

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

**Decision notice**

**Date:** 03 May 2012

**Public Authority:** Department of the Environment (Northern Ireland)

**Address:** 10-18 Adelaide Street  
Belfast  
BT2 8GB

**Decision (including any steps ordered)**

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1. The complainant has requested the following information: -

"...Please disclose: -

1. All incident reports indicated as high severity incidents and medium severity incidents upon the Six Mile Water.
2. All fish kill assessments that you hold.
3. Records of enforcement action taken that relates to any of those incident reports.
4. June 2008 biological investigation into the cause of the fish kill on the Six Mile Water.
5. October 2008 baseline biological survey for the Six Mile Water system.

Where a survey did not result in a published report, please provide appropriate interpretation of the information so that the information disclosed is accessible to me.

I note that you do not hold information showing the water pollution incidents plotted on a map or by way of a timeline. However, if this is easy for you to produce then I should be grateful for it as well."

2. The Commissioner's decision is that the Department of the Environment for Northern Ireland ("the Department") has correctly

applied the exceptions under regulations 13(1) and 12(5)(b) of the EIR. However, the Department has breached regulations 11 and 14 (2) and (3) of the EIR.

## Request and response

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3. The Commissioner notes that under the EIR the Northern Ireland Environment Agency ('NIEA') is not a public authority itself, but is actually an executive agency of the Department of the Environment ('the Department') which is responsible for the NIEA and therefore, the public authority in this case is actually the Department of the Environment and not the NIEA. However, for the sake of clarity, this decision notice refers in parts to the NIEA as if it were the Department of the Environment.

4. On 22 November 2010, the complainant wrote to the Department and requested information in the following terms:

"[name redacted] acts for its member club [name redacted] which holds fishing rights on the Sixmilewater. In order that we may advise our member on dealing with various pollution incidents on the Sixmilewater, please can you confirm and/or disclose:

1. All incident reports for the last 6 years to date dealing with recorded incidents of pollution on, or otherwise directly affecting (e.g. on a nearby tributary), the Sixmilewater;
2. fish kill assessments for each incident;
3. records of all enforcement taken in connection with those incidents (including warning notices); and
4. all biological fishery, invertebrate or other surveys and reports completed in connection with the incidents as referred to at point

If you do not hold any particular information requested please confirm that fact and explain why it is not available."

5. The Department responded on 30 December 2010. It stated that the requested information consisted of a large number of documents, for which the Department proposed to charge the complainant a fee of £472.92. In light of this, the Department invited the complainant to review its request. In order to facilitate this, the Department provided the complainant with a summary of the information held by it.

6. On 5 January 2011 the complainant responded, narrowing its request down to the following: -

"...Please disclose: -

1. All incident reports indicated as high severity incidents and medium severity incidents upon the Six Mile Water.
2. All fish kill assessments that you hold.
3. Records of enforcement action taken that relates to any of those incident reports.
4. June 2008 biological investigation into the cause of the fish kill on the Six Mile Water.
5. October 2008 baseline biological survey for the Six Mile Water system.

Where a survey did not result in a published report, please provide appropriate interpretation of the information so that the information disclosed is accessible to me.

I note that you do not hold information showing the water pollution incidents plotted on a map or by way of a timeline. However, if this is easy for you to produce then I should be grateful for it as well."

The complainant requested the information in DVD or electronic format.

7. On 26 January 2011 the Department responded to the complainant's refined request, stating that it held the requested information, which would be provided to the complainant after he had paid a charge of £38.42.
8. The complainant requested an explanation of why the information could not be provided electronically. The Department stated that the information would have to be physically burnt onto a disk, which would constitute a disproportionate diversion of resources within the Department.
9. Following the Commissioner's intervention, the Department conducted an internal review of its decision and provided this to the complainant on 13 September 2011. It stated that it was now able to provide some of the requested information in electronic format without charge, namely the entirety of the information in parts 4 and 5 of the complainant's request and some of the information in parts 1-3 of that request, however it was withholding the remainder of the information

under regulations 13(1) (personal data) and 12(5)(b) (disclosure would adversely affect the course of justice) of the EIR.

## Scope of the case

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10. The complainant contacted the Commissioner to complain about the way his request for information had been handled, the fact that he was being charged, and that the information was not being provided in the format he had requested. That complaint was made on 8 June 2011. Once the Commissioner had intervened and the complainant had received some of the requested information in electronic format, he again contacted the Commissioner to complain about the Department's application of the exceptions under regulations 13(1) and 12(5)(b) of the EIR to the remaining withheld information ("the withheld information"). That information consists, specifically, of reports of pollution incidents which are held by the Department for investigative purposes. Some are withheld in their entirety and some have simply had personal details of individuals redacted from them before disclosure.
11. The Commissioner has considered the manner in which the complainant's request was handled and the Department's application of the below exceptions under the EIR.

## Reasons for decision

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### Exceptions

#### **Personal Information of Third Parties – Regulation 13(1) of the EIR**

12. Under Regulation 5(1) of the EIR a public authority that holds environmental information is required to make it available on request. However, that requirement is subject to Regulation 13(1) which provides that, to the extent that the information requested includes personal data of which the applicant is not the data subject and the disclosure of the information to a member of the public would contravene any of the data protection principles set out in the Data Protection Act 1998 (DPA), a public authority shall not disclose the personal data.
13. The first principle of the DPA requires that the processing of personal data is fair and lawful and that at least one of the conditions for processing in Schedule 2 is met. In the case of sensitive personal data, at least one of the conditions for processing in Schedule 3 must

be met.

14. The information being withheld under regulation 13(1) of the EIR is personal data as it contains details of individuals who are polluters or alleged polluters, details of third party witnesses and employees of companies. The details of individual polluters or alleged polluters would also constitute sensitive personal data under section 2(g) of the DPA as the data relates to the commission or alleged commission of an offence by those individuals.
15. The Commissioner has firstly considered whether the disclosure of this information would be fair. In order to reach a view on this he has considered what would be the reasonable expectation of the individual(s) whose personal and/or sensitive personal data is held by the Department, i.e. would they have any expectation of their personal data being provided to a third party.
16. In deciding whether disclosure of the information being withheld under regulation 13(1) would be unfair the Commissioner has taken into account a range of factors including the potential consequences of disclosing the information, i.e. what damage or distress would the individuals suffer if the information was disclosed?
17. In most cases the very nature of sensitive personal data means it is most likely that disclosing it will be unfair. As it is information of the most private and personal nature, the reasonable expectations of the data subject is that such information would not be disclosed and that the consequences of any disclosure could be distressing to them.
18. However, as always, it remains important to consider all the circumstances of the case. In particular it is important to consider both the reasonable expectations of the data subjects regarding their personal and/or sensitive personal information and whether some or all of that information has already been put into the public domain with the knowledge of the data subject. If either factor is relevant, then it is likely that any disclosure would be fair. The Commissioner has considered whether any of these factors are relevant in this case.
19. The Department is an investigative body, which the Commissioner considers must be able to carry out fair and thorough investigations as a result of information received. There must be an expectation that the interests of the parties involved in an investigation will be protected and all parties will be treated fairly. In order for the Department to operate effectively it must be able to receive information, often personal information, which it then holds for the purposes of carrying out its investigative function. The individuals whose personal

information the Department holds would have an expectation that their information will only be used for such purposes.

20. The Commissioner considers that the above individuals – witnesses, employees and alleged offenders, would not have had any expectation that their personal information would be disclosed to the public. They would have had, as the Department argues, a reasonable and legitimate expectation that their information would only be used for the purposes of the investigations and any subsequent court proceedings and would not be disclosed into the public domain. Therefore it would be unfair to disclose the personal and sensitive personal data of those individuals and the Commissioner agrees with the Department that no legitimate interest exists which would justify such disclosure.

21. The complainant raised the point that it was seeking the information in connection with legal proceedings, and that therefore section 35(2) of the DPA would apply. Section 35(2) of the DPA states that: -

“Personal data are exempt from the non-disclosure provisions where the disclosure is necessary-

(a) for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings), or

(b) for the purpose of obtaining legal advice,

Or is otherwise necessary for the purposes of establishing, exercising or defending legal rights.”

22. The Department has followed the Commissioner’s guidance regarding the above section of the DPA. That guidance makes it clear that a data controller does not have to comply with a request for personal data from a third party simply because the exemption in the above section applies. It is for the data controller to determine whether such disclosure is “necessary” for the specified purposes. The Department considers that the necessity test would be met only by production of a court order to disclose the data. In the absence of such an order, the Department will not disclose the personal data in question to the complainant. The Commissioner also notes that the Regulations are focused on disclosure of information to the public; Regulation 13 refers to “disclosure of the information to a member of the public”. The circumstances of the complainant and their argued requirement for the information to be provided to support their legal proceedings is not relevant to the considerations under Regulation 13.

23. The Commissioner agrees that disclosure of the personal and sensitive personal data of third parties would be unfair in this instance and the complainant's assertion relating to section 35(2) is not relevant to considerations about whether the disclosure would be unfair. As disclosure would be unfair, this would be a breach of the first data protection principle. The Commissioner therefore considers that the council was correct to apply Regulation 13(1) in this instance.

### **Regulation 12(5)(b) of the EIR**

24. Under this exception, a public authority can refuse to disclose information to the extent 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". The Department applied the exception as a basis for withholding certain information, namely reports of pollution incidents which have resulted in prosecutions as it stated that disclosure would adversely affect the course of justice.
25. The Commissioner, having perused the information withheld under the above exception, is satisfied that it is information held by the Department solely as evidence for the purpose of court proceedings regarding pollution incidents.

### **Would disclosure cause an adverse effect?**

26. 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 explained that there must not simply be an effect, but a definite "adverse" effect resulting from disclosure of the information as indicated by the wording of the exception.
27. In accordance with another Tribunal decision *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".
28. The Department holds the information withheld under regulation 12(5)(b) for the purpose of court proceedings. Such information is protected by the existing regime of Magistrates Courts rules. Access to documents held for the purposes of such proceedings is very strictly governed by those rules.
29. It is clear that to circumvent the access regime provided by the existing governance of the above rules, where the expectation is that decisions regarding the disclosure of relevant information are made by

the judiciary, would have an adverse affect on the course of justice. Parties involved in judicial proceedings have the expectation that such information will only be disclosed under the established systems and procedures; disclosure under EIR may serve to undermine general confidence in the judicial or inquiry system. Therefore, the Commissioner is satisfied that the test in the Archer case has been met. Disclosure of the information would have an adverse affect on the course of justice and the exception under regulation 12(5)(b) is therefore engaged. The Commissioner has gone on to consider the public interest factors for and against disclosure in this case.

### **Public interest arguments in favour of disclosing the withheld information**

30. The EIR specifically state that a presumption in favour of disclosure should be applied. Some weight must therefore be attached to the general principles of achieving accountability and transparency. This in turn can help increase public understanding and participation in decisions taken by public authorities.
31. In addition to the general considerations, the Commissioner also appreciates that there is a strong public interest in being as transparent as possible in relation to anything which has a significant impact upon the environment or which concerns public money. Disclosure of the withheld information would enable the public to assess whether the Department thoroughly investigates and deals appropriately with offences concerning pollution of the environment. There is also a public interest in the public being reassured that the investigations are thorough and appropriate, which can strengthen the public's confidence in the system. The Commissioner accepts these are strong arguments in favour of disclosure.

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

32. The Department is mindful of the presumption in favour of disclosure within the EIR and of the importance of public authorities being transparent and accountable. However, it does not consider that these public interest factors outweigh the strong public interest in the overriding need to adhere to judicial rules, thereby protecting the integrity of our justice system and ensuring equitability and fairness to all parties involved.

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

33. The Commissioner appreciates that there is a strong public interest in public authorities being as accountable as possible in relation to decisions relating to the protection of the environment and concern

public money. However, having regard to the circumstances of this case, it is the Commissioner's view that the very strong public interest in maintaining the exception outweighs the public interest in disclosure.

34. In coming to this conclusion, the Commissioner has considered the timing of the request, the accessibility of the information and the purposes for which it is held, all of which could affect the public interest arguments in this case.
35. If a request is made when court proceedings are still ongoing, the public interest in preserving the course of justice, by avoiding prejudice to an ongoing case, will usually be paramount. The Commissioner is satisfied that proceedings were still ongoing at the time of the request and that therefore the public interest in avoiding prejudice was paramount.
36. If the information is also held by a public authority for purposes other than court proceedings, this may weaken the public interest in non-disclosure, as it may mean the information is less sensitive, or otherwise accessible. The Commissioner accepts the Department's assertion that the information in this case is held solely for the purpose of court proceedings. He is satisfied that it is not otherwise accessible to the public as access to the information is governed very strictly by judicial rules.
37. Since there are no factors existing in this case which would weaken the strong public interest in not prejudicing ongoing court cases and thereby undermining the judicial system, the Commissioner is satisfied that the public interest in maintaining the exception outweighs any public interest in disclosure of the information withheld under regulation 12(5)(b) of the EIR.

### **Procedural requirements**

38. The Commissioner has found a breach of regulation 14(2) and (3) because the Department, when responding to the complainant's revised request of 5 January 2011, did not properly refuse any part of the request – it simply stated its estimate of costs for providing the requested information. It failed to rely on any exceptions under the EIR until during its internal review, when it stated that some of the information was being withheld under regulations 12(5)(b) and 13(1) of the EIR. It should have relied upon these exceptions within 20 working days of the request.
39. The complainant also asked the Commissioner to consider the length of time taken for the council to conduct its internal review. Under regulation 11 of the EIR, a public authority has 40 working days to

conduct an internal review following receipt of a complaint. The Department in this case was in breach of this requirement.

### **Other matters**

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40. The Commissioner is concerned with the length of time taken by the Department to respond to the complainant in this case. The Commissioner has further significant concerns about the delays or lack of response to his correspondence in relation to his investigation. The Commissioner has noted the details of this case in particular.

## Right of appeal

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41. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

42. 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.
43. 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** .....

**Steve Wood**  
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**Information Commissioner's Office**  
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