

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

**Decision notice**

**Date:** 13 July 2023

**Public Authority:** Northern Ireland Assembly  
**Address:** Parliament Buildings  
Stormont  
Belfast  
BT4 3XX

**Decision (including any steps ordered)**

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1. The complainant has requested correspondence held by the Northern Ireland Assembly regarding Private Members' Bills. The Assembly stated that it was acting in a legislative capacity as set out at regulation 3(3) of the EIR, therefore it was not required to process the request under the EIR.
2. The Commissioner's decision is that in the circumstances of this particular request the Assembly is acting in a legislative capacity, therefore the Assembly is not required to respond to the request under the EIR. The Commissioner does not require further steps to be taken.

**Background**

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3. The Northern Ireland Assembly (the Assembly) is the devolved legislature for Northern Ireland. It is responsible for making legislation on transferred matters in Northern Ireland.<sup>1</sup>

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<sup>1</sup> <http://www.niassembly.gov.uk/assembly-business/legislation/>

4. Most primary legislation that passes through the Assembly is brought forward by the relevant Minister. However, bills can also be introduced by individual Members, known as Private Members' Bills (PMBs).<sup>2</sup>

## Request and response

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5. On 24 January 2022 the complainant requested the following information from the Assembly:

"Please forward to me any and all correspondence between the Bill Office holds [sic] which is connected in all ways and anyways with private members bills to ban 'fracking' and has taken place since January 1st 2020 and December 31st 2021. Please accompany the response with a summary list which explains what information the Bill Office holds and what is released/not released, dates of any interactions, and with a meaningful description of what that set of information is."

6. The Assembly responded on 7 April 2022. It advised that regulation 3(3) of the EIR was engaged and that the Assembly was not required to process the request under the EIR.
7. The complainant requested an internal review on 3 May 2022, and the Assembly provided him with the outcome of that review on 18 May 2022. It maintained its position that the Assembly was acting in a legislative capacity and was not required to comply with the request under the EIR.

## Scope of the case

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8. The complainant contacted the Commissioner on 14 June 2022 to complain about the way his request for information had been handled. The complainant maintained that the Assembly ought to have complied with his request under the EIR.
9. The Commissioner considers that the scope of his investigation is limited to determining whether or not the Assembly is acting in a legislative capacity in respect of the requested information. He has inspected the

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<sup>2</sup> <http://www.niassembly.gov.uk/assembly-business/legislation/2017-2022-mandate/about-non-executive-bills/>

requested information to inform this decision, but has not formed a view as to whether it ought to have been disclosed to the complainant.

## Reasons for decision

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### Regulation 3(3): application of the EIR

10. It is not disputed by either party that the Assembly is a public authority within the meaning of the EIR. However Regulation 3(3) states that the EIR do not apply to a public authority to the extent that it is acting in a judicial or legislative capacity. This reflects Article 2 of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters<sup>3</sup>, which states that the definition of public authorities excludes bodies or institutions acting in a judicial or legislative capacity.

### The complainant's position

11. The complainant's position is that the Assembly is not acting in a legislative capacity in providing services to Members through the Bill Office. He referred the Assembly to Article 8 of the Aarhus Convention, which recognises the importance of effective public participation in decision making.
12. The complainant also referred to the Aarhus Convention Implementation Guide:<sup>4</sup>

"The collaboration between executive branch and legislative branch authorities in law-making is recognised in article 8. As the activities of public authorities in drafting regulations, laws and normative acts is expressly covered by that article, it is logical to conclude that that the Convention does not consider these activities to be acting in a 'legislative capacity'. Thus, executive branch authorities engaging in such activities are public authorities under the Convention." (page 49)

13. The complainant suggested that if the Assembly was always acting in a legislative manner, it would effectively not be required to answer any requests under the EIR, which he did not accept. The complainant was

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<sup>3</sup> <https://unece.org/DAM/env/pp/documents/cep43e.pdf>

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[https://unece.org/DAM/env/pp/Publications/Aarhus\\_Implementation\\_Guide\\_interactive\\_eng.pdf](https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf)

of the view that the Assembly was effectively denying him his rights under the Aarhus Convention.

### The Assembly's position

14. The Assembly maintained that it is not obliged to comply with the complainant's request because it is acting in a legislative capacity. It explained that PMBs are legislative proposals brought forward by individual Members.
15. Members seeking to develop a PMB must seek permission from the Assembly's Presiding Officer (the Speaker), who may authorise access to the non-Executive Bills service provided by the Assembly Commission Bill Office. The Bill Office provides assistance to Members to develop a PMB and guides them through the legislative scrutiny process. This includes access to parliamentary drafters (specialist lawyers who assist in drafting the Bill).
16. The Assembly set out that any recorded information held by the Bill Office during the legislative process would arise only in the context of supporting that process and assisting Members in their role as legislators. It did not consider that any distinction could be made between the legislative process and the administrative process that supports a Bill. It considered that this view was supported by the Grand Chamber decision of the Court of Justice (the CJEU) in the case of Flachglas Torgau.<sup>5</sup> In that case the CJEU stated:

"...a broad interpretation of 'legislative process' should be adopted, including the different stages of that process until the promulgation of any law that may be adopted in that process." (para 56)
17. The Assembly further set out that at the time of the request, the requested information directly related to a Bill which had been introduced into the assembly and which was subject to the legislative process. The Assembly explained that the fact that the Bill was being scrutinised by the Assembly at the time of the request was a key element in the decision that regulation 3(3) disapplied the provisions of the EIR.
18. The Commissioner asked the Assembly to consider the complainant's arguments, set out in his request for internal review, since they did not appear to have been addressed in the internal review.

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<sup>5</sup> Case C-204/09, Grand Chamber 14 February 2012  
<https://curia.europa.eu/juris/document/document.jsf?docid=119426&doclang=en>

19. In response, the Assembly took the view that the complainant's arguments regarding the Aarhus Convention were not of assistance in determining the matter. It set out that Article 8 of the Aarhus Convention did not make any reference to the participation of public authorities in drafting laws which would become primary legislative acts.

#### The Commissioner's findings

20. The Commissioner considers the key issue to be whether a distinction can be made between the Assembly as a public authority, and as the legislature. The Commissioner is mindful that the Implementation Guide is not binding, but provides guidance on interpretation of the Aarhus Convention. He notes that the Implementation Guide discusses the role of public authorities in the preparation of legislation, explaining that in some countries, public authorities other than the legislature participate in the preparation of legislation that is then submitted to the legislative body for consideration:

“Because the legislative bodies are the institutions competent for final adoption of the legal acts, with subsequent binding effect, the preparation of legislation by the public authorities cannot be considered as acting in a legislative capacity within the meaning of the Convention. Where public authorities drafting legislation will pass it on to a parliament or other legislative body, public participation while the drafts are under the auspices of public authorities does, in fact, constitute participation at an early stage.”  
(page 120)

21. This suggests that, in some cases, the public authority preparing the legislation and the legislative body adopting it, are separate legal persons. However, in the case of the Assembly, legislation is prepared by and adopted by the legislature as part of the broader legislative process.
22. The Commissioner is mindful that the CJEU in Flachglas Torgau found that a broad interpretation of 'legislative process' should be adopted. In the Commissioner's opinion it follows that the Assembly Commission Bill Office operates as part of the legislative process. In supporting Members through this process, it is effectively acting in a legislative capacity.
23. The Commissioner has carefully considered the complainant's position and submissions put forward. However he finds that the CJEU judgment must carry more weight than the Implementation Guide. Therefore the Commissioner accepts that in the circumstances of this particular request the Northern Ireland Assembly is acting in a legislative capacity and is therefore not required to respond to the complainant's request under the EIR.

## Right of appeal

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24. 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: 0203 936 8963  
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)

25. 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.
26. 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 .....**

**Sarah O’Cathain  
Senior Case Officer  
Information Commissioner’s Office  
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