

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

### **Decision notice**

**Date:** 12 April 2024

**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 information held by the Northern Ireland Assembly in connection with Private Members' Bills to ban fracking. 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 that access regime.
2. The Commissioner's decision is that the Assembly is acting in a legislative capacity in this particular case, therefore the Assembly is not required to respond to the request under the EIR. However the Commissioner finds that the Assembly is required to respond to the request under FOIA. The Assembly is not entitled to refuse the request in reliance on the exemption at section 39 of FOIA.
3. The Commissioner requires the Assembly to take the following steps to ensure compliance with the legislation.
  - Respond to the complainant's request: Firstly, confirm or deny that the requested information is held (or, if the public authority decides to refuse to confirm or deny that any of the requested information is held, then a refusal notice should be issued that complies with the requirements of section 17 of FOIA).
  - Secondly, and subject to the above, if the information is held the public authority must either disclose the requested information or, if it wishes to withhold any information, issue a

refusal notice in relation to the information it wishes to withhold and disclose the remainder.

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 FOIA and may be dealt with as a contempt of court.

## Request and response

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5. On 20 July 2023 the complainant requested the following information from the Assembly:

"...please forward to me **A LIST** of any and all information known to the Bill Office which is connected in all ways and any ways with private members bills to ban 'fracking' and has taken place since January 1st 2020 and December 31st 2021. Please ensure this summary list explains what information the Bill Office holds, has [sic] date of information, and a meaningful description of what that set of information is."

6. The Assembly originally responded by stating that it did not hold the requested information. It suggested that the complainant specifically ask for a summary or digest of information held.
7. The complainant declined to submit a revised request and requested an internal review on 24 August 2023.
8. The Assembly provided the complainant with the outcome of the internal review on 20 September 2023. It maintained that it did not hold a list of information, and that it was not required to create information which did not already exist.
9. The complainant contacted the Commissioner on 28 September 2023 to complain about the Assembly's response to his request. The Commissioner wrote to the Assembly on 30 October 2023. He referred the Assembly to his published guidance<sup>1</sup> setting out his view on requests for lists of information held by public authorities:

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<sup>1</sup> <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/determining-whether-we-hold-environmental-information/#create>

“Sometimes a requester wants a list of documents, schedule of correspondence or a document summary rather than a particular document itself. Whilst you may not physically possess such a document, you would probably still hold the information, because you could compile or extract it from raw data that you possess.”

10. The Commissioner also pointed out that the complainant had specifically asked for a “summary list” of information held. The Commissioner asked the Assembly to reconsider the request.
11. Following the Commissioner’s intervention the Assembly issued a fresh response on 13 November 2023. At this point the Assembly stated that it was not required to comply with the request under the EIR since it was acting in a legislative capacity.

### **Scope of the case**

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12. The complainant contacted the Commissioner on 2 January 2024 to complain about the Assembly’s revised response. The complainant argued that the Assembly ought to have responded to his request under the EIR.
13. The Commissioner notes that he issued a previous decision notice involving the same parties which dealt with the same issue, albeit in respect of a subsequent request for similar information.<sup>2</sup> The Commissioner further notes that the complainant did not seek to appeal that decision, but has made further submissions in support of his position in respect of this fresh request.
14. The Commissioner considers that the scope of his investigation is limited to determining the appropriate access regime in this case. The Commissioner has not investigated whether or not the Assembly holds information relevant to the request.
15. The Commissioner has considered the complainant’s detailed submissions, but may only take into account those arguments relating to whether or not the Assembly is acting in a legislative capacity. Arguments relating to the public interest in accessing the requested information are not relevant to this specific issue and have not been addressed in this decision notice.

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<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4025919/ic-175966-q9x9.pdf>, issued 13 July 2023.

## Reasons for decision

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

16. 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 Commissioner's previous decision

17. In the previous decision notice referred to above the Commissioner considered whether a distinction could be made between the Assembly as a public authority, and as the legislature.

18. The Assembly explained that Private Members Bills (PMBs) are legislative proposals brought forward by individual Members. 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).

19. The Commissioner took account of the Grand Chamber decision of the Court of Justice (the CJEU) in the case of Flachglas Torgau<sup>4</sup> that a broad interpretation of 'legislative process' should be adopted. He concluded that the Assembly Commission Bill Office operates as part of the legislative process, and that in supporting Members through this process, the Assembly is effectively acting in a legislative capacity.

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

<sup>4</sup> Case C-204/09, Grand Chamber 14 February 2012

<https://curia.europa.eu/juris/document/document.jsf?docid=119426&doclang=en>

### The complainant's position

20. The complainant maintains that the Assembly is not acting in a legislative capacity in providing services to Members through the Bill Office. He has also referred to the CJEU in Flachglas Torgau, which ruled:

"2. The first sentence of the second subparagraph of Article 2(2) of Directive 2003/4 must be interpreted as meaning that the option given to Member States by that provision of not regarding bodies or institutions acting in a legislative capacity as public authorities can no longer be exercised where the legislative process in question has ended".

21. The complainant drew the Commissioner's attention to the dates and timings of the PMB to which his request related.<sup>5</sup> The PMB was introduced in November 2021 and progressed to Committee Stage.

22. However, the NI Assembly was dissolved in March 2022 following the resignation of the then First Minister. An election was held in May 2022, but the Democratic Unionist Party subsequently refused to nominate a First Minister, which meant that an Executive could not be formed.

23. The Commissioner understands the complainant's argument to be that the "legislative process" in this case had ceased at the point the Assembly was dissolved. Therefore, in the complainant's opinion, the Assembly was no longer acting in a legislative capacity and regulation 3(3) could not apply.

24. The complainant also referred the Commissioner to the CJEU decision in the case of Deutsche Umwelthilfe eV:<sup>6</sup>

"31. As regards the aims of the directive, only the smooth running of the process for the adoption of legislation and the particular characteristics of the legislative process, which ensure that the public is usually adequately informed justify the fact that those bodies acting in a legislative capacity or participating

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<sup>5</sup> <http://www.niassembly.gov.uk/assembly-business/legislation/2017-2022-mandate/non-executive-bill-proposals/onshore-fracking-prohibition-bill/>

<sup>6</sup> Case C-515/11, Second Chamber 18 July 2013

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=139762&pageIndex=0&doclang=EN>

in the legislative process should be exempt from the obligations to provide information imposed by that directive.”

25. The complainant argued that this should be interpreted to mean that “the legislative capacity exception cannot apply when meaningful public participation has not taken place...”. He considered that the Commissioner ought to consider whether public participation had been impeded by what he described as the Assembly’s refusal to interact meaningfully with him.

#### The Assembly’s position

26. The Assembly maintained that it is not obliged to comply with the complainant’s request because it is acting in a legislative capacity. It acknowledged that the Bill was no longer being considered by the Assembly at the time of the request, but confirmed that this did not alter its position.

27. The Assembly drew the Commissioner’s attention to the Opinion<sup>7</sup> given by the Advocate General which informed the decision in Flachglas Torgau:

“...executive bodies whose role in the legislative process is limited to submitting or commenting on legislative proposals may be excluded from the definition of ‘public authority’ when they are performing such a role.” (paragraph 72)

28. In her Opinion the Advocate General went on to contrast the above bodies with those who are structurally part of the legislature itself:

“With regard to the enactment of legislation, and with regard to the legislation enacted, bodies which form part of the legislature act exclusively in a legislative capacity.

Their activity in that capacity has no beginning or end in time. There is therefore no temporal limitation on the possibility of their exclusion from the definition of ‘public authority’ within the meaning of the Directive.” (paragraph 73)

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<sup>7</sup> [https://curia.europa.eu/juris/document/document\\_print.jsf?doclang=EN&docid=104343](https://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&docid=104343)

29. The Assembly also referred the Commissioner to the CJEU's decision in *Friends of the Irish Environment*.<sup>8</sup> This case dealt with the exclusion of judicial bodies from access rights under the Aarhus Convention and the Directive which the EIR enact,<sup>9</sup> and the Assembly set out that legislatures should be equally excluded. It argued that:

"The Assembly is excluded from Directive 2003/4/EC because of its institutional nature, not because of the legislative functions it exercises from time to time".

#### The Commissioner's findings

30. The Commissioner has taken account of the arguments put forward in the previous decision notice, and of his findings in that case. He is mindful 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 Assembly as part of the wider legislative process.
31. Following the approach of the CJEU in *Flachglas Torgau* who found that a broad interpretation of 'legislative process' should be adopted, the Commissioner was satisfied in the previous case 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.
32. The Assembly has subsequently argued that it should be excluded from the EIR because of its "institutional nature", as opposed to its legislative functions. However the Commissioner is of the view that this interpretation is too broad. Regulation 3(3) of the EIR excludes public authorities "to the extent that" they are acting in a legislative capacity. This suggests that regulation 3(3) does not constitute an absolute disapplication of the EIR to legislative bodies.

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<sup>8</sup> *Friends of the Irish Environment Ltd v Commissioner for Environmental Information* (Courts Service of Ireland intervening), case C-470/19 [2021] WLR 5557

<sup>9</sup> Council Directive 2003/4/EC

33. The Commissioner notes that the Assembly website explains that the Assembly has three main roles: a legislative role; a scrutiny role; and a representation role.<sup>10</sup>
34. These roles are clearly distinguished by the Assembly, which further indicates that the Assembly does not act exclusively in a legislative capacity.
35. The Commissioner has also given careful consideration to the Opinion of the Advocate General as set out at paragraphs 27 and 28 above. The Assembly has cited this Opinion in support of its position but the Commissioner is mindful that the Opinion focuses on the activity of the legislature "with regard to the enactment of legislation", as opposed to more broadly.
36. The Commissioner acknowledges that the Assembly is the legislature, but he finds that the Assembly's activities are not limited to the enactment of legislation. Consequently the Commissioner does not accept the Assembly's argument that it should be excluded from the EIR by virtue of its institutional nature.
37. The Commissioner has considered the complainant's argument that regulation 3(3) cannot apply unless meaningful public participation has taken place. In the Commissioner's opinion the case law cited by the complainant falls far short of setting such a test or bar in practice, and the Commissioner is not persuaded that he ought to interpret regulation 3(3) in this manner.
38. The Commissioner has gone on to examine both parties' arguments concerning whether the Assembly can be said to be acting in a legislative capacity beyond the passage of a particular Bill, whether or not that is passed into legislation.
39. The Commissioner notes that the CJEU in Flachglas Torgau was asked to consider regulation 3(3) in the context of a government department, as opposed to the legislature. The Advocate General's Opinion, as quoted at paragraph 28 above, sets out that the legislature's activity in a legislative capacity has no temporal limitation. The Commissioner interprets this to mean that the legislature should be distinguished from other public authorities when considering the temporal aspect of legislative activity.

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<sup>10</sup> <http://www.niassembly.gov.uk/about-the-assembly/how-the-assembly-works/3-roles-of-the-assembly/>



40. Consequently the Commissioner is satisfied that the complainant's request fell within the scope of the Assembly's legislative capacity, irrespective of the status of the draft legislation itself at the time of the request. Regulation 3(3) is accordingly engaged, and the Commissioner must find that the Assembly was not required to respond to the complainant's request under the EIR.

### **Application of FOIA**

41. Neither party has disputed that the requested information is "environmental information" within the meaning of regulation 2 of the EIR. The Commissioner is satisfied that the requested information, to the extent that it is held, would fall within the meaning of regulation 2(1)(c) in particular. The requested information relates to PMBs to ban fracking, which the Commissioner considers falls squarely within the description of "...legislation... affecting or likely to affect the elements and factors" as set out at regulation 2(1)(c).
42. However, since the Commissioner has found that regulation 3(3) disappplies the EIR in this case, he has gone on to consider whether the Assembly ought to have responded to the request under FOIA. This is notwithstanding the fact that the complainant expressly directed that his request should not be considered under FOIA. The Commissioner has commented on this in Other Matters below.
43. Requests for environmental information would normally fall to be considered under the EIR rather than FOIA. There is nothing to prevent a public authority from issuing a response under FOIA in addition to the EIR if it wishes to do so. In practice public authorities tend to respond solely under the EIR, and the Commissioner considers this a proportionate way of handling requests where the EIR apply.
44. However, since in this case the Commissioner has found that the Assembly is not obliged to respond to a request for environmental information under the EIR, he is of the opinion that the Assembly ought to have considered the request under FOIA and responded under that access regime.

### **Section 39: environmental information**

45. In light of his conclusions with regard to the EIR, the Commissioner has proactively considered the exemption at section 39 of FOIA. Section 39 provides an exemption from the duty to disclose environmental information (and the duty to confirm or deny that environmental information is held) under the following circumstances:

"39.(1) Information is exempt information if the public authority holding it –

- (a) is obliged by regulations under section 74 to make the information available to the public in accordance with the regulations, or
- (b) would be so obliged but for any exemption contained in the regulations."

46. The "regulations under section 74" of FOIA are the EIR.<sup>11</sup>
47. For the reasons set out above the Commissioner is satisfied that the Assembly was not obliged to respond to the request under the EIR. It follows that the Assembly could not have been obliged to make the requested information available under the EIR, therefore section 39(1)(a) cannot be engaged in the circumstances of this case.
48. With regard to section 39(1)(b), the Commissioner is of the opinion that regulation 3(3) of the EIR cannot be interpreted as an "exemption". Rather, it disapplies the EIR as an access regime, meaning that the public authority is not required to issue a response, offer an internal review, etc. Under regulation 3(3) the public authority is not required to consider whether information can be disclosed under the EIR, therefore the question of engaging exemptions (referred to as exceptions under the EIR) does not arise. Consequently the Commissioner also finds that section 39(1)(b) cannot be engaged in the circumstances of this case.
49. In conclusion, the Commissioner is satisfied that the Assembly ought to have responded to the complainant's request under FOIA. He is further satisfied that the Assembly would not have been entitled to refuse the request under section 39 of FOIA. The Commissioner would emphasise that he has not considered whether the Assembly would be entitled to rely on any other exemption or exclusion under FOIA.

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<sup>11</sup> <https://www.legislation.gov.uk/ukpga/2000/36/section/74>

## Other matters

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50. The Commissioner considers that this complaint provides an opportunity to offer some advice for requesters when drawing up requests.
51. The Commissioner observes that the complainant directed the Assembly not to consider his request under FOIA. Rather, he explicitly stated in his request (complainant's emphasis):

"PLEASE NOTE:  
THIS IS NOT A FREEDOM OF INFORMATION REQUEST  
DO NOT TREAT IT AS A FREEDOM OF INFORMATION REQUEST."

52. The complainant did not cite the EIR but instead referred to:
- "...any and all of the Complex UK Environment legislation re UNECE Aarhus Convention & UNECE Aarhus Convention".
53. The Commissioner acknowledges the complainant's position that the Assembly ought to have responded to the request under the EIR. However, the Commissioner would respectfully point out that it is for a public authority to identify the appropriate access regime, based on the information that is being requested. There is no provision for a requester to choose which regime they would prefer the public authority to apply. In this case, had the Commissioner accepted the complainant's instruction not to consider the request under FOIA, the complainant's own choice of words would have prevented him from receiving the response under FOIA to which the Commissioner finds he is entitled.
54. The Commissioner also notes that the complainant requested:
- "A LIST of any and all information known to the Bill Office which is connected in all ways and any ways with private members bills to ban 'fracking'...".
55. The Commissioner acknowledges that the complainant presumably wanted to ensure that no relevant information was excluded from the scope of his request. However the Commissioner would point out that access rights under FOIA, and the EIR, extend only to recorded information held by a public authority at the time of the request.

56. The Commissioner would further point out that requests framed in such a broad manner (“any and all information known to” and “information which is connected in all ways and any ways”) often risk refusal on the grounds of cost or burden. Such phrasing may also lead to disputes about the interpretation of the scope of the request.
57. The Commissioner would recommend that requesters consider carefully the phrasing and scope of requests, so that they are as clear as possible and limited to the actual information sought. Requesters may find it helpful to consult the Commissioner’s published guidance before submitting a request.<sup>12</sup>

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<sup>12</sup> <https://ico.org.uk/for-the-public/official-information/how-to-write-an-effective-request-for-information/>

## **Right of appeal**

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58. 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)

59. 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.

60. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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