

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice**

Date: 25 June 2019

Public Authority: Department for Infrastructure
Address: Clarence Court
10 – 18 Adelaide Street
Belfast
BT2 8GB

Decision (including any steps ordered)

1. The complainant has submitted an 11-part request to the Department for Infrastructure (Northern Ireland). The complainant seeks information which concerns Planning Application LA01/2016/0335 and a variety of matters which have or might have flowed from that application.
2. The Commissioner's decision is that the Department for Infrastructure has contravened Regulations 5(1) and 5(2) of the EIR.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - The Department for Infrastructure is required to issue a fresh response to the complainant in respect of the information relevant to the complainant's request which it discovered after the Commissioner made her enquiry.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 2 May 2018, the complainant wrote to DRD Roads Department and asked to be provided with the following information:

" [1] Copies of all correspondence between the Department for Infrastructure - Roads and the Causeway Coast and Glens Council, and the Causeway Coast and Glens Council's Planning Department in relation to Planning Application LA01/2016/0335/ and all subsequent designations of the said Planning Application, to include written notes, letters, emails, memos, minutes of any meetings held between the parties, transcripts of any conversations, telephone conversions, the contents of any emails that have been deleted, and any other correspondence howsoever generated.

[2] Full disclosure in respect of all public safety considerations in respect of Planning Application LA01/2016/0335/ and all subsequent designations, to include the impact on existing residents in the Swilly Close, Swilly Mews, Swilly Park and Swilly Drive areas of Portstewart.

[3] Full disclosure of all documentation detailing how objections and petitions of objection to Planning Application LA01/2016/0335/ and all subsequent designations were considered by DFI Roads during the Planning Process and the reasons why all objections were dismissed.

[4] Full disclosure and copies of all documentation in respect of vehicle parking in Swilly Park, Portstewart. To include details of how and at what stage vehicles lawfully parked are deemed to be causing an obstruction. To include details of where vehicles can lawfully park in Swilly Park to prevent them becoming an obstruction.

[5] Full disclosure and copies of all documentary evidence to support comments made by DFI Roads Engineer [a named person], DFI Roads, Coleraine that it was acceptable to drive on the wrong side of the carriageway. To include details of how it is safe to drive around a traffic calming measure installed on a blind right angle bend in Swilly Park Portstewart requiring road users to drive on the wrong side of the carriageway, and details of how it is safe to drive over the traffic calming measure installed on a blind right angle bend in Swilly Park in Portstewart, the impact of which results in vehicles being 'thrown' across the carriageway onto the wrong side of the road and into the path of oncoming vehicles. And, to also include at what stage during either manoeuvre those motorists can ensure it is safe to proceed. Details of how [a named person] has calculated when a safe negotiation of the traffic calming measure becomes a danger to the motorist, other road users and pedestrians, and when the manoeuvre is no longer safe what actions drivers should take to avoid a collision.

[6] Full disclosure and copies of all documents detailing the DFI Roads' plan demonstrating how the emergency services will gain vehicular

access to Swilly Drive, Swilly Park, Swilly Green, Swilly Close and Swilly Mews, when the one and only single track access road is obstructed. To include copies of all contingency plans and evacuation plans for private residents and Social Housing tenants in such an eventuality. To also include details as to why DFI Roads would deliberately implement a policy that creates obstacles for and makes life difficult for the emergency services when attending an emergency; details of who gains an advantage or profits financially from the construction of narrow urban roads that do not provide for easy and unhindered vehicular access to residential areas; how the DFI Roads decided on a low risk instead of a no risk option in relation to vehicular access by the emergency services; how the level of risk changes when the low risk option becomes a reality and residents trapped in a house fire are being burned alive. For example: Should residents being burned alive take comfort in knowing they are being burned alive in an incident the DFI Roads has designated as low risk? Or, would residents being burned alive think that the risk they are facing is the highest level of risk?

[7] Details of who would be responsible for the death of a resident if they should die as a result of the construction and approval of a dangerously narrow single access roadway that has become blocked and which delays or prevents the arrival of the emergency services vehicles at the scene of the incident.

[8] Full details and copies of all documents detailing how the DFI Roads expects motorists on out bound trips from the direction of Swilly Green to negotiate the give way road markings at the junction of Swilly Park and Swilly Road, Portstewart without committing the offence of Breach of Traffic Signs and without mounting the nearside kerb at Swilly Road if they do. To include vehicles towing trailers, caravans, Lorries, buses, and heavy goods vehicles. To also include how motorists with right of way travelling from the direction of Swilly Drive are expected to negotiate the Swilly Park, Swilly Road junction without ending up on the wrong side of the carriageway on Swilly Road.

[9] Full details and copies of all documents detailing how the DFI Roads dealt with the impact of site traffic to and from the construction work at Swilly Green and its effect on existing residents in the area. To include consideration given in respect of potential damage to the existing access road, and upon whom the costs of repairing any damage to the access road should rest.

[10] Full details and copies of all documents detailing how the DFI Roads considered the impact of mud on the road emanating from the construction site at Swilly Green upon all road users in the immediate area. To include how this would be monitored, details of all inspections,

the frequency of inspections and how complaints from the public are dealt with and collated.

[11] Copies of all policy documents detailing which Government Department has responsibility for dealing with, and prosecuting those responsible for depositing mud and debris on the carriageway. To include details of the quantities of mud and/or debris required to be present for prosecution purposes, the policy relating to continuous or repeated offences on the same stretch of carriageway over any given length of time. And, details of any restrictions on prosecuting offenders.”

6. The Department for Infrastructure (“DfI”) responded to the complainant’s request on 31 May 2018, advising him that his request fell to be considered under the Environmental Information Regulations 2004. The DfI’s response went on to address each part of the complainant’s request in turn.
7. In response to item 1, the DfI informed the complainant that all of the consultations it had been involved in are publically available on the relevant Planning Portal at:

<http://epicpublic.planningni.gov.uk/publicaccess>
8. The DfI sent the complainant copies of the documents it holds which relate to his enquiry but which do not appear on the Planning Portal. These documents were redacted of personal data in reliance on Regulation 13 of the EIR.
9. The DfI responded to item 2 of the complainant’s request by informing him that the new residential development complies with the requirements of the Department’s design guide, entitled ‘Creating Places: Achieving Quality in Residential Developments’ and to other relevant planning policy and guidance documents, which he could download from:

https://www.planningni.gov.uk/index/policy/planning_statements_and_supplementary_planning_guidance/guides/guides_places.htm
10. The Department responded to item 3 of the request by advising the complainant that objections to planning application LA01/2016/0335 were received by the Planning Authority which consulted the DfI Roads on the roads related issues. The DfI’s responses to this consultation and any objections are publicly available on the Planning Portal at:

<http://epicpublic.planningni.gov.uk/publicaccess/>

11. In response to item 4 of the request, the DfI informed the complainant that vehicle parking is provided for in-curtilage and on-street, in accordance with the current parking standards and it advised him that these spaces are indicated on various drawings attached and publicly available on the Planning Portal.
12. Additionally, the DfI advised the complainant that the provision of parking within developments must comply with the Department's current design guide, '*Creating Places: Achieving Quality in Residential Developments*' and other relevant planning policy and guidance documents.
13. The DfI stated that advice on waiting and parking is addressed under rules 238-252 of the Highway Code which the complainant could access at:

<https://www.nidirect.gov.uk/sites/default/files/publications/The-Official-Highway-Code-for-Northern-Ireland.PDF>
14. With regard to vehicles deemed to be causing an obstruction, the DfI advised the complainant that offences such as dangerous parking are addressed within the Road Traffic (Northern Ireland) Order 1995 and enforcement of the relevant articles would be a matter for the PSNI.
15. The DfI addressed item 5 of the request by informing the complainant that Swilly Park has been designed and constructed in accordance with 'Creating Places' and assured him that the road layouts within the development are fit for purpose. The Department advised the complainant that the Highway Code can be obtained at:

<https://www.nidirect.gov.uk/sites/default/files/publications/The-Official-Highway-Code-for-Northern-Ireland.PDF>
16. The Department then informed the complainant that it does not hold any further information which is relevant to item 5 of his request.
17. Responding to item 6 of his request, the DfI informed the complainant that it does not hold any information on contingency plans and evacuation plans for private residents and social housing tenants in the event of a fire, etc. and it advised the complainant that his local emergency services may be able to advise him on this issue.
18. The DfI advised the complainant that it does not hold any information in respect of item 7 of his request.
19. The Department addressed item 8 of the complainant's request by advising him that the junction referred to in his question has been designed and constructed in accordance with 'Creating Places' and

advice on negotiating a junction similar to that described in his enquiry is provided under rules 221-222 of the Highway Code.

20. In response to item 9 of his request, the Department advised the complainant that, "roads in the vicinity of this development have been designed and constructed to accommodate traffic of this type and, defects on existing access roads will be dealt with by the Department under the normal maintenance cyclic inspect and repair regime". The DfI informed the complainant that it does not hold any further information on this part of the enquiry.
21. The DfI addressed item 10 of the complainant's request by drawing his attention to "a number of informatives" relating to the approval of planning permission for Swilly Park. One of these requires the contractor to immediately remove any mud, refuse, etc. deposited on the road, as the result of the development. The Department advised the complainant that all of the "informatives" in relation to planning application LA01/2016/0335 can be viewed on the Planning Portal at the following web address:

<http://epicpublic.planningni.gov.uk/publicaccess/>
22. The Department provided the complainant with copies of all of the correspondence and file notes it holds in relation to complaints of mud on the road at Swilly Park, together with a Director of Engineering memorandum (*Swilly Park mud on road 2*) which details the revised DfI Roads Policy Procedure Guidance for the Road Maintenance Standards for Safety. The DfI advised the complainant that, in accordance with this memorandum, the housing area in the vicinity of the Swilly Green is on a six month cyclic inspect and repair regime by staff from our Maintenance Section.
23. The DfI advised the complainant that staff from its Development Control and Private Streets section inspects development sites on a regular basis or as required by the developer.
24. The complainant was advised that, in recent years the Department has implemented a Voluntary Exit Scheme which has resulted in a significant reduction in staff numbers and change in personnel. This has made it to obtain accurate details of the number of site visits carried out at the Swilly Green site in recent years. However, from its available records, the Department confirmed the site has been visited on the following occasions 16/05/16, 20/01/17, 15/02/18, 24/01/17, 12/03/18, 06/12/17 and 13/03/18. The Council added that its staff may have visited the development on other occasions but as there were no issues of concern, the visit was not formally recorded.

25. The DfI directed the complainant to its procedure for dealing with complaints at <https://www.infrastructure-ni.gov.uk/dfi-complaints-procedure>. It informed the complainant that the Council undertakes quarterly exercises to obtain details of the number of complaints received by business areas across the Department, along with details of any lessons learned as a result of those complaints. This information is collated in a report which is presented to the Departmental Board to highlight any lessons learned and how the Department has handled complaints.

In answer item 11 of the complainant's request, the DfI provided him with a copy of an internal memo of 29 May 2013, which details the actions DfI Roads, PSNI and local council may take in relation to mud on the road (*Swilly Park mud on road 1*).

26. On 7 June 2018, the complainant asked the DfI to conduct an internal review of its handling of his request for information. The complainant asserted that the Department had failed to answer all of his questions and expressed concerns about, what he considers, are 'flaws' in the Safer Places Policy.
27. On 25 July 2018, the DfI wrote to the complaint to advise him of the results of its internal review. The Department told the complainant that it considered it had answered all of his questions on the basis of the information it held. That said, the DfI acknowledged that it had failed to provide him with more explanation of what information the Department could and could not provide, including highlighting where there are unrealistic expectations about the information that the authority will actually hold.
28. The DfI responded to the points raised by the complainant in his request for internal review and explained its position in respect of "conditional questions" which it considered fell outside the scope of the information access legislation of the FOIA and EIR.

Scope of the case

29. The complainant contacted the Commissioner on 21 August 2018 to complain about the way his request for information had been handled.
30. The Commissioner advised the complainant that the focus of her investigation would be to determine whether the DfI has provided him with all of the information it holds relevant to each of the 11 parts of his request or has directed you to relevant information where it is already in the public domain by virtue of being published on the internet.

Reasons for decision

31. Under Regulation 5(1) of the EIR a public authority is required to 'make available on request' information which is environmental information.
32. To determine whether the DfI holds information which has not been disclosed to the complainant or information to which the DfI has not directed the complainant to, The Commissioner asked the Department to respond to a number of questions about the searches it has made to locate information which falls within the terms of the complainant's request. The Commissioner's investigation also included questions about the possible deletion and destruction of information which might be relevant to the complainant's request.
33. In making her determination as to whether the DfI holds further information relevant to the complainant's request, the Commissioner applies the civil test of the balance of probabilities. This test is in line with the approach taken by the First Tier Tribunal (Information Rights) when it has considered whether information is held in cases which it has considered in the past.

The DfI's representations

34. The DfI has described the searches it made to locate recorded information falling within the scope of the complainant's request. Those searches involved relevant paper files, emails, the section office computer and the Hewlett Packard Records Management system ("HPRM") used by the Department within DfI Roads. Additionally the Department checked the appropriate planning portal in order to ensure the documents referred in its response to the complainant were available for him to view.
35. The Department consider that its searches were appropriate to the complainant's request as the records described above would be where all relevant data would be held.
36. The search terms used by the DfI would have been 'Swilly Park', '[the complainant's surname]', 'mud Swilly Park' '[the complainant's surname] complaint' and 'Swilly complaint'
37. Searches of the Department's electronic records were considered appropriate as all complaints concerning mud on roads would be held electronically, whereas Development Control information would be held electronically and as manual records.
38. The DfI advised the Commissioner that no recorded information falling within the scope of complainant's request has been deleted or

destroyed. To assist the Commissioner further, the DfI provided her with a copy of its Disposal of Record Schedule which it implemented on 11 October 2016. This Schedule confirms that Information relating to the building of a housing development is required to be held for seven years after the completion of the development where adoption of the site by DfI Roads has taken place. This being the case, all information relating to Swilly Park and the complainant's request is therefore available.

39. The Schedule confirms that complaints made to the DfI will be held for three years following the provision of the Department's answer to the complaint and therefore, all information relating to complaints about Swilly Park and the complainant's request is still held.
40. Following its receipt of the Commissioner's enquiry, the DfI undertook a search the desktop computers of some other staff. Those searches uncovered the following recorded information which is relevant to the complainant's request:
 - Photographs of mud on the road at Swilly Park
 - A complaint about mud on the road at Swilly Park where the person who raised that complaint is not the complainant in this case
 - A copy of a request made by Claire Sugden MLA to the Permanent Secretary of the DfI on behalf of the complainant in this case, together with the Department's response
41. Following a search of the Public Information Portal ("PIP") a further three enquiries relating to issue at Swilly Park have now been discovered.

The Commissioner's conclusions and decision

42. The Commissioner is satisfied that the initial searches carried out by the DfI were relevant to the complainant's request and were, for the most part, appropriate. Those searches allowed the DfI to either provide the complainant with relevant recorded information – see its response to item 11 of his request, or to direct him to relevant information which is publicly available on the internet.
43. That said, the Commissioner cannot ignore the recorded information which the DfI discovered following her enquiry. That information is undeniably relevant to the complainant's request and its recent discovery casts doubt on the efficacy of the Department's initial searches.

44. At this juncture, the Commissioner is content that the DfI has now conducted appropriate searches and she is satisfied that the DfI has, on the balance of probabilities, located all of the information it holds which is relevant to the complainant's request.
45. However, the discovery of the information listed at paragraphs 41 and 42 above, must inevitably lead the Commissioner to conclude that the DfI has contravened Regulations 5(1) and 5(2) of the EIR. This is because, within the time for complying with his request, the DfI has neither disclosed the newly discovered information to the complainant nor has it issued any response to him which cites an appropriate exception under which the DfI seeks to withhold some or all of that information.
46. In view of her decision, the Commissioner requires the DfI to issue a fresh response to the complainant in respect of the information listed at paragraphs 41 and 42.

Regulation 9 – Advice and assistance

47. Under Regulation 9 of the EIR, a public authority shall provide advice and assistance to applicants and prospective applicants, so far as it would be practical.
48. In recognition of its duty under Regulation 9, the DfI provided the complainant with a number of links to the Planning Service Portal to enable him to search the information already available to the public. The complainant was advised to contact the local emergency services and Police Service Northern Ireland ("PSNI") on the grounds that these services may have been able to provide information relating to some of the complainant's queries which fall outside the remit of DfI Roads.
49. The Commissioner accepts that additional information the DfI provided to the complainant was relevant to the complainant's request and in providing that information the DfI has met its duty under Regulation 9.

Other matters

50. The Commissioner acknowledges the DfI's position in respect of the points raised by the complainant in his request for internal review in respect of, what the DfI terms are, his "conditional questions".
51. The Commissioner agrees with the DfI that some of the complainant's request do not fall within the ambit of either the Freedom of Information Act or the Environmental Information Regulations. The duty to provide information which is imposed by these provisions only relates to that

information which is held by public authorities at the time a request is made. The legislation does not require public authorities to create recorded information to answer a request or to answer questions of interpretation or confirmation.

Right of appeal

52. 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

53. 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.

54. 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

**Ben Tomes
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