



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

Appeal Reference: EA/2019/0400

**Decided without a hearing
On 11 November 2020**

Before

JUDGE ANTHONY SNELSON

Between

MR GEOFFREY JOHNSTON

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

The decision of the Tribunal is that the appeal is dismissed.

REASONS

Introduction

1. The Appellant, Mr Geoffrey Johnston, runs a marina business at Bellanaleck on Upper Lough Erne, Co Fermanagh. The Fermanagh and Omagh District Council ('the Council') granted planning applications in respect of land adjacent to his under references L/2014/0535/F and LA10/2017/1207/F.¹ The first application was for retrospective permission for development already

¹ This slightly oversimplifies. The second application was an extension of the first, which itself was the fourth of a series of related applications made between 2012 and 2014.

carried out. Mr Johnston opposed both applications. On 17 February 2018 he wrote to the Council requesting information as follows (the underlining is his):

Under the Environmental Information Regulations (2004), the following requests are made regarding the continuing planning approval:

- 1 What statutory instrument or common law authority was used by the Council retrospectively to decriminalise the unauthorised removal of foreshore without approval, development order, licence and/or permit causing environmental damage to protected species and natural habitats within an ASSI² on Lough Erne (as legislated as a criminal and or unlawful offence) within the Council's retrospective approval of L/2014/0535/F.
- 2 What statutory instrument or common law authority was used by the Council retrospectively to decriminalise the unauthorised dumping on-site of foreshore without approval, development order, licence and/or permit of industrial waste from dredging operations carried out in the removal of foreshore containing environmentally protected species and natural habitats on this ASSI site.
- 3 What statutory instrument or common law authority can the Council rely [on] to support their administration of not taking any enforcement action regarding the reported unauthorised development which caused (1) environmental damage to protected species and natural habitats foreshore and (2) the dumping of the industrial waste on site.
- 4 Provide an explanation as to why no 'environmental impact assessment' has ever been sought or should have been sought by the Council regarding the reported environmental damage to this ASSI site in any of the local planning development or analysis reports as provided by local planning in recommending planning approval to the above applications regarding (1) the dredging and environmental damage to an ASSI site and (2) the dumping of the industrial waste without development order, licence and/or permit.

I will refer to these requests by number.

2. The Council replied to the requests on 12 March 2018 as follows:

In relation to Question 1 and 2, I would refer you to Section 55 of the Planning Act relating to applications for planning permission for development already carried out. The legislation relating to ASSIs is a matter for the Northern Ireland Environment Agency (NIEA) and I would refer you to them for comment in relation to any offence that may have occurred within their statutory functions, although I note that you have already received reply from them.

In relation to Question 3, as planning permission was subsequently granted then no breach of planning control exists with which to progress with any enforcement action in relation to these matters. Your complaint of dumping of industrial waste and damage to protected species and the foreshore, should be referred to NIEA for comment.

Again in relation to Question 4 I would refer you to NIEA for comment on damage to the ASSI. I can confirm that the environmental impacts of the development were considered in reaching a recommendation and decision on the application. In

² Area of Special Scientific Interest

considering the application the Council consulted with NIEA who replied with comments, which you can view online ...

3. In a letter to the Council of 2 May 2018 Mr Johnston expressed dissatisfaction with the answer, although he did not seek a formal review. The stance of the Council did not change.
4. On 14 August 2018 Mr Johnston complained to the Respondent ('the Commissioner') about the way in which the Council had dealt with his request.
5. The Commissioner proceeded to carry out an investigation. By a letter of 27 March 2019 she described the scope of her inquiry as follows:

The focus of my investigation will be to determine whether Fermanagh & Omagh District Council handled your request in accordance with the EIR. Specifically, I will look at whether the Council has supplied all the information it holds falling within the scope of your request. Please note that the Commissioner is not able to consider whether the Council acted in accordance with any of the statutory or common law authority you have requested.

Mr Johnston raised no challenge.

6. By a decision notice dated 1 October 2019 ('the DN') the Commissioner determined, on a balance of probabilities, that the Council did not hold information in addition to that already disclosed.
7. By a notice of appeal dated 25 October 2019, Mr Johnston challenged the DN on a number of grounds.
8. In submissions dated 17 December 2019 the Commissioner joined issue with the appeal and defended the DN.
9. In a seven-page document of 20 February 2020 Mr Johnston responded to the Commissioner's submissions.
10. The matter came before me in the form of a video hearing (by CVP). Mr Johnston appeared in person. The Commissioner chose not to attend, relying on her written submissions. I had before me the open bundle of documents of 184 pages.

The Law

11. The Environmental Information Regulations 2004 ('EIR'), reg 5(1) enacts a general right of access upon request to environmental information held by public authorities. The parties rightly agree that, given the subject-matter of the requests, the information sought is, for the purposes of EIR, 'environmental' (see reg 2(1)). 'Information' means information in "written, visual, aural, electronic or any other material form" (*ibid*).

12. In *Bromley v Information Commissioner and Environment Agency* EA/2006/0072, the Information Tribunal stated that any question as to whether requested information is 'held' is to be decided on a balance of probabilities, adding (reasons, para 13):

Our task is to decide ... whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.

Although not binding on me, I accept this as an accurate statement of the approach to be taken.

13. The appeal is brought pursuant to the Freedom of Information Act 2000, s57. The Tribunal's powers in determining the appeal are delineated in s58 as follows:

(1) If on an appeal under section 57 the Tribunal considers -

- (a) that the notice against which the appeal is brought is not in accordance with the law; or**
(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that [she] ought to have exercised [her] discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

Analysis

14. I am clear, for the following reasons, that the Commissioner's decision was correct.

Requests (1) and (2)

15. It is convenient to consider requests (1) and (2) together because they have a great deal in common. Both are presented in obviously tendentious and unfair terms but the Council sensibly and reasonably interpreted them as asking for the legal basis for the first (retrospective) planning decision. To that question, it gave an answer to which no sustainable objection can be raised: it cited the statutory provision under which it had power to grant planning permission retrospectively. The thrust of the requests, the complaint to the Commissioner and the appeal was that the Council ought to have cited statutory instruments, procedural guidance, examples of best practice and sundry other materials. In my judgment the complaint is misconceived first and foremost because it ignores the fact that the question was directed to the source(s) of the power "used" to give the retrospective decisions. Incontrovertibly, that power was to

be found in the statutory provision which the Council identified and nowhere else. Mr Johnston does not and cannot disagree.

16. Can it nonetheless be said that the Council has failed to answer requests (1) and (2) properly because it has omitted to identify other information which somehow influenced or fed into the relevant decision? Mr Johnston says that the Council *ought* at the very least to have had regard to the various secondary materials which he mentions. There are three difficulties with this. First, the argument betrays the sentiment and purpose which seem to lie behind Mr Johnston's case, namely his dissatisfaction with the planning decisions and his desire to attack them through EIR. To state the obvious, (a) the merits of the planning decisions are, for present purposes, wholly immaterial, (b) the law provides separate means by which planning decisions may be challenged, and (c) it is not proper to employ freedom of information rights as a vehicle for pursuing collateral grievances. Second, however generously his word "used" is read, the requests ask about *legal* authority and wider considerations such as guidance, best practice and so on are self-evidently outside their scope. Third and in any event, the Council gives a simple and wholly plausible answer: it relied on its power under statute and nothing else. I see nothing remotely questionable about that. I have no doubt that it reflects the reality of day-to-day decision making across a great proportion of local authority functions. Mr Johnston advances no good reason for supposing that (regardless of what he thinks it *should* have done) the Council *did in fact* also direct itself by reference to, or otherwise "use", say, any particular statutory instrument, let alone a credible theory to explain why, if it did, it accidentally overlooked, or wilfully suppressed, that information and/or any record evidencing it.
17. I have not lost sight of the fact that the core issue is whether any relevant information is held besides that which has been disclosed. I have considered whether the requests were reasonably interpreted and whether the Council's assertions as to the basis of its decision-making are plausible only because doing so may serve as an aid to answering the core question. In my judgment those considerations argue strongly in favour of the Council's case but I have had regard to all the material before me. I have to say that I find in it nothing at all that leans in the contrary direction. As many litigants fail to appreciate, EIR offers access to information in a recorded form. A public authority is under no obligation to *create* documents in response to requests for information. In relation to requests (1) and (2), I consider it most unlikely that the Council has failed in any respect to comply with its reg 5(1) duty.

Request (3)

18. The third request asks for the Council to justify by reference to "statutory instrument or common law authority" the undisputed fact that it took no enforcement action in response to reported unauthorised development. The answer given was that, in light of the retrospective permission, there was no

breach of planning control against which to take any enforcement action. The Council added that there was no evidence of dumping of industrial waste in any event.

19. Although Mr Johnston does not deny that the permission under L/2014/0535/F was retrospective in effect, he points out that the Council's response does not cover the period before that decision was given. I agree. His problem, however, is that his request is not directed to that period (or any period). And in any event it asks the wrong question. The question actually posed has been answered, at least by implication: the Council would not rely on any "statutory instrument or common law authority" to justify the absence of enforcement action. Rightly or wrongly, it would rely only on the retrospective effect (under statute) of the permission.
20. Mr Johnston's difficulties on request (3) do not end there. The question actually asked was not merely inept but impermissible. Unlike requests (1) and (2), which at least ask a factual question (about the legal reasoning actually relied upon for a particular decision), it invites the Council to say how, legally, it *would* defend the fact that it did not take enforcement action. The request is not a request for 'information' at all. It is simply an attempt to engage the Council in legal argument.
21. For the reasons stated, I am entirely satisfied that the Council does not hold *any* recorded information within the scope of request (3).
22. A request for recorded information relating to or explaining the absence of enforcement action between "around December 2012" (the date given in Mr Johnston's letter of 17 February 2018) and the grant of permission under L/2014/0535/F could have been made but was not. Moreover, I suspect that a fresh request so framed would yield nothing. Relevant documents have been disclosed. The bundle contains some dating back to 2012 and 2013 which show that concerns were raised by Mr Johnston about allegedly unlawful development at that time. One, dated 25 February 2013 (p155), seems to show that a Council official on that date took the view that any decision on enforcement action should await the outcome of a planning application then pending (not L/2014/0535/F). It would not be surprising if the reason or main reason (justified or not) why no enforcement action was taken was that, over the two years or so, planning applications were either pending or anticipated. It would also not be surprising if a fresh request produced no further documents. There is nothing to suggest that the disclosure already given is incomplete or selective.

Request (4)

23. The fourth request asks why no 'environmental impact assessment' "has ever been sought or should have been sought". The second part of the question can

safely be disregarded as meaningless. As to the first, the Council replied that it gave consideration to the environmental impact of the developments and consulted the NIEA. In the course of the Commissioner's investigation, it added that the proposal under LA/2017/1207/F did not fall within any description of development in the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2017 and accordingly an environmental impact assessment was not required.

24. Here again, Mr Johnston asks why something has not been done and receives a clear response. The answer is correctly addressed to the request, which is about the Council's (collective) mental processes. It explains in entirely plausible terms why the action to which the request was directed was not taken. It is consistent with the Council's contention that no relevant (recorded) information is held. I see no reason whatsoever to doubt that contention. The fact that Mr Johnston believes that an environmental impact assessment *should* have been carried out is simply beside the point.

Outcome

25. For all of these reasons, I conclude that the Commissioner's finding that the Council does not hold any information beyond what has been disclosed was in accordance with the law. Accordingly, there was no breach of the duty to disclose.
26. The appeal is dismissed.

(Signed) Anthony Snelson
Judge of the First-tier Tribunal

4 January 2021

Promulgated: 19 January 2021