

Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004

Decision Notice

Date: 31 August 2010

Public Authority: Omagh District Council
Address: The Grange
Mountjoy Road
Omagh
Co Tyrone
BT79 7BL

Summary

The complainant requested information about an Equality Impact Assessment on the Disposal of Land for the Purpose of Erecting or Retaining a Memorial or Monument. The Council handled the request under the Freedom of Information Act 2000 but did not make the information available. The Commissioner finds that the information requested is actually environmental information and therefore exempt under section 39 of the Act. Accordingly, the request should have been dealt with under the Environmental Information Regulations 2004 (EIR). The Commissioner therefore requires the Council to reconsider the request under the EIR and to either disclose the information to the complainant in accordance with Regulation 5 or issue a refusal notice under Regulation 14.

The Commissioner's Role

1. The Environmental Information Regulations (the EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the Commissioner). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the Act) are imported into the EIR.
2. This Notice sets out the Commissioner's decision in respect of the complainant's request.

Background

3. The background to the request concerns the presence of a memorial to the 1981 I.R.A. hunger-strikers on the site of the Old Church grounds and graveyard in Dromore, Co. Tyrone, which is owned by Omagh District Council, and the subsequent decision of that Council to dispose of the section of the site on which the memorial is situated to a particular group who are believed to have been responsible for erecting the memorial. The memorial is seen as controversial because it was erected to commemorate ten IRA hunger strikers who died in 1981. It consists of a flagpole, the Irish tricolour flag, a monument to IRA hunger strikers, and ten trees, one for each hunger striker.
4. Following a complaint, the Equality Commission for Northern Ireland (the ECNI) conducted an investigation to establish whether Omagh District Council (the Council) had failed to comply with its approved equality scheme. Each public authority is required to maintain an equality scheme under section 75 of the Northern Ireland Act 1998.
5. On 28 February 2007 the ECNI published its report. This recommended that the Council conduct an Equality Impact Assessment (EQIA) on the disposal of the land in this way. The Council subsequently produced a draft EQIA which was sent out to consultation.
6. On 22 April 2009 the complainant wrote to the Council raising some queries in order that he could respond to the draft EQIA. The complainant received a response to his queries.

The Request

7. The complainant received some answers to his queries (paragraph 6 above) and on 1 June 2009 the complainant wrote to the Council and asked for:

'In my initial request for information I had posed the following question;

"Who within the council was responsible for drawing up the draft EQIA?, your response was "The draft EQIA was prepared by Council Officials" A typical generalised answer!. In the interest of public transparency could you now provide me with the names of

those Council Officials, their job titles and the actual department within Omagh District Council that they work in?

In addition and in response to another question, you had stated "The draft EQIA was forwarded to the Equality Commission for comment in advance of the EQIA being put out to public consultation". Could you provide me with a copy of the letter forwarded to the Equality Commission seeking their comment, a copy of their response and any subsequent correspondence between Omagh District Council and the Equality Commission regarding the draft EQIA".

8. On 3 June 2009 the Council wrote to the complainant and informed him they were now dealing with his request under the Freedom of Information Act (FOIA).

9. The Council wrote to the complainant again on 26 June 2009 and said:

'The draft EQIA was prepared by Council officials and approved by the Council

As the EQIA process is currently ongoing it is not appropriate to issue any further information until the final report is published.'

10. On 21 July 2009 the complainant wrote to the Council to appeal its decision in its letter of 26 June 2009.

11. On 31 July 2009 the Council wrote to the complainant and confirmed that;

'As the EQIA process is currently ongoing, it is not appropriate to issue any further information until the final report is published'.

The Investigation

Scope of the case

12. On 16 September 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular the complainant argued to the Commissioner that, as a ratepayer of the Council, he should be entitled to know who had made decisions on his behalf.

13. The Commissioner notes that the requested information comprises the following:
- the names, job titles and departments of the Council officials who drafted the EQIA; and
 - correspondence between the Council and the ECNI regarding the draft EQIA.

Chronology

14. In examining the correspondence it appeared to the Commissioner that the complainant had requested environmental information, therefore the Commissioner first considered the appropriate access regime.
15. On 23 April 2010 the Commissioner wrote to the Council to advise of his preliminary view that the requested information was environmental. Therefore the Commissioner was of the view that the EIR was the appropriate legislation for handling the request.
16. The Commissioner advised the Council that, if it wished to withhold the requested information from the complainant it should serve a refusal notice which indicated which provisions of the EIR it sought to rely on.
17. The Council contacted the Commissioner by telephone on 12 May 2010 as despite receiving the Commissioner's letter of 23 April 2010 the Council remained unsure of its obligations. The Commissioner further explained what was required and advised that he required a formal response to his letter of 23 April 2010.
18. The Council wrote to the Commissioner on 15 June 2010 to advise that it was "currently considering the matter". However the Commissioner has not to date received a substantive response to his letter of 23 April 2010. Nor has the complainant received a substantive response to his request of 22 April 2009.

Analysis

Is it environmental information?

19. The first matter for the Commissioner to decide is whether the information requested by the complainant is covered by the Act or the EIR. The correct access regime is determined by considering the nature of the requested information.

20. The definition of "environmental information" is set out in EIR regulation 2(1). This states that:

"Environmental information" has the same meaning as in Article 2(1) of the Directive, namely 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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)..."
21. The Commissioner has considered this definition in the context of the requested information (see paragraph 13 above). The information in question relates to an EQIA on a Council policy on the disposal of Council land and alleged unauthorised items placed on that land.
22. The Commissioner notes that regulation 2(1)(c) defines environmental information as information on measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements of the environment. The Commissioner believes that the EQIA on the Council policy on the disposal of land can therefore be

defined as a measure which is likely to affect the land and landscape, which are elements of the environment. The details of those officials responsible for drafting the policy are not so far removed from the 'measure' not to have an affect and therefore the Commissioner is satisfied that the withheld information falls under the definition of environmental information at regulation 2(1)(c) of the EIR.

23. The Commissioner is satisfied that the requested information consisting of the EQIA is environmental information. In light of this, the Commissioner also considers the names of the authors of the EQIA to fall within the remit of the EIR, as it is their findings that have the consequences on the environment described above, through the report. It therefore it follows that the complainant's request ought to have been considered in its entirety under the EIR. Under regulation 5(2) the Council ought to have responded to the complainant either by providing the requested information, or by issuing a valid refusal notice which complied with the requirements of regulation 14.
24. The Commissioner notes that despite being given the opportunity to consider the request under the correct legislation, the Council has to date failed to do so.

The Decision

25. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the provisions of the EIR.

The Council breached regulation 14 for applying the incorrect regime and 14(2) for not issuing a refusal notice within 20 working days, 14(3) for failing to specify the reasons not to disclose the information and 14(5) for failing to inform the complainant of his right to make representations under regulation 11 and of the appeal provisions of the Act.

Steps Required

26. The Commissioner requires the Council to take the following steps to ensure compliance with the EIR.
 - The Council must consider the request under the EIR and either disclose the requested information to the complainant in accordance

with regulation 5 or provide him with a valid refusal notice in accordance with the requirements of regulation 14.

27. The Council must take the steps required by this notice within 35 calendar days of the date of this Notice.

Failure to comply

28. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 31st day of August 2010

Signed

**Andrew White
Group Manager Complaints Resolution**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Freedom of Information Act 2000

Section 39(1) provides that –

“Information is exempt information if the public authority holding it-

- (a) is obliged by regulations under section 74 to make the information available to the public in accordance with the regulations, or
- (b) would be so obliged but for any exemption contained in the regulations.”

Section 39(2) provides that –

“The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).”

Section 39(3) provides that –

“Subsection (1)(a) does not limit the generality of section 21(1).”

Environmental Information Regulations 2004

Regulation 2 – Interpretation

Regulation 2(1)

In these Regulations –

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (g) 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;
- (h) 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);

- (i) 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;
- (j) reports on the implementation of environmental legislation;
- (k) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (l) 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);

"historical record" has the same meaning as in section 62(1) of the Act;

"public authority" has the meaning given in paragraph (2);

"public record" has the same meaning as in section 84 of the Act;

"responsible authority", in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

"Scottish public authority" means –

(a) a body referred to in section 80(2) of the Act; and

(b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

"transferred public record" has the same meaning as in section 15(4) of the Act; and "working day" has the same meaning as in section 10(6) of the Act.

Regulation 5 - Duty to make available environmental information on request

Regulation 5(1)

Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

Regulation 5(2)

Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 5(3)

To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

Regulation 5(4)

For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

Regulation 5(5)

Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to the standardised procedure used.

Regulation 5(6)

Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.