

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

Decision Notice

Date: 31 May 2022

Public Authority: Mid and East Antrim Borough Council
Address: 1-29 Bridge Street
Ballymena
BT43 5EJ

Decision (including any steps ordered)

1. The complainant has requested information relating to a number of redevelopment projects. Mid and East Antrim Borough Council issued a refusal notice citing section 42 of FOIA but advised that it required additional time to consider the public interest. The Council subsequently advised that it was seeking legal advice in respect of the requests. At the date of this decision notice it has not issued a substantive response to either request.
2. The Commissioner's decision is that both requests are for environmental information, therefore they ought to have been dealt with under the EIR rather than FOIA. In failing to provide a full response within the statutory time limit the Council has failed to comply with regulation 5(1) of the EIR.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Respond to the complainant's requests under the EIR: in each case, 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

5. On 20 December 2021 the complainant requested the following information from the Council:

Request 1

"All information held by the Council about the entire process prior to and up to the date of the decision last year to award a contract to a developer to develop the Former Fish Factory in Glenarm, the Former Quarry Site in Glenarm and the Former Eglinton Yard in Glenarm".

Request 2

"All information held by the Council in relation to the development of the Former Fish Factory in Glenarm, the Former Quarry Site in Glenarm and the Former Eglinton Yard in Glenarm since the date of the decision to award those contracts last year".

6. The Council sought and received clarification from the complainant on 29 December 2021, at which point both parties agreed to replace references to awarding the contracts to accepting the proposal.
7. The complainant sent reminders to the Council on 3 February and 7 February 2022.
8. On 23 February 2022 the Council issued a partial refusal notice stating that it was considering reliance on the exemption at section 42 of FOIA. The Council stated that it required additional time "to pursue independent legal advice and consider the public interest test in relation to this request".
9. The complainant queried this response and the Council advised them on 7 March 2022 that the request "in its entirety" had been referred for independent legal advice.

Scope of the case

10. The complainant contacted the Commissioner on 11 March 2022 to complain that they had not received a substantive response to either request.

11. It appeared to the Commissioner that the complainant's requests ought to have been handled under the EIR rather than FOIA.
12. The Commissioner wrote to the Council on 5 May 2022 to request that it reconsider the complainant's requests and issue responses under the EIR.
13. The Council acknowledged receipt of the Commissioner's correspondence. However the complainant had not received any further correspondence from the Council at the time of issuing this decision notice.
14. In light of the above the Commissioner's decision in this case relates to the appropriate access regime, and the fact that the Council has failed to issue a substantive response to the two requests. The Commissioner has not considered whether the requested information, to the extent that it is held by the Council, ought to be disclosed.

Reasons for decision

Regulation 2: environmental information

15. Regulation 2(1) of the EIR provides the following definition of environmental information:

"...any information in written, visual, aural, electronic or any other material form on-

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);"

16. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition there are some procedural differences affecting how requests should be handled.
17. The Commissioner recognises that it can sometimes be difficult to identify environmental information, and has produced guidance to assist public authorities and applicants.¹ The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.
18. Further, the Commissioner considers that interpretation of the phrase 'any information... on' will usually include information concerning, about, or relating to the measure, activity, factor etc., in question. It is not necessary for the information itself to have a direct effect on the elements of the environment, or to record or discuss such an effect. Rather, with regard to regulation 2(c) it is the measure or activity that must be likely to affect the elements or factors as set out in regulation 2(a) and (b).
19. Accordingly the Commissioner has considered whether the requested information has something to do with a measure or activity that is likely to affect the environment. The requested information relates to the proposed development of three Council-owned sites in Glenarm, Co Antrim. The Commissioner is satisfied that the proposed development of

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/regulation-2-1-what-is-environmental-information/>

sites is an activity that is likely to affect the elements and factors set out in regulation 2(a) and (b). Consequently, the Commissioner is satisfied that information relating to that activity will be environmental information within the meaning of regulation 2(1)(c) of the EIR.

Regulation 5: duty to make available environmental information on request

20. Regulation 5(1) of the EIR states that a public authority which holds environmental information shall make it available on request, subject to certain conditions.
21. Regulation 5(2) states that a public authority shall make information available as soon as possible and no later than 20 working days after the date of the request.
22. If the public authority wishes to refuse any part of the request it must issue a valid refusal notice under regulation 14 of the EIR. This includes refusing part or all of the request on the basis that the public authority does not hold the requested information.
23. Despite the Commissioner's intervention, the Council has failed to respond to the complainant's requests. The Commissioner is concerned that the Council first extended the time to consider the public interest test, and later advised the complainant that it was seeking legal advice in respect of the request.
24. Neither FOIA nor the EIR permit public authorities to extend the time for compliance in order to seek legal advice in respect of a request. FOIA does allow a public authority to take extra time to consider the public interest in respect of a qualified exemption that has already been engaged, but this extra time only applies to the extent that it is reasonable. There is no corresponding provision within the EIR.
25. Since the complainant's requests fell to be considered under the EIR the 20 working day time for compliance applies.
26. The Commissioner observes that regulation 7 of the EIR allows a public authority to take up to 40 working days to respond to a request

"...if it reasonably believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or make a decision to refuse to do so".

27. However the Council did not handle the request under the EIR, and in any event has exceeded even 40 working days.
28. The Commissioner therefore finds that the Council has failed to comply with regulation 5(1) of the EIR in respect of both requests.

Right of appeal

29. 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@hmcts.gsi.gov.uk

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

30. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Tribunal website.
31. 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
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Wycliffe House
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