



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2019/0398

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Ms Alison Lowton
and
Mr David Wilkinson

Between

Geoffrey Johnston

Appellant

-and-

The Information Commissioner

Respondent

Sitting at Field House on 12 March 2020

Representation: The Appellant appeared in person

The Commissioner was not represented

DECISION AND REASONS

THE REQUEST AND RESPONSE

1. The Appellant made the following request for information on 20 February 2018 to the Fermanagh and Omagh District Council (the Council), as follows: -

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 national 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 'extension of boat berthing facilities' at the Moorings Marina.
 3. Supply a copy of the Local Planning analysis report that no infringement would be suffered by the neighbouring Moorings Marian by approval of the unauthorised development.
2. On 21 March the Council replied to say that it did not hold the documents requested in requests 1 and 3 and provided the name of the legislation for request 2. An internal review confirmed this position on 29 June 2018.
 3. The Appellant pursued the matter to the Commissioner on 14 August 2018, on the basis that he did not think that the Council had fully answered his questions or provided a proper explanation as to the legal basis to support its actions.
 4. The Council's position is that, in relation to request 1 and 3 respectively, the NIEA (the Northern Ireland Environment Agency) was not consulted on the application referred to as it was not a development which fell within the Environmental Impact Assessment Regulations (EIA Regulations); and that there was no 'Local Planning Analysis Report' for

the development, although there is a Development Control Officer's Professional Planning Report (PPR) available to view online.

5. In relation to request 2, the Council says that the legislation used to determine the planning application was the Planning (Northern Ireland) Order 1991.
6. The Council explained that a case officer would have assessed whether a project fell within the EIA Regulations, and also set out why it was of the view that it did not do so. It confirmed that it was of the view that the grant of planning permission was lawful.
7. The Commissioner's decision notice of 1 October 2019 concluded that the Council was correct to say that it did not hold the material referred to in requests 1 and 3, and had provided the information sought in relation to request 2.

THE APPEAL

8. The Appellant's appeal is dated 24 October 2019. He argues that the 1991 Order does not contain provisions to allow the grant of planning permission in the case he is concerned about, and says therefore that the Commissioner 'has failed to identify as to whether the Council actually hold such a legislative instrument of common law authority'. He also does not accept that the PPR 'could be developed without any supporting planning analysis documents' and therefore the Commissioner has erred in determining that 'no Local Planning analysis is held relating to and supporting the PPR'.
9. The Commissioner's response supports the conclusions in the decision notice. In relation to request 3, the Commissioner did suggest that the Council might be joined as a party to the appeal 'for further explanation

as to the content of the Development Control Officer's Professional Planning Report'. However, this has not been pursued by the Tribunal or the Appellant, and the Commissioner also declared herself satisfied that there was no further information held in relation to request 3.

10. The Appellant's further submissions and his oral submissions at the hearing concentrate on the provision of the Council of further 'legislative instruments or common law authority which it used in the application' and which the Appellant believes the Council must hold. He argues that this should include procedural and practice guidance. He also argues that the Council should hold information in relation to request 1 if it had acted within the relevant regulations.

DISCUSSION AND DECISION

11. Public authorities are under a general duty to disclose environmental information they hold where it is requested: regulation 5(1) EIR. By regulation 5(4) EIR, 'where the information made available is compiled by ...the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes'.
12. When a public authority says that it does not hold the information requested (or any further information), the Commissioner (and now this Tribunal) has to consider the searches made by the public authority and the explanations given and decide, on the balance of probabilities, whether the public authority is holding the information requested. We are concerned with recorded information that is held by the Council, and not the knowledge or understanding of an individual or individuals, for example, about the reasons behind various planning decisions.
13. We are also not concerned with information which it is said that the Council should hold, even where it is said that this is necessary to comply

with statutory functions, if in fact the Council does not hold that information.

14. In this case the Council has explained why it does not hold the information described in request 1 (the 'consultation document' relevant to the assessment under the EIA regulations). The Commissioner has recorded in the decision notice the reasons why the Council says that no assessment was completed (and therefore why there is no consultation document). As explained we do not have a role in deciding whether the Council should have produced a consultation document. We have no reason to believe that the Council has prepared a consultation document and is now refusing to disclose it. On the balance of probabilities, we accept that the Council does not hold the information referred to in request 1.

15. In relation to request 2, the Appellant remains convinced that there is other statutory material which has been used to determine the planning application in this case other than the 1991 Order referred to by the Council. We have not consulted the 1991 Order, and we have not sought to investigate whether there is anything else that could be relevant in terms of Northern Ireland law in this case which the Council could or should have referred to. The Council may have limited the material it has consulted or used (we do not know), but, again, we have no reason to believe that the Council has based its decisions on other statutory material or common law authority and is now simply refusing to say what these are. The Appellant's request did not, in our view, extend to other material such as practice guidance.

16. If the Appellant thinks that the Council has acted unlawfully by not applying the correct law to the planning issue, then there are other avenues he can use. The Appellant told us that he was familiar with making judicial review applications, and that might be one possible route (we say no more than that), and it may well be that there is a planning

complaints or appeal process if it is thought that the Council has acted unlawfully.

17. In relation to request 3, again the Appellant is faced with the difficulty that the Council says that there is no Local Planning Analysis Report for the development, and so it cannot be disclosed to the Appellant. The Appellant has confirmed that there is a Development Control Officer's Professional Planning Report (PPR) available to view online as stated by the Council. The PPR was not in our bundle, but the Appellant told us that he was content for us to look at it. From a brief viewing it the PPR appears to contain a fair amount of detail about the development and the surrounding circumstances. Again, we have no reason to believe that the Council has produced a Local Planning Analysis Report which it is now refusing to disclose.

18. It does not seem to us that we need to receive further information from the Council as to how the PPR is produced to decide this case.

19. The Appellant may have concerns that the Council has not dealt with the application for this development in a lawful way. However, the Appellant will not be able to advance his arguments by seeking information that the Council does not hold.

CONCLUSION

20. For the reasons set out above we are satisfied, on the balance of probabilities, that that the Council does not hold the information sought by the Appellant in relation to requests 1 and 3, and has responded appropriately to provide him with the information it holds in relation to request 2, and we dismiss the appeal.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 4 April 2020.

Date Promulgated 8 April 2020.