

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 15 June 2017

Public Authority: Ards & North Down Borough Council

Address: Town Hall
The Castle
Bangor
BT20 4BT

Decision (including any steps ordered)

1. The complainant has requested information relating to a planning application for a site in Kircubbin, County Down, Northern Ireland. The Council provided some information within the scope of the complainant's request, however it stated that it did not hold the remaining information.
2. The Commissioner's decision is that, on the balance of probabilities, the Council does not hold the remaining requested information.
3. Therefore the Commissioner requires no steps to be taken.

Request and response

4. On 10 July 2016, the complainant wrote to the Council and requested information in the following terms:

"I wish to make an application under the Freedom of Information Act 2000 for all information regarding the application to commence current development at Fishquarter Quarry, Coulters Hill, Kircubbin.

Any reference to third parties or identification of person should be omitted as appropriate.

This request is for any recorded information, either notes, formal communication, email, application or adjudication regarding any decision to allow the current operation at the Quarry."

5. The Council responded on 2 August 2016 and stated that there had been no such application to commence further development at Fishquarter Quarry. The complainant wrote to the Council to request an internal review, stating that the Council had only responded in relation to the existence of an application for development and had not dealt with the part of his request seeking any recorded information about Fishquarter Quarry.
6. Following an internal review the Council wrote to the complainant on 30 August 2016. It stated that it did not hold any further recorded information within the scope of his request apart from a 1967 planning approval document which had been previously provided to the complainant.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The Commissioner has considered whether the Council holds further information within the scope of the complainant's request.

Reasons for decision

Regulation 5 – Duty to make environmental information available on request

9. Regulation 5(1) of the EIR says that a public authority that holds environmental information shall make it available on request.

Regulation 12(4)(a) EIR

10. By virtue of regulation 12(4)(a), a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
11. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner – in accordance with a number of First-Tier Tribunal decisions – applies the civil standard of the balance of probabilities. In other words, the Commissioner will determine, on the balance of probabilities, whether the public authority holds additional information within the scope of the complainant's request.

12. In making her decision, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the public authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
13. The Council has informed the Commissioner that it does not hold any further recorded information in relation to the complainant's request. As stated to the complainant in the Council's response dated 5th August 2016, the Council has no record of an application submitted in relation to works currently commencing at Fishquarter Quarry.
14. The Council also states, in addition, and as advised to the complainant on 30th August 2016, the Council does not hold notes or records of informal reception-based discussions on planning-related matters. This service is provided on a without prejudice basis to give on-the-spot, informal guidance about planning issues. The advice is intended to be helpful but it cannot be taken as formal advice because it is very unlikely that Council officers would have all of the information and time necessary to be in a position to advise accordingly, without the submission of a planning application or Certificate of Lawfulness of Existing or Proposed Use.
15. The Commissioner asked the Council what steps it had taken to determine what recorded information is held relevant to the scope of the request and to provide a detailed account of the searches that it had conducted to determine this.
16. The Council informed the Commissioner that, in line with Council practice, the request was forwarded to the relevant department for processing. In this case, the request was forwarded to the Head of Planning, who instructed officers to undertake a search of the Planning Section's system. As an enforcement investigation was underway, the Planning Department had already undertaken a search of its available records back to 1973 and was unable to source any planning application made since that time to either the then Department of the Environment (DOE) (pre 1 April 2015) or the Council (post 31 March 2015); it was, however, in possession of a copy of a decision from 1967 from the then Down County Council which it has provided to the complainant by way of advice and assistance.
17. The Council told the Commissioner that, in respect of general enquiries, it has no record of the communications alleged by the

complainant, as no records are kept of informal queries whether made by telephone or in person at reception. The Council further informed the Commissioner that records in respect of all planning applications are held by it as both manual paper based records (on a public register as required under The Planning (General Development Procedure) Order (NI) 2015) and electronic records via the Planning NI Portal (www.planningni.gov.uk). The Council has a statutory duty to hold and process all information relating to planning applications under the Planning (General Development Procedure) Order (Northern Ireland) 2015, however there is no requirement under legislation for the Council to hold records in respect of informal planning queries.

18. The complainant's argument is that the Council does hold information within the scope of his request. To evidence this argument, he provided the Commissioner with a copy of a pre-action protocol letter in relation to a Temporary Stop Notice (TSN) issued by the Council in respect of works being carried out at Fishquarter Quarry. The letter indicates that the applicant (a developer) began carrying out works to Fishquarter Quarry based on the understanding that planning permission was not required for these works. That understanding was allegedly based on an informal discussion between the applicant and a Council representative which took place in May 2016. The complainant also provided the Commissioner with an extract from the minutes of a Council meeting in September 2016 in which the Fishquarter Quarry planning issue was discussed and it was stated that an informal discussion had taken place between the developer and a Planning Officer.
19. The Commissioner, after having perused the contents of the pre-action protocol letter and the extract from the meeting minutes, wrote to the Council stating that these appeared to indicate that there had been some discussion between the Council and the developer regarding planning permission for works to be carried out at Fishquarter Quarry and enquiring once again as to whether this discussion had been documented.
20. The Council replied to the Commissioner stating that the Council had at no point accepted the content of the pre-action protocol letter. The Council reiterated to the Commissioner that it did not keep notes or records of informal 'reception-based' discussions relating to planning matters and that they are provided as a matter of customer service on a 'without prejudice' basis.
21. In the circumstances, the Commissioner does not consider that there is any evidence that would justify refusing to accept the Council's position that it does not hold information within the scope of this request. The

Council has carried out searches and confirmed that it does not hold the information. The Commissioner considers that the further documentation provided to her by the complainant could lead to the belief that some further information within the scope of the request exists, however it does not specifically state that the information is in existence. She also acknowledges that there is often a difference between what a complainant believes should be held by a public authority and what is actually held by a public authority. She is therefore satisfied that, on the balance of probabilities, information within the scope of this request is not held by the Council. Accordingly, she does not consider that there was any evidence of a breach of regulation 5 in relation to such information.

Right of appeal

22. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

23. 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.
24. 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
Water Lane
Wilmslow
Cheshire
SK9 5AF