all minutes, notes and records pertaining thereto.

Copies of all communications to and from Mr Jackson, Chief Executive, in connection with the proposal for a hotel at Ballyreagh Road, Portstewart before, during and after the lodging of planning application LA01/2016/1328/F.

Copies of all diary entries, or other recorded material, touching upon contact by or with Mr Jackson, Chief Executive, in connection with the proposal for a hotel at Ballyreagh Road, Portstewart before, during and after the lodging of planning application LA01/2016/1328/F."

6. On 3 May 2108, the Council wrote to the complainant to advise him that whilst it held relevant information, due to the complexity and volume of that information it was not practicable for the Council to comply with the request within the twenty day compliance period. In consequence of this the Council referred the complaint to Regulation 7 of the EIR which allows it to extend the compliance period to 40 working days.
7. On 1 June 2018, the Council wrote to the complainant again to advise him that it was relying on Regulation 7 of the EIR and that it would require a further 20 working days to complete the request.
8. On 10 July 2018, the Council responded to the complainant's request by providing him with a copy of the records it holds. The Council advised the complainant that it was withholding some information in reliance on Regulations 13 and 12(4)(e) of the EIR.
9. On 18 July 2018, the complainant wrote to the Council and asked it to review its decision to withhold information from him.
10. The complainant asserted that the Council's response had ignored the 'essence' of his request, in that it provided information largely in the public domain instead of a list of the relevant meetings. The complainant argued that, "it is discernible that Mr Jackson attended meetings on [...] 18 November 2015 and 16 December 2015", and he asserted that,

"What other meetings he attended should have been disclosed in response to my request but even those meetings were concealed".

11. The complainant also referred to "documentation relevant to such meetings and other engagements in connection with this hotel application, including the "famous 'strategic priority'" email..." and he pointed out that none of this information has been revealed.
12. On 9 August 2018, the Council wrote to the complainant after completing its internal review. The Council noted that the complainant's request under reference RFI/060/18 – this request, is related to other requests made under references RFI/385/16, RFI/160/17, RFI/257/17, RFI/357/17, RFI/414/17, RFI/427/17, RFI/500/17 and RFI/501/17. The Council advised the complainant that the first sentence of its response of 10 July should have been:
13. "In giving consideration to your request, Council holds records within the scope of your request and has considered records out-with previous requests and responses".
14. The Council apologised for its omission and advised him that the notes and meetings referred to in his request had been disclosed to him in correspondence dated 24 January 2018.

Scope of the case

15. The complainant contacted the Commissioner on 2 July 2018 to complain about the way his request for information had been handled.
16. The Commissioner advised the complainant that the focus of her investigation would be to determine whether the Council is entitled to withhold information from him in reliance on Regulation 13 and Regulation 12(4)(e) of the EIR.

Reasons for decision

17. The Council has provided the Commissioner with a 190 page PDF document containing the information it has disclosed to the complainant.
18. The Council has identified for the Commissioner those documents or pieces of information within the 190 pages PDF document which have been withheld from the complainant in reliance on Regulations 12(4)(e) and 13 of the EIR by way of redaction.
19. The information which the Council has withheld from the complainant in reliance on Regulation 12(4)(e) is found on pages 63 to 68 of the PDF

document. The Commissioner notes that pages 63 to 65 is reproduced on pages 74 to 76 of the PDF document and that these pages are likewise withheld.

Regulation 12(4)(e) – Internal Communications

20. Under Regulation 12(4)(e) of the EIR a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. The exception provided by Regulation 12(4)(e) is class-based. This means that the information falling within the scope of the exception will be exempt from disclosure and there is no need to consider whether disclosure would result in prejudice or harm in order to engage the exception.
21. The information which the Council has withheld in reliance on Regulation 12(4)(e) is comprised of internal communications between some of its senior officers and an adviser embedded within the Council's structures and also between Senior Management and elected members of Council.
22. The first question for the Commissioner to consider is whether the withheld information is a 'communication' for the purposes of the Regulations.
23. The Commissioner considers that a 'communication' will encompass any information someone intends to communicate to others, or even information placed on file (including saving it on an electronic filing system), where others may consult it.
24. Having examined the withheld information, the Commissioner is satisfied that where the Council has applied Regulation 12(4)(e) to information that can properly be characterised as a communication for the purpose of this exception.
25. There is no definition of what is meant by 'internal' contained in the EIR, however, in this case the Commissioner is satisfied that Regulation 12(4)(e) is properly engaged. This is because the withheld information is comprised of a written discussion and advice to Council about a potential development of and at Ballyreagh which appears to be intended for internal use only.
26. The Council has explained the position regarding its 'Adviser'. It says that a Strategic Investment Board Ltd (SIB) Advisor has been embedded within Council structures through a Service Level Agreement since January 2014. The Advisor reports directly to the Leisure & Development Director and exercises administrative functions on behalf of Council to advance strategic development projects.
27. The Advisor, who is part of a project team, is able to have confidential access to Council documents and to Senior Officers, including the

Council's legal team. Any report generated by the Adviser is solely for the Council's purposes and is subject to the Council's procedures. The Adviser's records cannot be accessed by SIB Ltd.

28. Where Regulation 12(4)(e) is engaged, it is subject to a public interest test required by Regulation 12(1)(b). The test is whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
29. When carrying out the test the Commissioner must take into account a presumption towards the disclosure of the information which is required by Regulation 12(2).

The public interest test

30. The principal public interest favouring the disclosure of the withheld information relates to the requirement that planning decisions should be open and transparent. This is particularly the case where those decisions affect an entire community.
31. In the Commissioner's opinion, planning decisions and the process leading to those decisions should be as open and transparent as possible and ideally all parties should be fully informed about the issues considered by the Council.
32. The public should be satisfied that the final decisions are fully explained and they should know all the facts and reasoning which lies behind those decisions. The Commissioner believes that disclosure of relevant information would assist the public's understanding of the issues considered by the Council and they would be more inclined to actively participate in the decision making process.
33. Many of the arguments supporting greater openness rest in the decisions themselves and in the general openness of the planning process. This openness is generally provided by the availability of documents associated with that process on the Council's website.
34. The decisions are to some extent distanced from the public interest favouring disclosure of the withheld information and consequently this weakens the public interest arguments in favour of disclosure of the withheld information. This is because the withheld information does not necessarily affect the Council's final decision.
35. The withheld information relates to potential rights for access / servitude to land. This issue was considered by the Council "in committee" at a meeting held in accordance with the Local Government Act (NI) 2014 (the LGA). This provision allows the Council to make a resolution to exclude the public from a meeting if it is likely, in view of the nature of the business to be transacted or the nature of the proceedings, that if

members of the public were present during that item there would be disclosure to them of exempt information, as defined in section 51 of said Act.

36. Schedule 6(3) of the LGA confirms that "Information relating to the financial or business affairs of any particular person (including the council holding that information)." is considered exempt information which was applicable in this instance.
37. The information which the Council is withholding under Regulation 12(4)(e) of the EIR comprises of the background papers provided to Council members for the purpose of its meeting. They include advice on the legal and financial considerations relating to the granting of rights of access to land.
38. In the Council's opinion it is necessary to withhold this 'internal communication' in order to allow Councillors and Senior Management the opportunity to discuss the financial and legal considerations of this matter in a 'safe space'. Notwithstanding this need, the Council points out that the outcomes of the meeting and decisions reached were released into the public domain.
39. The Council has advised the Commissioner that the complainant has initiated legal proceedings concerning the planning matter associated with his request for information. This has required the Council to undertake a review of its documentation for the purpose of the disclosure process of court proceedings and has resulted in further disclosures.
40. The Commissioner recognises the merit in the arguments which favour disclosure of the requested information as well as those favouring its continued withholding. On balance, the Commissioner has decided that greater weight has to be given to those factors which favour withholding the internal communications. She is particularly persuaded by the need for Council officers to operate in a 'safe space' where they can deliberate on potentially controversial issues.
41. The Commissioner recognises the real danger of a 'chilling effect' being caused by the disclosure of internal communications. This would have the potential to negatively affect the Council's decision making in future planning matters where its officers and advisers might provide less full and frank advice.
42. The Commissioner has decided that the public interest lies in maintaining the exception in this instance and that the Council is entitled to rely on Regulation 12(4)(e) to withhold its internal communications.

Regulation 13 of the EIR – the personal data of a third party

43. The Council has redacted information in reliance on Regulation 13 of the EIR. This exception to disclosure allows a public authority to withhold personal data where the applicant is not the data subject and where one of the conditions listed in Regulation 13(2A), 13(2B) or 13(3A) is satisfied.
44. In this case the relevant condition is contained in Regulation 13(2A)(a).¹ 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 ("the GDPR").
45. In order to engage regulation 13, the information sought by the applicant must satisfy the definition of personal data provided by sections 3(2) and (3) of the Data Protection Act 2018 ("the DPA") and means any information relating to an identified or identifiable living individual.
46. 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.
47. Information will relate to a person if it is about them, linked to them, has biographical significance to them, is used to inform decisions affecting them or has them as its main focus.
48. The Council's initial response to the complainant's request was made in line with the prevailing legislation at that date and not as amended by Data Protection Act 2018. The Council accepts that this was in error due to a failure to note the transitional arrangements in Schedule 20 of the DPA 2018, for requests received under EIR.
49. The Commissioner has examined the information which the Council has withheld from the complainant in reliance on Regulation 13. She considers that the Council has taken a broad brush approach in redacting information under this exception, in that its redactions go beyond the names and contact details of members of its staff who are 'back office' employees and who hold positions below Head of Service level .

¹ As amended by Schedule 19 Paragraph 307(2) DPA

50. By way of example the Commissioner notes the two redactions made on page 1 of the 190 page PDF document. This is a short email chain which contains has two areas of redacted information: The first area is an email dated 14 May 2018. Here the names of the sender and recipient has been redacted, together with following: the persons' names who were copied into the email, the subject of the email, the single-sentence contents of the email and the fact that the email had attachments.
51. The Commissioner accepts that the senders' name and the names of the persons copied into the email are those persons' personal data. That said, the sender was the Council's Chief Executive Officer and, having spoken with the Council, the Commissioner has identified the two other recipients are Heads of Service.
52. The redaction of those persons' names is contrary to the Council's position in respect of its reliance on Regulation 13: They are senior individuals holding positions at or above Head of Service. Therefore the Council should not rely on Regulation 13 to withhold those names. Those persons have different expectations of privacy to their more junior colleagues and therefore the Council must disclose those names.
53. The remaining information which the Council has redacted from the first area does not satisfy the definition of personal data provided by sections 3(2) and (3) of the Data Protection Act 2018. That information must also be disclosed to the complainant.
54. The Commissioner has restricted her decision solely to the names and contact details of those persons who are members of the Council's staff who are 'back office' employees and who hold positions below Head of Service level together with handwritten signatures.
55. 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*". In this case processing personal data means its disclosure in response to a request for information. In order to be lawful, processing must satisfy one of the lawful bases provided by Article 6(1) of the GDPR and must also be 'generally lawful'.
56. The Commissioner considers that basis 6(1)(f) is relevant to the Council's position in this case. This states:

"...processing is necessary for the purposes or 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 and which require protection of personal data, in particular where the data subject is a child".
57. The Council has considered whether it would be lawful to disclose this personal data. It has assured the Commissioner that it does not have

the consent of the data subjects to release their personal data and therefore it has given necessary consideration to the legitimate interest test in the first instance. This test requires the public authority to consider:

- I. Whether a legitimate interests is being pursued in the request for information;
 - II. Whether disclosure of the personal data is necessary to meet the legitimate interests in question; and
 - III. Whether the legitimate interests override the interests or fundamental rights and freedoms of the data subjects – the more junior members of the Council's staff.
58. The Council has considered whether there are any legitimate interests in disclosure of the personal data and particularly whether disclosure is necessary.
59. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Therefore the test is one of reasonable necessity: It involves consideration of alternative measures whereby the legitimate aim could be achieved by something other than the disclosure of the identified personal data. Disclosure of personal data under EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
60. In this case, the Council has advised the Commissioner that it does not consider disclosing the withheld personal data to the requester to be necessary or justified in order to satisfy the information request and the requirements of the EIR. It asserts that, in the circumstances of this request, there is no strong legitimate interest that would override the prejudice to the rights and freedoms of the data subjects and therefore disclosure would be unlawful.

Balance between legitimate interests of the complainant and the data subject's interests or fundamental rights and freedoms

61. The Council argues that data subjects would not reasonably expect their personal data to be disclosed in the way required by this request. The Council points out that this expectation is reflected by Council Policy and it asserts that there is no strong legitimate interest that would override the prejudice to the rights and freedoms of the data subjects.
62. The Council considers that the information it has withheld under Regulation 13 relates to the data subjects work or professional lives as opposed to their personal or private lives and particularly in the context of their employment as more junior members of staff and being "back office employees". The Council says:

"Mobile phone numbers are routinely redacted from responses as they may be personal numbers as opposed to used purely for business purposes." And, "...release to the 'world at large' could lead to living individuals being contacted routinely out of hours leading to an invasion of privacy and personal life."

63. Signatures and the email addresses of third parties have also been withheld as they too are considered to be personal data.
64. The Council has told the Commissioner that its policy on releasing information about its more junior employees is that they should not expect their personal data to be released unless they have indicated otherwise. For example Planning Officers with enforcement powers have indicated they are content for their names to be released.
65. It is not Council policy to ask its staff if they consent to the disclosure of their personal data. That said, consent to share correspondence between a particular civil servant and the Council's Chief executive officer was obtained and his details have been released to the complainant. This was not the case in respect of those persons who were 'carbon copied' into the correspondence: They were not asked as they are back office employees or staff below the grade of Head of Service.
66. In the Council's opinion, should it be required to disclose the information it has identified as personal data, the rights to privacy of the data subjects would be infringed and this would cause unnecessary and unjustified damage and distress. It is on this basis that the Council maintains that Regulation 13(2)(i) applies - that disclosure would breach one of the data protection principles, i.e. that personal data shall be processed lawfully, fairly and in a transparent manner..."
67. The Council has advised the Commissioner that its staff are aware of, and have received training in the policy which governs information which the Council will release into the public domain under access to information legislation.
68. The Commissioner has considered all the circumstances relevant to the complainant's request. She is mindful that the Council has not withheld any of the contents of the documents, other than where it has relied on Regulation 12(4)(e) (see above) and its actions have demonstrated both openness and transparency which satisfies the legitimate interests of the complainant and the wider public.
69. The Commissioner finds there is no strong legitimate interest that would override the prejudice to the rights and freedoms of the Council's more junior staff to justify disclosing their names and contact into the public domain. The Commissioner considers that there is no Article 6 basis for processing this personal data and therefore it would not be lawful to do so.

70. The Commissioner's conclusion that disclosure would be unlawful means that she is not required to consider whether disclosure would be fair and transparent.
71. The Commissioner's decision is that Causeway Coast and Glens Council has correctly applied Regulation 13 of the EIR to the names and contact details of its staff employed below the level of Head of Service by virtue of Regulation 13(2A)(a).

Right of appeal

72. 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

73. 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.

74. 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

**Andrew White
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