

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 June 2024

Public Authority: Antrim and Newtownabbey Borough Council
Address: Antrim Civic Centre
50 Stiles Way
Antrim
BT41 2UB

Decision (including any steps ordered)

1. The complainant has requested information provided to Antrim and Newtownabbey Borough Council (the Council) as part of a planning enforcement case. The Council provided some information and withheld other information in reliance on the exception at regulation 12(5)(b) of the EIR (adverse effect on the course of justice).
2. The Commissioner's decision is that the Council was entitled to rely on regulation 12(5)(b). No steps are required.

Request and response

3. The complainant submitted his original request to the Council on 12 September 2023:

I would like all correspondence issued to or from [name and email address provided] and [name and email address provided] for the following applications:

LA03/2020/0123/F
LA03/2021/1075
LA03/2022/0521/F
LA03/2022/0662/F
LA03/2023/0140/CLOPUD
LA03/2023/0200/CLOPUD

4. The Council responded on 6 October 2023, providing some of the requested information but refusing the remainder under regulation 12(4)(a) of the EIR (information not held).
5. The complainant contacted the Council on 6 October 2023 advising that he was aware that the Council had been provided with an expert report relating to planning application LA03/2022/0662/F. The complainant advised that this report was not available on the planning portal.
6. The Council responded to the complainant on 12 October 2023. It stated that it had reviewed the file in question and had not located an expert report as described.
7. The complainant disputed this on 12 October 2023 and the Council conducted an internal review.
8. The Council provided the outcome of the internal review on 1 November 2023. It confirmed that it had now identified relevant information but refused to provide it, relying on the exception at regulation 12(5)(b).
9. The complainant advised the Council on 1 November 2023 that he had not requested an internal review but wished to do so now. The complainant confirmed that he already held a copy of the report, and wished to understand who it was issued to and when, and to receive a copy of the email that accompanied the report.
10. The Council wrote to the complainant on 1 December 2023 but declined to provide any further substantive response.

Scope of the case

11. The complainant contacted the Commissioner on 1 December 2023 to complain about the way his request for information had been handled. The complainant argued that the Council ought to have disclosed the expert report, as well as correspondence relating to that report.
12. The complainant indicated to the Commissioner that some of the withheld information is likely to comprise his personal data. The Commissioner subsequently advised the complainant that information which is the personal data of the requester falls outside the scope of the EIR by virtue of regulation 5(3). The complainant agreed that his personal data could be excluded from the scope of the case.
13. The complainant also confirmed to the Commissioner that he had a copy of what he believed to be the report in question. However the complainant maintained that he required a copy of the report as

provided to the Council in order to compare it with the information he possessed.

14. Following the Commissioner's intervention the Council disclosed one email to the complainant. Consequently the remaining withheld information comprises the expert report provided to the Council.

Reasons for decision

Regulation 12(5)(b): the course of justice

15. Regulation 12(5)(b) provides an exception where disclosure of the information in question 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.
16. "Adversely affect" means there must be an identifiable harm to or negative impact on the interests identified in the exception. Furthermore, the threshold for establishing adverse effect is a high one, since it is necessary to establish that disclosure would have an adverse effect. "Would" means that it must be more probable than not, ie a more than 50% chance that the adverse effect would occur if the information were disclosed. If there is a less than 50% chance of the adverse effect occurring, then the exception is not engaged.

The complainant's position

17. The complainant argued that he had raised concerns with the Council about the "impartiality, accuracy and ethical considerations" of the report. He set out that the Council's reliance on the report, without addressing his concerns, undermined the integrity of its enforcement process.
18. The complainant also advised the Commissioner that the Council had not used the report in its "Statement of Case" in the enforcement case. Therefore the complainant disputed that the exception applied.

The Council's position

19. The Council set out that at the time of the request the withheld information, ie the report, was held as part of a planning enforcement files that was still subject to a statutory planning appeal and an ongoing planning enforcement investigation.

20. The Council further explained that planning decisions are subject to a statutory right of appeal in Northern Ireland, currently to the Planning Appeals Commission (the PAC). The PAC is an independent body dealing with a range of planning issues and related matters.¹
21. The Council confirmed that the planning application linked to the enforcement notice was appealed on 5 July 2023 and the Planning Enforcement Notice was appealed on 5 September 2023. Both appeals remained under consideration by the PAC at the time of the complainant's request.
22. The Council also confirmed that the withheld information was relevant to matters that were subject to investigation by its Planning Enforcement Team at the time of the request. The Council provided the Commissioner with details of the issues under investigation.
23. The Council argued that disclosing such information would adversely affect the course of justice, ie its ability to investigate the planning enforcement matter, and furthermore that disclosure had the potential to prejudice the statutory appeals process under way with the PAC.

The Commissioner's position

24. With regard to the issue of timing, it is important to note that the Commissioner's role in considering complaints is limited, in accordance with case law, to considering the circumstances as they existed at the time of the request. In any event, in view of the Council's submissions above, the Commissioner accepts that at the time of the request the planning application and planning enforcement appeals remained live, and that this was also the case at the internal review stage, as it was in early 2024.
25. In terms of the risks of the withheld information being disclosed, the Commissioner notes the complainant's argument that the information in question was not used as part of the Council's "Statement of Case". However, the Commissioner notes the Council's argument that it was still investigating related issues at the time of the complainant's request. The Commissioner therefore accepts that the withheld information related to a live investigation as opposed to matters that had been concluded.

¹ <https://www.pacni.gov.uk/about-us>

26. The Commissioner further accepts that in order for the Council to be able to investigate alleged planning breaches, and in order for the interests of fairness and justice for those against such breaches have been made to be maintained, the Council requires a confidential space in which to consider any evidence or information provided.
27. In the circumstances of this case the Commissioner accepts that disclosure of the withheld information in this case would undermine that confidential space and represents a genuine and real risk of harming its ability to conduct an inquiry, namely this particular investigation. The Commissioner acknowledges the complainant's concern about the integrity of the investigation, but is of the opinion that disclosure of the withheld information would be more likely to have a harmful effect for the reasons set out above.
28. The Commissioner also accepts that disclosure of such information, during the course of an ongoing investigation, could dissuade further involvement or reporting by complainants or co-operation by parties, in future unrelated cases if the parties in question thought that their correspondence with the Council could potentially be disclosed under the EIR during the course of an ongoing investigation. On the basis of the above factors the Commissioner accepts that the withheld information is exempt from disclosure on the basis of regulation 12(5)(b).

Public interest test

29. Since the Commissioner finds that the exception at regulation 12(5)(b) is engaged, he must go on to consider whether the public interest in maintaining that exception is sufficiently strong to outweigh the public interest in disclosure. He is also mindful that regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions.
30. The complainant reiterated his concerns about the report, and its consideration by the Council as part of the planning enforcement process. He argued that withholding the information undermined public trust and contradicted the Council's duty to maintain transparency.
31. The complainant also made allegations about the independence of the report and its author, which he felt increased the public interest in disclosure.

32. The Council acknowledged the public interest in access to information that demonstrated the Council's statutory obligations in relation to enforcement. It drew the Commissioner's attention to its Planning Enforcement Strategy.²
33. The Commissioner appreciates that the complainant has a particular interest in this planning enforcement matter. As a result the Commissioner accepts that he has a genuine interest in understanding all aspects of the Council's decision making in respect of this issue, including its consideration of information and evidence received from third parties. Disclosure of the withheld information would directly address the complainant's interest in this regard. More broadly, and more relevant to the wider public interest, the Commissioner accepts that disclosure of the withheld information would allow the public to scrutinise it and assess its value as evidence.
34. Nevertheless, the Commissioner is not persuaded that there is significant overlap in this case between the complainant's personal interest and the wider public interest. The Commissioner accepts that there is a legitimate, and strong, public interest in the Council being able to investigate alleged breaches of planning legislation; this is particularly the case when the matter in question remains live and ongoing, as it is here. As part of this process it is essential that the Council be able to examine and consider information in a protected space.
35. The Commissioner further observes that the planning appeals process provides a route by which those involved in planning enforcement cases may scrutinise and challenge decisions. In the Commissioner's opinion, this lessens the weight of the public interest in disclosure of the withheld information in this case, especially where the Commissioner has already accepted that disclosure would have an adverse effect.
36. In conclusion, whilst the Commissioner has been informed by the presumption in favour of disclosure, he is satisfied that, in all the circumstances of this particular case, the public interest in maintaining the exception at regulation 12(5)(b) outweighs the public interest in disclosure of the withheld information.

² <https://antrimandnewtownabbey.gov.uk/getmedia/9edf60c9-89c4-4cae-bd06-671ce958e611/Planning-Enforcement-Strategy-August-2019.pdf.aspx>

Right of appeal

37. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

38. 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.
39. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Sarah O’Cathain
Senior Case Officer
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
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