

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 regarding planning approval and enforcement action for a development. The Council supplied some information falling within the scope of the request but denied holding the remainder.
2. The Commissioner's decision is that on the balance of probability Fermanagh and Omagh District Council has supplied all the information it holds falling within the scope of the request and has therefore complied with regulation 5(1) of the EIR.

Request and response

3. On 20 February 2018, the complainant wrote to Fermanagh and Omagh District Council and requested information in the following terms:

'Re: Fermanagh and Omagh District Council Planning approval for extension – L2012/0676/F via Enforcement Case L/2012/0145/CA

1. *'The Council is requested to provide a copy of the NIEA or Department's EIA assessment 'consultation document' consenting and approving the removal of the natural habitats and ASSI from the shoreline enabling the above approval.*
 2. *Supply the legislative instrument of common law authority that was used to enable the approval to be defined as an 'extension of boat berthing facilities' at the Moorings Marina.*
 3. *Supply a copy of Local Planning analysis report that no infringement would be suffered by the neighbouring Moorings Marina by approval of the unauthorised development'*
4. The Council responded on 21 March 2018. It said that although the request was dated 20 February 2018 it had not been received by the Planning Department until 12 March 2018. It stated that it did not hold the documents requested in questions 1 and 3 and provided the name of the legislation for question 2.
5. Following an internal review the Council wrote to the complainant on 29 June 2018. It stated that it considered the questions raised by the complainant had already been answered, but provided further explanation and signposting to support its responses.

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. He did not think that the Council had fully answered his questions, or provided a sufficient explanation of the grounds, statutory instruments or common law authority to support its actions.
7. The Commissioner therefore considers whether the Council has complied with its responsibilities under regulation 5(1) of the EIR. As she has not had sight of all the review communications between the complainant and the Council, she is not able to consider whether the Council met or breached the 40 working day requirement for a review response.

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 stated that the NIEA (Northern Ireland Environment Agency) was not consulted on the application as it was not a development that fell within the EIA (Environmental Impact Assessment) Regulations;

For question 2, it said that the legislation used to determine the planning application was the Planning (Northern Ireland) Order 1991 and

For questions 3, it advised that there was no 'Local Planning Analysis Report', but that the Development Control Officer's 'Professional Planning Report' was available to view online through the NI planning portal.

10. The complainant requested a review of the Council's response on 27 March 2018. He did not consider that :

- The Council had provided all the information it held regarding its decision not to consult the NIEA; and
- The information in the legislation referred to provided a definition of 'extension'.

11. The Council responded fully to the complainant's concerns on 27 June 2018, explaining that the decision as to whether a project is an EIA development is reached with reference to the Environmental Impact Regulations (available online). The Case Officer assesses whether a project falls within the regulations, but this is one of a numerous checks required on applications and an explanation of how that particular check was determined is not recorded (this would be unnecessarily onerous). However the Council did provide a fairly detailed explanation as to why it did not consider the project and associated application to require an EIA, with reference to Schedules 1 and 2 of The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999. It also noted the complainant's disagreement with the interpretation of 'extension', but confirmed that it was satisfied that planning permission was lawful. It confirmed that the Planning (NI) Order 1991 was the legislation applied at the time of the application. The Development Control Manual was also sent to the complainant.

12. 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 stated that the Council 'failed to provide the specific statutory /common law authority used within the context of relevant legislation; procedural guidance; definitions; and best practice examples, relevant case law regarding the information sought on extension planning applications decision L/2012/0767/F & L/2012/0145/CA.'

13. 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. The Council provided some detail surrounding the context of the request, which related to a planning application that the complainant had objected to on a number of grounds. It explained that there had been several communications with the complainant to determine his exact concerns with the Council's original response, before it provided the letter dated 27 June 2018. It confirmed to the Commissioner that:

- The NIEA or EIA assessment requested does not exist. This is because the Council did not consider the proposal fell within Schedule 1 or 2 of the Environmental Impact Regulations. Similarly, there is no record of this decision as the case officer performs this as part of the general application review process, which includes a number of checks.
- The legislative instrument used to determine the planning application was the Planning (Northern Ireland) Act 1991.
- There is no Local Planning analysis report, but the Development Control Officer's Planning Report, which can be viewed online.

14. 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. Whilst the Commissioner understands that the complainant has concerns about the Council's decisions regarding the development, 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 Planning complaints and appeals channels.

15. 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. She has not been able to determine the Council's compliance with the EIR for its review times due to missing documentation.

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