

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 24 August 2021

Public Authority: Armagh City Banbridge and Craigavon Borough Council

Address: The Palace Demesne
Armagh City
BT60 4FL

Decision (including any steps ordered)

1. The complainant has requested information regarding Armagh City Banbridge and Craigavon Borough Council's ("the Council") decision not to revoke planning permission relating to a specified piece of land. The Council applied regulation 12(4)(a) to the requested information.
2. The Commissioner's decision is that the Council does not hold the requested information and that therefore regulation 12(4)(a) has been correctly applied.
3. The Commissioner's decision is also that the Council has not complied with regulation 14 of the EIR.

Request and response

4. On 14 February 2020, the complainant wrote to the Council and requested information in the following terms:

"Re. Letter from Gabriel Cooney, Chair of the Historic Monuments Council, dated 30th October 2017, to Roger Wilson, CEO ABC Council. The above letter requests that ABC Council, in consultation with the DFI, revoke the planning permission for the wind turbine at Knock Iveagh under section 68 of the Planning Act (NI) 2011."

As revocation was only possible 'at any time before those operations have been completed' and it is now clear that ABC Council did not use their powers under s.68, I would like to request the following under the Freedom of Information Act:-

The Council's substantive reasons for the decision not to use their powers under s.68 to revoke planning permission for the wind turbine at Knock Iveagh prior to the completion of the turbine development.

5. The Council responded on 20 March 2020 and provided some information regarding discontinuance of the planning permission.
6. Following a request for internal review made by the complainant on 3 July 2020, the Council wrote to the complainant stating that it was not going to carry out an internal review as this had been requested "outside the period of escalation."
7. The complainant made a fresh request to the Council on 8 July 2020 in the same terms as the original request.

Scope of the case

8. The complainant contacted the Commissioner on 25 August 2020 to complain about the way her request for information had been handled. At that time she had not received a response from the Council to her fresh request.
9. The Council responded to the complainant on 3 September 2020 stating that her request was manifestly unreasonable and that therefore it was applying regulation 12(4)(b) of the EIR to the request.
10. The Commissioner contacted the Council, who sent the Commissioner a copy of its response to the complainant of 3 September 2020.
11. The Commissioner wrote to the Council on 11 October 2020, requesting its submissions as to its application of regulation 12(4)(b) to the request.
12. The Council responded to the Commissioner on 8 July 2021. Following further correspondence, it confirmed that it now wished to withdraw its reliance upon regulation 12(4)(b) and was now applying regulation 12(4)(a) of the EIR to the complainant's request.

13. The Commissioner agreed with the Council that she would treat that response as an internal review of the Council's response of 3 September 2020 and requested submissions as to the Council's application of regulation 12(4)(a). The Council responded on 3 August 2021 stating that it considered that regulation 12(4)(a) applied due to the reasons set out in its letter of 8 July 2021.
14. The Commissioner has considered the Council's handling of the complainant's request, in particular its application of the exception as set out in regulation 12(4)(a) of the EIR.

Reasons for decision

Regulation 12(4)(a) of the EIR - Information not held

15. Regulation 5(1) of the EIR requires that: "... a public authority that holds environmental information shall make it available on request."
16. Regulation 12(4)(a) of the EIR allows a public authority to refuse to provide the requested information if it does not hold it at the time of the request being received.
17. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request).
18. The Council has told the Commissioner that it did not make a decision not to use its powers under section 68 of the Planning Act (NI) 2011 to revoke the planning permission for the wind turbine at Knock Iveagh prior to the completion of the turbine development. The development was subject to an enforcement investigation by the Council, which commenced on 20 October 2017 and concluded on 20 November 2017. Therefore the development was still under investigation at the time of the letter from Mr Gabriel Cooney, Chair of the Historic Monuments Council, which was sent on 30 October 2017.
19. During the investigation a temporary stop notice was served by the Council on the landowner and the operator on 23 October 2017, which expired on 20 November 2017. The Council states that, within three days of the expiration of the temporary stop notice, the operator had erected the wind turbine and at that point revocation was not legally possible. Therefore the Council does not hold any information regarding

a decision not to use its powers to revoke the planning permission in question, as no such decision was ever taken.

20. The Commissioner is aware of the wording of section 68(1)(a) of the Planning (Northern Ireland) Act 2011, which states that revocation of planning permission may take place:-

"where the permission relates to the carrying out of building or other operations, at any time before those operations have been completed."

21. The Commissioner accepts that the land in question was under enforcement investigation by the Council at the time it received the letter of 30 October 2017 requesting that it revoke planning permission for the wind turbine to be erected on the land. At that time no building was taking place on the land due to the temporary stop notice having been served. As the wind turbine was erected within three days of the expiration of the temporary stop notice, it is clear to the Commissioner that revocation was not at that point possible under the terms of the above section of planning legislation.
22. The Commissioner points out that it is not in her remit to determine whether the requested information should be held by the Council, she can only determine whether it is held or not.
23. If the Council's position is that no decision was taken to revoke the planning permission in question, as revocation was not legally possible, then it is difficult for the Commissioner to see why the Council should hold information on a decision which was never taken.
24. The Commissioner, on review of the above, is satisfied that the Council does not hold information regarding any decision not to revoke the planning permission in question. The Council has provided the complainant with some information regarding discontinuance of the planning permission, which is a separate and distinct legal process.
25. On the basis that there is no evidence to show that the Council holds information falling within the scope of the request and the Council's statement that no decision was ever taken not to revoke the planning permission, the Commissioner finds on the balance of probabilities that the requested information is not held.

Regulation 14 of the EIR - Issuing a valid refusal notice

26. Regulation 14(1) of the EIR states:

"If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation:-

(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of the receipt of the request.

(3) The refusal shall specify the reasons not to disclose the information requested, including- (a) any exception relied on under regulations 12(4), 12(5) or 13..."

27. In this case, as the Council does not hold the requested information it should have issued a refusal notice citing regulation 12(4)(a) of the EIR, but failed to do so.
28. In addition, it took well over 20 working days to respond to the complainant's fresh request of 8 July 2021.
29. The Commissioner therefore finds that the Council breached regulations 14(2) and 14(3)(a) of the EIR.
30. As the Commissioner has since found that the information is not held, she does not require any steps but asks that the Council takes note of its obligations for issuing refusal notices under the EIR.

Right of appeal

31. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

32. 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.
33. 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

Deirdre Collins
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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