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 concerning Fermanagh and Omagh District Council's enforcement actions regarding a planning development. The Council supplied information falling within the scope of the request.

2. The Commissioner's decision is that Fermanagh and Omagh District Council has interpreted the request correctly, disclosing all relevant information and therefore complying with section 5(1) of the EIR. The Council is not required to take any steps.

Request and response

3. On 19 February 2018 the complainant wrote to Fermanagh and Omagh District council and requested information in the following terms:

> *'Subject to the Freedom of Information Act 2000 and/or Environmental Information Regulations 2004. The following information is requested;*
>
> 1. *The Council to provide the statutory instruments within the Planning Act (Northern Ireland) 2011 which provides the council retrospective powers enabling the council powers of enforcement in which it can issue planning contravention notices, enforcement notices for alleged breaches of development carried our prior to the enactment of the 2011 legislation as implied within the letter dated 07 September 2017 (attached)*
> 2. *The Council to provide the grounds and statutory instrument and / or common law authority to support the common law enforcement notice [redacted] in the decision that development [redacted] cannot be considered operations on, in, under or over this site as per their letter dated 25 January 2018 (attached).*
> 3. *The Council to provide the grounds and statutory instrument and or common law authority to support the enforcement notice [redacted] in the decision that footway decking cannot be considered a private way as per their letter dated 25 January 2018.*

4. The Council responded on 9 March 2108. It provided the complainant with answers to the questions, and signposted him to relevant legislation.

5. The complainant requested an internal review of the Council's response on 29 March 2018. The Council did not respond to the review request, and informed the Commissioner it did not receive it.

Scope of the case

6. The complainant contacted the Commissioner on 14 August 2018 to complain about the way his request for information had been handled. In summary, he did not think that the Council had provided a sufficient explanation of the grounds, statutory instruments or common law authority to support its actions.

7. The Commissioner considers the scope of the case to be whether the Council has supplied all the information it holds falling within the scope of the request, complying with its duty with 5(1) of the EIR.

Reasons for decision

8. Regulation 5(1) of the EIR places a duty on public authorities to make the environmental information it holds available on request.

9. The Council responded to the complainant's request with the following information:

   For question 1, it advised that The Planning (2011 Act) (Commencement No.3) and (Transitional Provisions) Order (Northern Ireland) 2015 made on 12 February 2015 provided the necessary transitional arrangements for enforcement. It provided a link to the relevant website to access this information.

   For question 2, it advised that the relevant legislation was the Planning (General Permitted Development) Order (NI) 2015. It went on to say that the works are not permitted development as they are not required temporarily for operations on the land or adjoining land.

   For question 3, the Council explained that the legislation defines a private way, and the works do not fall within this definition.

10. The complainant did not consider the Council's response was adequate. He did not think that the legislation referred to provided the retrospective powers he sought, or that the other information supplied detailed the requested 'grounds, instruments or common law authority.

11. In his representations to the Commissioner, the complainant 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.

12. The Commissioner put the complainant's concerns to the Council, and asked it a number of questions regarding the searches undertaken to find information falling within the scope of the request.

13. The Council provided the Commissioner with some context for the request in order to demonstrate why it considered it had complied. The request concerns an alleged breach of planning control, after which an enforcement file was created and action pursued. The breaches included erection of a temporary cabin and linked access. An enforcement notice was served for the breaches.

14. For question 1 of the request, 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 take enforcement action against… the unauthorised portacabin. He has been advised that the relevant legislation covering enforcement is set out in Part 5 of the Planning (NI) Act 2011. The Planning (2011 Act)(Commencement No.3) and (Transitional Provisions) Order (NI) 2015 published the transitional arrangements for enforcement. There are no other statutory instrument or relevant legislation. [Complainant's name] did not request any information on any procedural guidance, definitions; and best practice examples; or relevant case law.'*

For question 2, the Council advised that the same response and legislation provided in question 1 applied, as well as the Planning (General Permitted Development) Order (NI) 2015 – Part 5 'Temporary Buildings and Uses', Class A of the schedule to the GDPO (NI) 2015. It explained to the Commissioner that:

> *'Class A says that the provision on land of buildings, moveable structures, works, plant or machinery required temporarily in connection with and for the duration of operations being or to be carried out on, in, under or over that land or on land adjoin that land is permitted development subject to limitations and conditions set out in Classes A1 and A2 thereof. The Council was of the view that the building was not permitted development as there no operations being carried out on, in, under or over the land that the development was being used in connection with'*

For question 3, the Council had nothing further to add as it had already explained to the complainant that the GDPO (NI) 2015 defined private right of way and it did not consider the works to fall within this definition. It told the Commissioner that *'this appears to be more of a*

disagreement with the Council's view rather than failure to provide information'

15. 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 and that the complainant has been given access to the enforcement file and electronic records.

16. 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.'*

17. 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 take enforcement action, which it has provided, and not for how the Council had complied with the Enforcement Practice notes when making its decision to take such action. Having viewed the Practice Notes, whilst they assist the Council 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. Additionally, the Commissioner's powers are limited to determining whether the Council has disclosed information it holds falling within the scope of the request, and not whether it acted in accordance with planning law and requirements. This would need to be pursued through the correct complaints/appeals channels.

18. The Commissioner therefore concludes that: the Council's interpretation of the request is correct; it has supplied an explanation and all information held in response to the request; and consequently, it has complied with section 5(1) of the EIR.

Right of appeal

19. 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

20. 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.

21. 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
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Wycliffe House
Water Lane
Wilmslow
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SK9 5AF