

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 1 October 2019

Public Authority: Fermanagh and Omagh District Council

Address: Townhall
2 Townhall Street
Enniskillen
Co Fermanagh
BT74 7BA

Decision (including any steps ordered)

1. The complainant has requested information about planning approval. Fermanagh and Omagh District Council supplied information held falling within the scope of the request.
2. The Commissioner's decision is that Fermanagh and Omagh District Council has supplied all the information it holds falling within the scope of the request, complying with section 5(1) of the EIR. No further steps are required.

Request and response

3. On 17 February 2018 the complainant wrote to Fermanagh and Omagh District Council (FODC) and requested information in the following terms:

'Under the Environmental Information Regulations (2004), the following request are made regarding the continuing planning approval.

- 1. What statutory instruments or common law authority was used by the Council retrospectively to decriminalise the unauthorised removal of foreshore without approval, development order, licence and or permit causing environmental damage to protected species and natural habitats within an ASSI on Lough Erne (as legislated as a criminal and or unlawful offence) within the Council's retrospective approval of [redacted planning number].*
 - 2. What statutory instruments or common law authority was used by the Council retrospectively to decriminalise the unauthorised dumping on-site of foreshore without approval, development order, licence and or permit of industrial waste from dredging operations carried out in the removal of foreshore containing environmentally protected species and natural habitats on the ASSI site.*
 - 3. What statutory instrument or common law authority can the council rely to support their administration of not taking any enforcement action regarding the reported unauthorised development which caused (1) environmental damage to protected species and natural habitats foreshore and (2) the dumping of the industrial waste on site*
 - 4. Provide an explanation as to why no 'environmental impact assessment' has ever been sought or should have been sought by the council regarding the reported environmental damage to this ASSI site in any of the local planning development or analysis reports as provided by local planning in recommending planning approval to the above applications regarding (1) the dredging and environmental damage to an ASSI site and (2) the dumping of the industrial waste without development order, licence and or permit.'*
4. The Council responded on 12 March 2018. It provided some information falling within the scope of the request, signposted the complainant to relevant legislation, and advised that for some of the information requested, the Northern Ireland Environmental Agency (NIEA) would be the appropriate organisation to contact.

Scope of the case

5. The complainant contacted the Commissioner 14 August 2018 to complain about the way his request for information had been handled. He did not consider that the Council had sufficiently responded to the questions in his request as he sought environmental information regarding 'the specific statutory instruments or common law authority to which its local planning office had acted'.
6. The Commissioner considers the scope of the case to be whether FODC complied with its duty under 5(1) of the EIR to make all the information held available to the complainant.

Reasons for decision

7. Regulation 5(1) of the EIR places a duty on public authorities to make the environmental information it holds available on request.
8. The Council responded to each question in the request. For Questions 1 and 2, it referred the complainant to section 55 of the Planning Act relating to retrospective planning permission. For legislation relating to ASSIs it advised this was an issue for the NIEA. For Question 3 it advised that as planning permission was subsequently granted for the development in question, there was breach of planning control to enforce. For the dumping of waste and damage in Questions 3 and 4 it again referred the complaint to the NIEA. Finally, for Question 4 it confirmed that the environmental impacts of the development in question were considered and the NIEA were consulted; and it directed the complainant to the planning portal to view this information.
9. The Commissioner asked the complainant to explain specifically why he considered the Council had not adequately responded to his request. He stated that he had requested the specific statutory instruments and common law authority under which the planning office had acted, and referred to the Council's Enforcement Practice notes, which state:

'Where appropriate this practice note will therefore highlight:

- *relevant legislation;*
- *procedural guidance; definitions; and*
- *best practice examples / relevant case law."*

The complainant did not consider that Council's response highlighted procedural guidance, definitions, best practice examples or case law.

10. The Commissioner put the complainant's arguments to the Council, and asked it demonstrate what searches it had undertaken to find information falling within the scope of the request.
11. The Council provided context for the request, which related to 2 planning applications concerning a marina. For the first application, the complainant objected on a number of grounds. The Council considered the objections and consulted with the NIEA, but considered the proposal complied with policy and planning permission was granted. The second application was objected to on the grounds of environmental damage, caused by unlicensed dumping, to protected species / natural habitats and the fact that there was no Environmental Impact Statement. The Council did not find any evidence of dumping of waste, and determined that as the proposal did not fall within those listed in the Planning (Environmental Impacts Assessment) regulations, no Environmental Impact Statement was required.
12. In response to the Commissioner's questions regarding the lack of reference to procedural guidance, definitions and best practice examples, the Council stated:

'[Complainant's name] has requested information about the statutory instruments and common law authority used by the Council in this case. The Council has taken this to mean what legislation or other powers has the Council relied on to determine the planning application... He did not refer to procedural guidance, definitions and best practice examples; relevant case law... The relevant legislation that allows the Council to determine applications where development has already been carried out i.e. retrospectively is the Planning (Northern Ireland) Act 2011 Section 55... The Council holds no other information and there are no other statutory instruments or common law authority'

13. For questions regarding searches undertaken to locate information falling within the scope of the request, the Council explained that it referred to the application files, planning portal and communications held by officers. It confirms that no other information is held other than that already supplied.
14. The Commissioner has reviewed the Enforcement Practice notes (which are actually produced by Northern Ireland's Department for Infrastructure and not the Council) to which the complainant refers and notes the preamble that describes the notes as:

'This Enforcement Practice Note sets out the legislative framework for planning enforcement in Northern Ireland. It forms part of a series of new practice notes stemming from the Planning Act (Northern Ireland) 2011 [the 2011 Act] and any

related subordinate legislation. The emphasis is very much on advice but where explicit legislative requirements must be followed these will be made clear.

Where appropriate this practice note will therefore highlight:

- relevant legislation;*
- procedural guidance;*
- definitions; and*
- best practice examples / relevant case law.'*

15. The complainant considers that the Council's response should have included consideration of the procedural guidance, definitions and best practice examples / relevant case law detailed in the Enforcement Practice Notes. However, the request was for the statutory instruments and common law authority used by the Council to apply retrospective planning permission, and not for how the Council had complied with the Enforcement Practice notes when making the planning decisions. Having viewed the Practice Notes, whilst they assist Council's in the application of the legislation, they are not a statutory or common law authority. Reference to case law within the documents does not make the Practice Notes 'common law authority' (a precedent set by decisions made by judges, the courts and tribunals) as the Notes are advisory in nature and much broader than simply reference to relevant case law. The Commissioner therefore considers that the Council's interpretation of the request is correct, and that its response complies with section 5(1) of the EIR.

Right of appeal

16. 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: 0870 739 5836

Email: grc@justice.gov.uk

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

17. 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.
18. 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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF